Forever Young

Celebrating 50 Years of the World Heritage Convention

edited by
Elisa Baroncini, Bert Demarsin, Ana Gemma López Martín,
Raquel Regueiro Dubra, Ruxandra-Iulia Stoica

with the collaboration of Manuel Ganarin and Alessandra Quarta

Volume I

6 *Un'anima per il diritto: andare più in alto*

Collana diretta da Geraldina Boni

Mucchi Editore

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6

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L'orizzonte meramente tecnicistico su cui ogni tipo di riflessione sembra oggi rischiare di appiattirsi non solo non cancella quegli interrogativi fondamentali che si confermano ineludibili per ciascuna disciplina in cui si ramifica il pensiero giuridico: ma li rivela, anzi, in tutta la loro impellenza. È dunque a tale necessità che facciamo riferimento nel cogliere e sottolineare il bisogno che si avverte di 'un'anima per il diritto', ispirandoci in modo particolare a quegli ammonimenti che Aleksandr Solženicyn rivolgeva a studiosi e accademici dell'Università di Harvard nel 1978 e che, a distanza di decenni, mantengono intatta la loro validità. Muovendo dalla domanda «se mi chiedessero: vorrebbe proporre al suo paese, quale modello, l'Occidente così com'è oggi?, dovrei rispondere con franchezza: no, non potrei raccomandare la vostra società come ideale per la trasformazione della nostra. Data la ricchezza di crescita spirituale che in questo secolo il nostro paese ha acquistato nella sofferenza, il sistema occidentale, nel suo attuale stato di esaurimento spirituale, non presenta per noi alcuna attrattiva»* – dichiarazione che si riempie di significato alla luce della vicenda personale, tanto dolorosa quanto nota, di colui che l'ha pronunciata –, l'intellettuale russo individuava infatti con profetica lucidità i sintomi e le cause di tale declino. In questo senso, ad interpellarci in modo precipuo in quanto giuristi è soprattutto l'osservazione secondo cui «in conformità ai propri obiettivi la società occidentale ha scelto la forma d'esistenza che le era più comoda e che io definirei giuridica»: una 'forma d'esistenza' che tuttavia è stata assunta come fondamento esclusivo e per ciò stesso privata dell'anelito a una dimensione superiore capace di giustificarla. Con l'inevitabile, correlata conseguenza che «l'autolimitazione liberamente accettata è una cosa che non si vede quasi mai: tutti praticano per contro l'autoespansione, condotta fino all'estrema capienza delle leggi, fino a che le cornici giuridiche cominciano a scricchiolare». Sono queste le premesse da cui scaturisce quel complesso di valutazioni che trova la sua sintesi più efficace nella seguente affermazione, dalla quale intendiamo a nostra volta prendere idealmente le mosse: «No, la società non può restare in un abisso senza leggi come da noi, ma è anche derisoria la proposta di collocarsi, come qui da voi, sulla superficie tirata a specchio di un giuridismo senz'anima». Se è tale monito a costituire il principio ispiratore della presente collana di studi, quest'ultima trova nella stessa fonte anche la stella polare da seguire per cercare risposte. Essa, rinvenibile in tutti i passaggi più pregnanti del discorso, si scolpisce icasticamente nell'esortazione – che facciamo nostra – con cui si chiude: «E nessuno, sulla Terra, ha altra via d'uscita che questa: andare più in alto».

* La traduzione italiana citata è tratta da Aleksandr Solženicyn, *Discorso alla Harvard University, Cambridge (MA) 8 giugno 1978*, in Id., *Il respiro della coscienza. Saggi e interventi sulla vera libertà 1967-1974. Con il discorso all'Università di Harvard del 1978*, a cura di Sergio Rapetti, Jaca Book, Milano, 2015, pp. 219-236.

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On the cover: *La Scuola di Atene*, Raffaello Sanzio, Musei Vaticani, Città del Vaticano.

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Preface

The scope of the publication *Forever Young: Celebrating Fifty Years of the World Heritage Convention* is to reflect on the diversity of professions concerned with the recognition and safeguarding of the properties inscribed in the UNESCO World Heritage List, and how to encourage emerging generations to approach related subjects.

The Convention Concerning the Protection of the World Cultural and Natural Heritage (the World Heritage Convention) was adopted by the UNESCO General Assembly in Paris on 16 November 1972. It followed two earlier conventions: the Hague Convention of 1954 concerning the protection of cultural heritage in the event of armed conflicts, and the 1970 convention on illicit traffic.

Over the past fifty years, the World Heritage Convention has given an incentive for adoption of other conventions and recommendations, which together have come to broaden our view and understanding of the significance of heritage and the requirements for its safeguarding. By 2022, the World Heritage List has grown to include 1157 properties in 167 States Parties.

In the early years, listing of cultural properties mostly concerned monuments and archaeological sites. Increasingly, it has included historic cities and cultural landscapes where it is essential that planning and management involve relevant communities. While culture and nature were first seen as two separate types of heritage, during the past twenty years they are now recognised as forming together an integrated environment, where it is essential that management and planning consider all the different elements. In this regard, at the 40th Anniversary in 2012, the adopted Kyoto Vision already well reflects the needs for the future of World Heritage: «Only through strengthened relationships between people and heritage, based on respect for cultural and biological diversity as a whole, integrating both tangible and intangible aspects and geared toward sustainable development, will the 'future we want' become attainable».

The two volumes of the present publication have gathered a large number of papers by professionals and scholars in different countries reflecting on the current situation and the challenges in reaching a multidisciplinary and participatory approach to heritage conservation as forecast in the Kyoto Vision. These efforts need to integrate with consideration of social, economic and environmental dimensions, and pay particular attention to vulnerable groups respecting all relevant international standards and obligations.

Rome, March 2023

Professor Jukka Jokilehto
Special Advisor to the Director-General of the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM), Honorary President of the International Training Committee of the International Council on Monuments and Sites (ICOMOS), and Expert of the World Heritage Committee (WHC)

FOREVER YOUNG: CELEBRATING 50 YEARS OF THE WORLD HERITAGE CONVENTION

The present open access publication *Forever Young: Celebrating 50 Years of the World Heritage Convention*, realised in two volumes, is the final result of the homonymous project financed by a Seed Funding Grant within the Una Europa Alliance. The WHC@50 project brings together four Una Europa Universities: the Alma Mater Studiorum - Università di Bologna, the Katholieke Universiteit Leuven, the Universidad Complutense de Madrid, and the University of Edinburgh. They started working together to write the research proposal in the spring - summer 2021, and after being awarded the grant, in January 2022 launched a call for papers looking for contributions of young Una Europa researchers to achieve the scientific purpose of the project. The Coordinator, Elisa Baroncini, together with the Academic Leads Bert Demarsin, Ana Gemma López Martín, Ruxandra-Iulia Stoica, and their respective research teams, intended to celebrate the first 50 years of the World Heritage Convention (WHC), the treaty adopted in Paris by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 16 November 1972 to identify, preserve, valorize and transmit to future generations the cultural and natural heritage of outstanding universal value (OUV). In fact, the WHC has provided for the decisive contribution of the reconceptualization of 'cultural property', paving the way for its dynamic evolution into the more comprehensive – and revolutionary – concept of 'world heritage', including also natural sites. Cultural and natural property and landscapes of outstanding universal value are framed by the 1972 Convention as a legacy for the humankind and a responsibility not only for the State Contracting Parties, but also for the International Community as a whole.

Therefore, the WHC@50 Research Team, with Prof. Raquel Regueiro Dubra supporting Complutense, worked to mark the anniversary of this crucial international treaty instrument by combining the insights of jurists, political scientists, historians, architects and economists, gathering together junior and senior academics and experts: the relevance and importance of world heritage requires a multi-perspective analysis of the 1972 UNESCO Convention to assess its current relevance in the values of the International Community, to consider its functioning and impact, to identify the points of strength and also weakness, disseminating the knowledge of the WHC and suggesting solutions to overcome the problematic aspects of its implementation and activities.

The result of this demanding research cooperation activity is here in this open access publication, which we offer to the academic community and, more generally, interested politicians, officials, stakeholders and the civil society, humbly hoping to contribute to a better awareness on one of the major treaty instruments of our age.

This publication would not have been possible without the debate among the authors which took place in the WHC@50 Webinar Series, a set of eight online events, organized by the WHC@50 Universities, featuring the presentation of the interim research results and discussing them also with external experts.

Likewise, this two-volume publication could not have seen the light without the invaluable technical support of the research officers at Una Europa Secretariat in Leuven and the four Universities involved. We express our gratitude to all of them, as well as to Mr Francesco Cunsolo for his contribution in drafting the research project and the call for papers. Heartfelt thanks have also to be expressed to Prof. Manuel Ganarin and Ms Alessandra Quarta, for their very intense, precise and patient work in coordinating the collection of contributions, carrying out the blind double peer review process, the correcting proofs activities, and networking authors and publisher. Last but not least, our grateful appreciation goes to Mucchi Editore, who with great professionalism and diligence ac-

companied the publication of this complex and extensive project, and Prof. Geraldina Boni, the Director of *Un'anima per il diritto: andare più in alto*, who generously accepted to include our editorial proposal in her prestigious book series.

Elisa Baroncini, Bert Demarsin, Ana Gemma López Martín
Raquel Regueiro Dubra, Ruxandra-Iulia Stoica

Bologna, Leuven, Madrid, Edinburgh, March 2023

Section I

From Cultural Property to World Heritage

Ivano Pontoriero

PROTECTION OF CULTURAL HERITAGE IN ROMAN LAW*

Abstract: The development of the concept of cultural heritage is foreign to the Roman legal experience and it is, therefore, not possible to identify the construction of an organic and coherent system of protections. Specific provisions, since the end of the republic, are aimed at preserving urban decorum (*decus urbium*). Among these, the SC. Hosidianum (47 CE) prohibits the buying and selling of buildings aimed at the demolition and reuse of building materials. The same *ratio* of protection of urban decorum inspires the provisions of the subsequent SC. Acilianum (122 CE), which prohibits bequeathing by legacy of things joined to buildings (*ea quae aedibus iuncta sunt*). A rescript by Alexander Severus (C.I. 8.10.2 [*Imp. Alex. A. Diogenes*, a. 222]) emphasizes that the owners are not allowed to disfigure the public view (*publicus deformetur adspectus*). More generally, it must not be neglected the role played, also with reference to developments of the Roman tradition, by the praetorian interdicts *ad publicam utilitatem pertinentea* (D. 43.1.2.1 [Paul. 63 *ad ed.*]), by the jurisprudential elaboration of the category of the *res in usu publico* (D. 43.8.2.5 [Ulp. 68 *ad ed.*]), by the use of procedural instruments with widespread legitimation (*actiones populares*). In late antiquity, the need to preserve cultural heritage sometimes seems to manifest itself with greater intensity (C.Th. 16.10.8; Nov. Maior. 4). Belisarius asks Totila (Proc., Οἱ ὑπὲρ τῶν πολέμων λόγοι, 7.22.11) to spare from destruction the city of Rome, a monument to posterity of the value of all (μνημεῖα τῆς πάντων ἀρετῆς τοῖς ἐπιγενησομένοις), thus avoiding committing a serious crime against men of all times (ἀδίκημα μέγα ἐς τοὺς ἀνθρώπους τοῦ παντὸς αἰῶνος).

1. *Introduction*

The development of the concept of cultural heritage is absolutely foreign to Roman law across its entire historical arc, for which it is not possible to identify the construction of an ordered, coherent system of protections within it[1].

* Double-blind peer reviewed content.

[1] The development of the concept of cultural heritage, on the basis of the French concept of *patrimoine national*, and the creation of organised systems of

However, many of the legal instruments that made it possible to create concrete forms of cultural heritage protection, of various range and intensity, are deeply rooted in Roman law and its later interpretation in the Romanistic tradition[2]. Here, I'm referring in particular to the development of the *dicatio ad patriam*, «romanistica, ma non romana [concerning Romanistic tradition, but not Roman]», as recently observed[3], the use of procedural instruments that allowed members of the public to bring action in the name of collective interest (*actiones populares*, *interdicta popularia*)[4], the jurisprudentially created

protections did not emerge until the nineteenth century. See F. Fasolino, *Dalla tutela alla cura del patrimonio culturale: l'utilità di una riflessione storico-giuridica*, in *Cura e tutela dei beni culturali*, edited by G.M. Esposito, F. Fasolino, Milano, 2020, p. 2 (= *La tutela dei beni culturali nell'esperienza giuridica romana*, edited by F. Fasolino, Milano, 2020, p. 2) and L. Solidoro, *Politiche e soluzioni organizzative del patrimonio culturale nell'Impero romano*, *ibid.*, pp. 61-68 (= *La tutela dei beni culturali*, cit., pp. 61-68). An important moment in this regard for the provinces of the Papal State was the issue, during the papacy of Pius VII, of an edict on antiquities and excavations by Cardinal Bartolomeo Pacca on 7 April 1820. The measures introduced by the Papal State were then copied by some of the other Italian States and in Europe. In the Kingdom of Sardinia, however, the pre-eminent value of private property continued to be recognised. The difficulty of reconciling such different traditions, one based on the idea of *utilitas pubblica*, the other on the importance attributed to property rights, made the path towards the promulgation of the Rava-Rosadi law of 1909 long and arduous. For a summary, see D. Mastrangelo, *Dall'Editto Pacca ai decreti modificativi del Codice Urbani. Breve storia della normativa sui beni culturali*[2], Rome, 2011, pp. 9-18.

[2] As observed by L. Solidoro in *Politiche*, cit., pp. 62-65 (= *La tutela dei beni culturali*, cit., pp. 62-65).

[3] On the *dicatio ad patriam*, see S. Randazzo, *I beni e la loro fruizione, fra pubblico e privato: a proposito della «dicatio ad patriam»*, in *Antologia giuridica romanistica ed antiquaria*, vol. II, edited by L. Gagliardi, Milano, 2018, pp. 349-378; L. Solidoro, *Politiche*, cit., pp. 80-89 (= *La tutela dei beni culturali*, cit., pp. 80-89) and, more recently, the exhaustive account in M. Falcon, *'Dicatio ad patriam'. La collocazione in pubblico di beni privati nella riflessione dei giuristi romani*, Napoli, 2020. For the apt words cited in the text, see p. 19.

[4] With special reference to the subject of landscape preservation in antiquity, see G. Lustig, *La tutela del paesaggio in Roma*, in *Il Filangieri*, 43, 1918, pp. 476-479. On procedural instruments that allowed members of the public to bring action in the name of collective interest, including with consideration of the present, see A. Di Porto, *Interdetti popolari e tutela delle «res in usu publico»*, in *Diritto e processo nella esperienza romana. Atti del Seminario torinese (4-5 dicembre 1991)*

categories of *res in usu publico*[5] and *res communes omnium*[6] and, most

in memoria di G. Provera, Napoli, 1994, pp. 483-520 (= Id., *Res in usu publico e 'beni comuni'. Il nodo della tutela*, Torino, 2013, pp. 3-42); G. Sanna, *L'azione popolare come strumento di tutela dei "beni pubblici": alcune riflessioni tra "bene pubblico" ambiente nell'ordinamento giuridico italiano e res publicae nel sistema giuridico romano*, in *Diritto@Storia*, 5, 2006; A. Trisciuoglio, *Consideraciones generales sobre la tutela de las res publicae y de sus usos en la experiencia romana*, in *Hacia un derecho administrativo y fiscal romano*, edited by A. Fernández De Buján, G. Gerez Kraemer, B. Malave Osuna, Madrid, 2011, pp. 151-160; S. Settis, *Azione popolare. Cittadini per il bene comune*, Torino, 2012, in particular pp. 221-228; as well as A. Saccoccio, *La tutela dei beni comuni. Per il recupero delle azioni popolari romane come mezzo di difesa delle res communes omnium e delle res in usu publico*, in *Diritto@Storia*, 11, 2013, pp. 7-21. Procedural instruments that allowed members of the public to bring action in the name of collective interest also made it possible to create forms of landscape protection in antiquity: see A. Di Porto, *La tutela della salubritas fra editto e giurisprudenza*, I, *Il ruolo di Labeone*, Milano, 1990, pp. 131-151; Id., L. Gagliardi, *Prohibitions concerning polluting discharges in Roman Law*, in *Contributions to the History of Occupational and Environmental Prevention. 1st International Conference on the History of Occupational and Environmental Prevention, Rome, Italy; 4-6 October 1998*, edited by A. Grieco, S. Iavicoli, G. Berlinguer, Amsterdam, 1999, pp. 121-134; Id., *Salubritas e forme di tutela in età romana. Il ruolo del civis*, Torino, 2014; L. Solidoro, *La tutela dell'ambiente nella sua evoluzione storica. L'esperienza del mondo antico*, Torino, 2009, pp. 91-94.

[5] In addition to the contributions by Andrea Di Porto and Antonio Saccoccio cited in the previous note, see J.M. Alburquerque, *La protección o defensa del uso colectivo de las cosas de dominio público: Especial referencia a los interdictos de publicis locis (loca, itinere, viae, flumina, ripae)*, Madrid, 2002, pp. 27-54. For an excellent summary of the historiographic debate on *res in usu publico*, see A. Schiavon, *Interdetti 'de locis publicis' ed emersione della categoria delle res in usu publico*, Napoli, 2019, pp. 1-10. For *res in usu publico*, also see *infra*, § 3.

[6] On *res communes omnium*, see M. Falcon, *'Res communes omnium'. Vicende storiche e interesse attuale di una categoria romana*, in *I beni di interesse pubblico nell'esperienza giuridica romana*, vol. I, edited by L. Garofalo, Napoli, 2016, pp. 107-163; D. Dursi, *Res communes omnium. Dalle necessità economiche alla disciplina giuridica*, Napoli, 2017, pp. 5-40; R. Basile, *«Res communes omnium». Disciplina giuridica e profili (a-)sistematici*, in *Index. Quaderni camerti di studi romanistici*, 48, 2020, pp. 307-322; D. Dursi, *Aelius Marcianus. Institutionum libri. I-V*, Roma, 2019, pp. 153-156; R. Marini, *'Mare commune omnium est'. A proposito di D. 47, 10, 13, 7 (Ulp. 57 ad ed.)*, in *Bullettino dell'Istituto di Diritto Romano "Vittorio Scialoja"*, 115, 2021, pp. 289-304. With reference to the idea of common good and the interpretation of Article 9 of the Italian Constitution, see S. Settis, *Paesaggio, Costituzione, cemento. La battaglia per l'ambiente contro il degrado civile*, Torino, 2010, pp. 304-313; Id., *La cultura come bene comune e la Costituzione tradita*, in *Il costituzionalista riluttante. Scritti per G. Zagrebelsky*, edited by A. Giorgis, E.

importantly, the development of the concept of *utilitas publica*[7].

These necessary clarifications having been made, we may now turn to consideration, proceeding inevitably by *exempla*, of a few traces of the attention of Roman law, taken here in its historical dimension, to cultural and landscape protection.

2. *Provisions for protecting the* decus urbium

Provisions for the preservation of the urban decorum (*decus urbium*) were enacted as early as the end of the Republic[8]. The mu-

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Grosso, J. Luther, Torino, 2016, pp. 389-397. For important clarifications on *res communes omnium* and *res in usu publico*, see G. Santucci, *'Beni comuni'. Note minime di ordine metodologico*, Κοινωνία, 44/II, 2020, pp. 1395-1406.

[7] On which, with reference to antiquity, see J. Gaudemet, *Utilitas publica*, in *Revue Historique de Droit Français et Étranger*, 28, 1951, pp. 465-499 (= *Études de droit romain*, vol. II, Camerino, 1979, pp. 163-197); M. Navarra, *Ricerche sulla utilitas nel pensiero dei giuristi romani*, Torino, 2002, in particular pp. 81-90; as well as R. Scevola, *Utilitas publica*, 2 vols., Padova, 2012, I: *Emersione nel pensiero greco-romano*; II: *Elaborazione della giurisprudenza severiana*. On the use of this idea in the field of cultural heritage protection, from the Middle Ages to the modern period, see S. Settis, *Paesaggio, Costituzione, cemento, La battaglia per l'ambiente contro il degrado civile*, cit., pp. 97-110, which identifies reference to the concept of *publica utilitas* as the underlying theme of various provisions enacted in Italy between 1162 and 1819.

[8] The expression *decus urbium* is documented for the first time with reference to the third interdict included under the title *Si opus novum nuntiatum erit* (*E.* 257c), in D. 39.1.20.10 (Ulp. 71 *ad ed.*): *Hoc interdictum prohibitorium est, ne quis prohibeat facere volentem eum qui satisdedit: etenim pertinet ad decus urbium aedificia non derelinqui* [This interdict is prohibitory and is to stop anyone preventing the carrying out of work by someone who has given security; for the nonabandonment of buildings is something that affects the embellishment of cities (translation A. Watson)]. See O. Lenel, *Das edictum perpetuum. Ein Versuch zu seiner Wiederherstellung*[3], Leipzig, 1927, p. 486; L. Labruna, *Vim fieri veto. Alle radici di un'ideologia*, Napoli, 1971 (repr. 2017), p. 34; D. Mantovani, *Giuristi romani e storia dell'economia antica. Elementi per una dialettica*, in *Il diritto allo stato puro? Le fonti giuridiche romane come documento della società antica*, edited by C. Buzzacchi, I. Fargnoli, Milano, 2021, p. 203. In D. 43.8.2.17 (Ulp. 68 *ad ed.*) and D. 43.8.7 (Iul. 48 *dig.*) it is argued that the city must not be marred by ruins (*ne ruinis urbs deformetur*). On this point, see G. Santucci, *Operis novi nuntiatio iuris publici tuendi gratia*, Padova, 2001, p. 139, n. 102. The two texts shall be consid-

nicipal laws required property owners to refrain from unroofing, demolishing or marring their buildings without providing for their restoration[9]. The oldest of these laws, relative to the *municipium* of Taranto, also expressly stated that the owner was required to ensure that any work done on the property would not leave it in worse condition (*nisei quod non deterius restituturus erit*)[10]. It is of particular interest here that the repression of the breach of law was

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ered below, § 3. On the subject of protection of the urban decorum, see C. Corbo, *Diritto e decoro urbano in Roma antica*, Napoli, 2019, pp. 69-146. More recently, with special reference to legislative trends in late antiquity, also see the summary in A. Trisciuoglio, *Temas de derecho administrativo romano comparado*, Madrid, 2021, pp. 89-91.

[9] The *lex municipii Tarentini*, datable between 89 and 62 BCE, the *lex coloniae Genetivae Iuliae* or *Ursunensis* (44 BCE) and the *leges Irnitana* and *Malacitana* (82-84 CE). On these provisions, see M. Sargenti, *La disciplina urbanistica a Roma nella normativa di età tardo repubblicana e imperiale*, in *La città antica come fatto di cultura. Atti del Convegno di Como e Bellaggio. 16/19 giugno 1979*, Como, 1983, pp. 267-271 (= *Scritti di Manlio Sargenti [1947-2006]*, Napoli, 2011, pp. 1019-1023); F. Lamberti, *«Tabulae Irnitanae». Municipalità e «ius Romanorum»*, Napoli, 1993, pp. 85-92; A. Calzada, *La demolición de edificios en la legislación municipal (siglos I a.C. – I d.C.)*, in *Studia et Documenta Historiae et Iuris*, 76, 2010, pp. 115-134; L. Franchini, *La tutela dei beni immobili privati di interesse storico-artistico nell'esperienza romana*, in *I beni di interesse pubblico nell'esperienza giuridica romana*, vol. II, edited by L. Garofalo, Napoli, 2016, pp. 696-702; A. Grillone, *La gestione immobiliare urbana tra la tarda repubblica e l'età dei Severi. Profili giuridici. Con Prefazione di* L. Capogrossi Colognesi, Torino, 2019, pp. 173-183; F. Procchi, *Profili giuridici delle insulae a Roma antica*, I, *Contesto urbano, esigenze abitative ed investimenti immobiliari tra tarda repubblica e alto impero*, Torino, 2020, pp. 191-194; P. Buongiorno, *Sulle tracce della legislazione 'ad modum aedificiorum': ritorno ad A. Berger*, in *Seminarios Complutenses de Derecho Romano*, 34, 2021, pp. 64-69.

[10] *Lex Tar.*, VIIII.4, l. 33 (in *FIRA*, I², n. 18, p. 168; in *RS*, I, n. 15, p. 304). On this point, see in particular F. Procchi, *Profili*, cit., p. 191 and note 44, who rightly observes: «questa precisazione compare esplicitamente solo nel testo della prima legge, ma deve essere considerata implicita nella regolamentazione della seconda, ché altrimenti sarebbe stata aggirabile sin troppo facilmente [this specification only appears explicitly in the text of the first law, but it must be considered implicit in the regulations of the second one, which would otherwise have been far too easy to get around]». See the earlier P. Garnsey, *Urban property investment*, in *Studies in Roman Property*, edited by M. Finley, Cambridge, 1976, pp. 133-134 (= *La proprietà a Roma. Guida storica e critica*, trans. by G. Barattelli, A. Fraschetti, Bari, 1980, p. 162).

entrusted to the instrument of action brought by a member of the public in the name of collective interest (*actio popularis*)[11]. As duly observed by Francesca Lamberti: «la comunità faceva leva, da un canto, sul senso civico dei propri membri, dall'altro non mancava di prevedere una ricompensa per l'attività di impulso processuale e

[11] D. 47.23 *De popularibus actionibus* opens with a Pauline fragment, which provides the concept of *actio popularis*. See D. 47.23.1 (Paul. 8 *ad ed.*): *Eam popularem actionem dicimus, quae suum* <sua vi*? Mommsen*> *ius populi tuetur* [We describe as a popular action one which looks to the public interest (translation A. Watson)]. On this definition, see F. Casavola, *Studi sulle azioni popolari romane. Le «actiones populares»*, Napoli, 1958, p. 18 and p. 97. According to the author, the term *populus* is «qui nulla più che l'empirico insieme degli individui che popolano la città e che rivendicano come *ius suum* il riconoscimento e la tutela di interessi, non ricompresi nella *res familiaris* ed estranei alla *res publica*, ma posti dall'ambiente comune in cui si svolgono le loro individuali e quotidiane attività. Questo *populus* è il *populus* dei passanti, degli utenti delle *res publicae* […]. L'*unus ex populo*, ciascun individuo in mezzo a questa folla di individui, ha un personale interesse alla repressione di quegli illeciti che ledano o compromettano l'incolumità del transito nelle strade, impediscano il libero e normale uso dei loca publica, vie, piazze, fiumi […] [here nothing more than the empirical whole of individuals who lived in the city and who claimed as *ius suum* the recognition and protection of interests, not included in the *res familiaris* and extraneous to the *res publica*, but situated in the shared environment where they carried out their individual and everyday activities. This *populus* was the *populus* of the passers-by, of the users of the *res publicae* … The *unus ex populo*, each individual in this crowd of individuals, had a personal interest in the repression of breaches of law that could be detrimental to or compromise safe passage in the streets or prevent the free and normal use of the *loca publica*, streets, squares, rivers …]». On this procedural tool and its reception in the Romanistic tradition, see the overview in M. Miglietta, v. *Azione popolare*, in *Enciclopedia di Bioetica e di Scienza Giuridica*, vol. I, Napoli, 2009, pp. 694-709. Title D. 47.23 contains exclusively edictal material and finds no parallel in the *Codex repetitae praelectionis*: see A. Soubie, *Recherches sur les origines des rubriques du Digeste*, Tarbes, 1960, pp. 67-68 and note 4. As observed in D. Mantovani, *Il problema d'origine dell'accusa popolare. Dalla «quaestio» unilaterale alla «quaestio» bilaterale*, Padova, 1989, p. 58, this was a «scelta sistematica che si distacca dai modelli classici non solo per l'inclusione della materia nella sezione criminalistica, ma prima ancora per la creazione di un titolo autonomo, come dimostra la provenienza dei frammenti che vi hanno trovato posto, derivati dalle varie *sedes* di commento alle singole azioni edittali [systematic choice that parts company with the classical models not just for the inclusion of the material in the crime section, but more importantly for the creation of an autonomous title, as demonstrated by the provenance of the fragments included there, drawn from the various *sedes* of commentary on the individual edictal actions]».

realizzazione della sanzione [the community appealed, on the one hand, to the public spirit of its own members and, on the other hand, provided for recompense for activity giving impetus to the proceedings and implementation of the sanction]»[12].

Then, there are two senatus consultua *de aedificiis non diruendis* from the first imperial period. The senatus consultum Hosidianum (47 CE), issued on the initiative of Claudius, forbade the sale of buildings for the purpose of demolition and reuse of the building materials (this conduct was described as a *cruentissimum genus negotiationis*), while the subsequent senatus consultum Volusianum, issued under Nero's principate (56 CE), confirming the rules and regulations of the first one, clarified a few points relative to their application, considering particular needs that had emerged from praxis[13]. During the Hadrianic period, the same *ratio* of protecting

[12] F. Lamberti, *«Tabulae Irnitanae»*, cit., pp. 91-92. On this point, also see F. Procchi, *La tutela urbanistica: un problema non nuovo. Considerazioni a margine del SC. Hosidianum*, in *Scritti in onore di A. Cristiani. Omaggio della Facoltà di Giurisprudenza dell'Università di Pisa*, Torino, 2001, pp. 659-660.

[13] The texts of the two senatus consulta were engraved on a bronze plate found at Herculaneum in 1600, now lost, but three transcriptions of it were made, upon which the current critical editions are based (in *CIL*, X, n. 1401, p. 158 [= *FIRA*, I², n. 45.I-II, pp. 288-290]). On this point, see M. Sargenti, *Due senatoconsulti. Politica edilizia nel primo secolo dell'impero e tecnica normativa*, in *Studi in onore di C. Sanfilippo*, vol. V, Milano, 1984, pp. 639-641 (= *Scritti*, cit., pp. 1039-1040); P. Buongiorno, *CIL X 1401 e il senatus consultum 'Osidiano'*, in *Iura*, 58, 2010, p. 237 and note 10; Id., *Senatus consulta claudianis temporibus facta. Una palingenesi delle deliberazioni senatorie dell'età di Claudio (41-54 d.C.)*, Napoli, 2010, pp. 237-238 and note 458; C. Gómez Buendía, *Conservación y estabilidad de los edificios en las fuentes jurídicas clásicas*, in *Hacia un derecho administrativo y fiscal romano*, vol. II, directed by A. Fernández de Buján, edited by G. Gerez Kraemer, Madrid, 2013, p. 209. The find in Herculaneum was not entirely accidental: the area had been hit by an earthquake in February 62 CE and was still basically an open worksite when it was destroyed by the eruption of Vesuvius in 79 CE. For the reconstruction work, a kind of dossier of city planning legislation was needed, hence the bronze plate, which contained the text of both senatus consulta. On this point, see, in particular, L. Cappelletti, *Norme per la tutela degli edifici negli statuti locali (secoli I a.C. – I d.C.)*, in *Bullettino dell'Istituto di Diritto Romano "Vittorio Scialoja"*, 111, 2017, p. 66 and note 28. The genesis of the senatus consultum Volusianum is connected to the *postulatio* of the *necessarii* of Alliatoria Celsilla. The latter owned plots of land with buildings on them in the Modena region known as

the urban decorum inspired the provisions of the senatus consultum Acilianum (122 CE), which prohibited making over things attached to buildings by legacy (D. 30.41.1 [Ulp. 21 *ad Sab.*]: *ea quae aedibus iuncta sunt*)[14].

campi Macri, where there had once been a market. On this site, located along the Secchia River in a fraction of Formigine called Magreta, see J. Ortalli, *I Campi Macri. Un mercato panitalico sulla via della lana*, in *La lana nella Cisalpina romana. Economia e società. Studi in onore di S. Pesavento Mattioli. Atti del Convegno (Padova-Verona, 18-20 maggio 2011)*, edited by M.S. Busana, P. Basso, Padova, 2012, pp. 195-211. The buildings were in a state of disrepair and there was no economic advantage in restoring them (*eaque edificia longa vetustate dilaberentur neque refecta usui essent futura, quia neque habitaret in iis quisquam nec vellet in deserta ac ruentia commigrare*). The woman was therefore found to be exempt from the application of the senatus consultum Hosidianum. On this point, see M. Sargenti, *La disciplina*, cit., pp. 279-281 (= *Scritti*, cit., pp. 1030-1032); B. Malavé Osuna, *La demolición de edificios en el derecho romano: una intervención del senado en el caso de Alliatoria Celsilla*, in *Mulier. Algunas Historias e Instituciones de Derecho Romano*, edited by R. Rodríguez López, M.J. Bravo Bosch, Madrid, 2015, pp. 225-239; as well as, more recently, A. Grillone, *La gestione*, cit., pp. 190-198 and F. Procchi, *Profili*, cit., pp. 199-201.

[14] The text of the senatus consultum Acilianum has not come down to us, but it was commented by jurists writing on the invalidity of legacies. See D. 30.41 (Ulp. 21 *ad Sab.*), D. 30.42 (Ulp. 2 *fideic.*), D. 30.43 (Ulp. 21 *ad Sab.*). On this point, see J.L. Murga, *El senado consulto Aciliano: ea quae iuncta sunt aedibus legari non possunt*, in *Bullettino dell'Istituto di Diritto Romano "Vittorio Scialoja"*, 79, 1976, pp. 155-192. Also see L. Franchini, *La tutela*, cit., pp. 714-721. The biographer of the *Historia Augusta* (*Vita Hadr.* 18.2: *constituit inter cetera, ut in nulla civitate domus aliqua transferendae ad aliam urbem ullius materiae causa diueretur* [established, among other things, that no house in any city may be demolished with the aim of transporting any material whatsoever to a different city]), most likely alludes to the senatus consultum Acilianum, taking into account, however, the interpretation provided by subsequent imperial constitutions from the Severan period (D. 30.41.3 and D. 30.41.5 [Ulp. 21 *ad Sab.*]). On this point, see the convincing analysis in F. Nasti, *I senatus consulta nella Historia Augusta. Provvedimenti senatori e opere giurisprudenziali*, in *Rappresentazione e uso dei senatus consulta nelle fonti letterarie del principato / Darstellung und Gebrauch der senatus consulta in den literarischen Quellen der Kaiserzeit*, edited by P. Buongiorno, G. Traina, Stuttgart, 2019, in particular pp. 249-260. On the passages from Ulpian's commentary, with specific reference to the interpretation of the phrase *ceterum de alia domo in aliam transferre quaedam exceptum est* found in C.I. 8.10.2 (*Imp. Alex. A. Diogeni*, a. 222), see Ead., *Mutare, detrahere, transferre: considerazioni sui senatusconsulta Osidiano, Aciliano e l'ad Sabinum di Ulpiano*, in *Studia et Documenta Historiae et Iuris*, 83, 2017, pp. 591-602.

It should be emphasised that there are significant differences between the provisions in the municipal laws and those in the senatus consultum Hosidianum, which emerge in the standardisation of the case in point, in the sphere of application of regulations and that of sanctions. In relation to the first, it needs to be noted that the senatus consultum highlights the buyer's intention to profit from the sale with a view to demolition: the sale needs to have been made *negotiandi causa*, and this might even be a reference to professional property speculators. The sphere of application is extended, in the case of the senatus consultum, across all of Italy and not just the cities. As for sanctions, the sanction provided for by the senatus consultum for the buyer was equal to twice the agreed price for the purchase of the property, whereas the municipal statutes provided for a sanction calculated in relation to its simple value[15].

The rules introduced by the senatus consultum Hosidianum were also mentioned – during the Severan period, about 150 years after their enactment – by Paul in his commentary on the edict[16]:

> D. 18.1.52 (Paul. 54 *ad ed.*): *Senatus censuit, ne quis domum villamve dirueret, quo plus sibi adquireretur neve quis negotiandi causa eorum*

[15] On these differences, see P. Garnsey, *Urban property investment*, cit., p. 134 (= *La proprietà a Roma*, cit., pp. 162-163).

[16] In the context of a lengthy digression on ownership and usucapion, see O. Lenel, *Das edictum*, cit., p. 25 and note 1. On this lengthy digression, see, in the most recent literature, G. Luchetti, *Paolo e i commentari edittali di epoca severiana: il legame con il passato*, in *Iulius Paulus. Ad edictum libri. I-III*, Rome, 2018, p. 54 and note 72. Justinian's commissioners, extracting the fragment from its original context, placed it in the title D. 18.1 *De contrahenda emptione et de pactis inter emptorem et venditorem compositis et quae res venire non possunt* [Conclusion of the contract of purchase, special terms agreed between the vendor and purchaser, and things which cannot be sold (translation A. Watson)]. For the Justinian origin of the title, see A. Soubie, *Recherches*, cit., pp. 119-121. Comparing it with the title C.I. 4.38 *De contrahenda empione*, it stands as evidence «d'un esprit minutieux, d'un goût assez discutable dont l'emphase, la verbosité sont en opposition avec la simplicité qui constitue généralement la marque des oeuvres classiques, dont les intitulés ont été souvent complétés». On the dating of Paul's commentary see A.L. de Petris, *La cronologia dei libri ad edictum*, in *Iulius Paulus. Ad edictum libri. I-III*, cit., pp. 27-36.

> *quid emeret venderetve: poena in eum, qui adversus senatus consultum fecisset, constituta est, ut duplum eius quanti emisset in aerarium inferre cogeretur, in eum vero, qui vendidisset, ut irrita fieret venditio. plane si mihi pretium solveris, cum tu duplum aerario debeas, repetes a me: quod a mea parte irrita facta est venditio. nec solum huic senatus consulto locus erit, si quis suam villam vel domum, sed et si alienam vendiderit* [The senate ordained that no one should destroy a dwelling or a country house, in order to make a profit thereby, nor buy or sell one for the purpose of such traffic; should anyone contravene the *senatus consultum*, the penalty provided is that the purchaser must pay double the price to the state treasury and that, for the vendor, the sale is void. Of course, if you have paid me the price, you can recover it from me, when you have to pay double to the treasury, since, from my point of view, the sale has been nullified. This *senatus consultum* applies not only when a man sells his own house, in town or country, but also when it is the house of another (translation A. Watson)].

Paul notes that the senate ruled that the sale of a building with the aim of demolishing it and reusing the materials was prohibited (*Senatus censuit, ne quis domum villamve dirueret, quo plus sibi adquireretur neve quis negotiandi causa eorum quid emeret venderetve*)[17]. He accurately explains the provided sanction: the buyer owed the state treasury double the price paid for the purchase, and the sale was rendered void for the seller (*poena in eum, qui adversus senatus consultum fecisset, constituta est, ut duplum eius quanti emisset in aerarium inferre cogeretur, in eum vero, qui vendidisset, ut irrita fieret venditio*)[18].

[17] The jurist's text is an accurate summary of the provisions of the senatus consultum Hosidianum, as referred in the subsequent senatus consultum Volusianum. Paul mentions just one senatus consultum, without distinguishing between the two provisions. On this point, see P. Buongiorno, *Senatus consulta*, cit., p. 239 and note 461. On the text, also see C. Gómez Buendía, *Conservación*, cit., p. 210.

[18] He prefers to use the category 'relative invalidity', F. Procchi, *La tutela*, cit., pp. 665-666; Id., *«Si quis negotiandi causa emisset quod aedificium…». Prime considerazioni su intenti negoziali e 'speculazione edilizia' nel Principato*, in *Labeo*, 47, 2001, pp. 413-414; Id., *Profili*, cit., p. 198 and note 73. On the difficulties of providing a precise dogmatic definition of this invalidity, see M. Talamanca,

The jurist further specifies that the buyer, owing double to the state treasury, would be able to claim back the price paid for the voided sale (*plane si mihi pretium solveris, cum tu duplum aerario debeas, repetes a me: quod a mea parte irrita facta est venditio*). The subsequent specification, that the senatus consultum would apply equally in the case of the sale of someone else's house (*nec solum huic senatus consulto locus erit, si quis suam villam vel domum, sed et si alienam vendiderit*), also traces back to the jurist's interpretation[19].

A rescript of Alexander Severus (C.I. 8.10.2 [*Imp. Alex. A. Diogeni*, a. 222]), referring to the previous prohibitions, emphasises that not even building owners were allowed to spoil the public view (*publicus deformetur adspectus*):

> C.I. 8.10.2 (*Imp. Alex. A. Diogeni*, a. 222): *Negotiandi causa aedificia demoliri et marmora detrahere edicto divi Vespasiani et senatus consulto vetitum est. ceterum de alia domo in aliam transferre quaedam licere exceptum est: sed nec dominis ita transferre licet, ut integris aedificiis depositis publicus deformetur adspectus* [By an edict of the deified Vespasian and a (prior) decree of the Senate, it was forbidden to demolish buildings and stripp off marble for speculation. But there is an exception permitting transfer of some things from one home to another (of the same owner); still, not even owners are allowed to transfer (materials) if the public vista is marred by entire buildings being torn down (translation F.H. Blume, B.W. Frier)].

Severus Alexander's chancery notes that it was forbidden by an edict of Vespasian and a senatus consultum to demolish buildings and remove the marbles in order to sell them (*Negotiandi causa ae-*

Pubblicazioni pervenute alla Direzione, in *Bullettino dell'Istituto di Diritto Romano "Vittorio Scialoja"*, 91, 1988, pp. 908-909 (on the reconstruction in J.M. Rainer, *Zum Senatusconsultum Hosidianum*, in *Tijdschrift voor Rechtsgeschiedenis*, 55, 1987, pp. 31-38). On this point, also see M. Talamanca, *Vendita (dir. rom.)*, in *Enciclopedia del Diritto*, vol. 46, Milano, 1993, p. 342.

[19] F. Procchi, *Profili*, cit., pp. 198-199. Contrary to that argued by Federico Procchi, I believe it is probable that the specification that the price paid by the buyer could be claimed back is a result of the interpretation by the Severan jurist.

dificia demoliri et marmora detrahere edicto divi Vespasiani et senatus consulto vetitum est)[20]. The lawfulness of transferring something from one house to another is noted as an exception (*ceterum de alia domo in aliam transferre quaedam licere exceptum est*), but owners were prohibited from demolishing buildings if this would mar the public view (*sed nec dominis ita transferre licet, ut integris aedificiis depositis publicus deformetur adspectus*)[21].

3. *Praetorian interdicts* ad publicam utilitatem pertinentia *and the jurisprudential formulation of the category* res in usu publico

More generally, we must also take into account, including with reference to later developments in the Romanistic tradition, the praetorian interdicts *ad publicam utilitatem pertinentia* (D. 43.1.2.1 [Paul. 63 *ad ed.*]) and the jurisprudential formulation of the category *res in usu publico* (D. 43.8.2.5 [Ulp. 68 *ad ed.*]). Paul's discussion of interdicts begins with a breakdown that highlights their respective functions:

> D. 43.1.2.1 (Paul. 63 *ad ed.*): *Interdicta autem competunt vel hominum causa vel divini iuris aut de religione, sicut est 'ne quid in loco sacro fiat'*

[20] The use of the expression *negotiandi causa* suggests that the senatus consultum in question was probably the Hosidianum. The senatus consultum Acilianum in fact took legacies into account. See Franchini, *La tutela*, cit., p. 710, note 56. If the senatus consultum in question was indeed the Hosidianum, the enumeration (*edicto divi Vespasiani et senatus consulto*) is of course not in chronological order. For a possible explanation, that appeals to the chancery's desire to emphasise the contribution of imperial legislation, see F. Procchi, *«Si quis»*, cit., p. 429 and P. Buongiorno, *Senatus consulta*, cit., pp. 240-241.

[21] See P. Buongiorno, *Senatus consulta*, cit., p. 240 and L. Franchini, *La tutela*, cit., p. 721. Closely examining the phrase *ceterum de alia domo in aliam transferre quaedam exceputm est,* it is argued in F. Nasti, *I senatus consulta*, cit., pp. 252-253, that, since the verb *transferre* is not used in the senatus consultum Hosidianum, Alexander Severus's secretary for petitions – and for that matter the biographer of the *Historia Augusta* – could have easily had in mind the content of the constitutions noted in Ulpian's *ad Sabinum* (see above, note 14).

> *vel 'quod factum est restituatur' et de mortuo inferendo vel sepulchro aedificando. hominum causa competunt vel ad publicam utilitatem pertinentia vel sui iuris tuendi causa vel officii tuendi causa vel rei familiaris. publicae utilitatis causa competit interdictum 'ut via publica uti liceat' et 'flumine publico' et 'ne quid fiat in via publica': iuris sui tuendi causa de liberis exhibendis, item de liberto exhibendo: officii causa de homine libero exhibendo: reliqua interdicta rei familiaris causa dantur* [Interdicts are in favor either of human beings or of divine law or religion, like the interdicts 'to prevent anything from being done in a sacred place', 'to make good what has been done', on interment of the dead, or on the building of a tomb. In favor of human beings are those which are for public welfare or for safeguarding rights, duties, or property. Available for public welfare are the interdicts to ensure freedom to use a public way or a public river, and that nothing should be done in a private way. For safeguarding personal rights are the interdicts for the production of children and freedmen. For duty are interdicts requiring the production of a freeman. Other interdicts are granted for the sake of personal property (translation A. Watson)].

This discussion, as has been rightly observed, starts with a classification – Gaius's *summa divisio* of the *res* into *res humani iuris* and *res divini iuris* – to then propose a categorisation of the interdicts by function[22]. Thus, the interdicts in favour of human beings (*hominum causa*) are identified as those that protect the *publica utilitas* (*ad publicam utilitatem pertinentia* or *publicae utilitatis causa*), a right (*sui iuris tuendi causa*), a duty (*officii causa*) and property (*rei familiaris causa*)[23].

[22] With reference to Gaius's *summa divisio* see, in particular, R. Scevola, *Utilitas publica*, II, cit., pp. 152-153 and note 85. On the attention to the functions of the interdicts, see M. Navarra, *Ricerche*, cit., pp. 115-116 and A. Schiavon, *Interdetti*, cit., pp. 50-51.

[23] For the exegesis, see G. Santucci, *Operis novi nuntiatio*, cit., pp. 48-55, which highlights the way that Paul's classification is: «caratterizzata da una forte tensione sistematica [characterised by a strong drive to find systematic order]». For Ulpian's parallel classification, contained in D. 43.1.1 pr. (Ulp. 67 *ad ed.*), see A. Schiavon, *Interdetti*, cit., pp. 11-21. On the various classifications of the interdicts proposed in Roman law texts, see, in general, S. Riccobono, *Interdicta*, in *Nuovo Digesto Italiano*, vol. 7, Torino, 1938, pp. 3-4 (= *Novissimo Digesto Italiano*,

Jurisprudence formulated, in parallel, the category of *res in usu publico*[24]. Limited as we inevitably are at present to proceeding solely *per exempla*, the three interdicts contained in the edict title *Ne quid in loco publico vel itinere fiat* (*E.* 237) permitted, among other things, the protection of things meant for public use[25]. Ulpian's commentary on the first of these interdicts underlines the fact that the relative provisions concerned both *publica utilitas* and private[26]:

> D. 43.8.2.1-2 (Ulp. 68 *ad ed.*): *Hoc interdictum prohibitorium est.* 2. *Et tam publicis utilitatibus quam privatorum per hoc prospicitur*. […] [This interdict is for prohibition. 2. It provides for both public and private welfare. (…) (translation A. Watson)].

The discussion then clarifies that the use of public places (*loca publica*) is the right of private citizens, *non quasi propria cuiusque*, but, instead, *iure civitatis*:

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vol. 8, Torino, 1962 [repr. 1982]), pp. 793-794); A. Biscardi, *La tutela interdittale ed il relativo processo. Corso di lezioni 1955-56*, edited by R. Martini, Siena, 1956, pp. 239-273 (= *Rivista di Diritto Romano*, 2, 2002, pp. [63]71-[74]82); L. Capogrossi Colognesi, *Interdetti (dir. rom.)*, in *Enciclopedia del Diritto*, vol. 21, Milano, 1971, pp. 905-909; A.M. Giomaro, *Interdicta*, in *Digesto delle Discipline Privatistiche (Sez. Civ.)*, vol. 9, Torino, 1993, pp. 506-508.

[24] Labeo (D. 43.8.2.3 [Ulp. 68 *ad ed.*]; D. 50.16.60.1 [Ulp. 69 *ad ed.*]), Celsus (D. 18.1.6 [Pomp. 9 *ad Sab.*]) and Ulpian made important contributions to the development of this concept. On the genesis of this category, «maturata a partire dall'interpretazione del campo di applicazione degli interdetti *de locis publicis* [developed starting from the interpretation of the applicative field of the interdicts *de locis publicis*]», see in particular A. Schiavon, *Interdetti*, cit., pp. 152-159.

[25] See O. Lenel, *Das edictum*, cit., pp. 458-459.

[26] This was the interdict *ne quid in loco publico fiat* (D. 43.8.2 pr. [Ulp. 68 *ad ed.*]): O. Lenel, *Das edictum*, cit., p. 458 and note 5. On the meaning of the reference to public and private use, see L. Capogrossi Colognesi, *La struttura della proprietà e la formazione dei «iura praediorum» nell'età repubblicana*, vol. 2, Milano, 1976, p. 12 and A. Palma, *Le strade romane nelle dottrine giuridiche e gromatiche dell'età del principato*, in *Aufstieg und Niedergang der römischen Welt*, vol. II.14, Berlin/New York, 1982, p. 860 and note 35. On this point, also see A. Schiavon, *Interdetti*, cit., p. 52 and note 141.

> D. 43.8.2.2 (Ulp. 68 *ad ed.*): […] *loca enim publica utique privatorum usibus deserviunt, iure scilicet civitatis, non quasi propria cuiusque, et tantum iuris habemus ad optinendum, quantum quilibet ex populo ad prohibendum habet. propter quod si quod forte opus in publico fiet, quod ad privati damnum redundet, prohibitorio interdicto potest conveniri, propter quam rem hoc interdictum propositum est* [(…) For public places serve both public and private uses, that is to say, as the property of the *civitas* and not of each individual, and we have as much right to enjoy them as anyone of the people has to prevent their misuse. On account of this, if any work should be undertaken in a public place that causes private damage, suit may be brought against it under this prohibitory interdict on account of which thing this interdict is available (translation A. Watson)].

Commenting on this text, Riccardo Orestano aptly observed: «l'uso dei *loca publica* spetta a tutti, senza che nessuno possa dirsene proprietario o possessore [the use of the *loca publica* was everyone's right, without anyone being able to call themselves their owner or proprietor]»[27]. Ulpian then further specifies the field of application of the relative edictal provisions:

> D. 43.8.2.5 (Ulp. 68 *ad ed.*): *Ad ea igitur loca hoc interdictum pertinet, quae publico usui destinata sunt, ut, si quid illic fiat, quod privato noceret, praetor intercederet interdicto suo* [This interdict therefore applies to those places which are intended for public use, so that if anything happens there which would harm a private citizen, the praetor may intervene with his interdict (translation A. Watson)].

The interdict concerns places meant for public use (*Ad ea igitur loca hoc interdictum pertinet, quae publico usui destinata sunt*) and the praetor's intervention had the scope of preventing conduct that

[27] See R. Orestano, *Il «problema delle persone giuridiche» in diritto romano*, vol. I, Torino, 1968, pp. 310-311. The author also refers the reader in this regard to D. 41.2.1.22 (Paul. 54 *ad ed.*).

could impair it (*ut, si quid illic fiat, quod privato noceret, praetor intercederet interdicto suo*)[28].

Commenting on these same edictal provisions, Julian reasons with reference to the need to preserve the urban decorum (*ne ruinis urbs deformetur*):

> D. 43.8.7 (Iul. 48 *dig.*): *Sicut is, qui nullo prohibente in loco publico aedificaverat, cogendus non est demolire, ne ruinis urbs deformetur, ita qui adversus edictum praetoris aedificaverit, tollere aedificium debet: alioqui inane et lusorium praetoris imperium erit* [Just as anyone who built in a public place when nobody forbade him is not to be compelled to demolish for fear of ruins disfiguring the city, so anyone who builds in defiance of a praetorial edict must remove the building. Otherwise, the praetor's power would be empty and derisory (translation A. Watson)].

Julian's reasoning is reiterated verbatim by Ulpian in D. 43.8.2.17 (Ulp. 68 *ad ed.*)[29]. The Severan jurist gives a more rigor-

[28] On the right to bring suit in the interdict *ne quid in loco publico fiat* and for the exclusion of its popular nature, see M. Fiorentini, *Fiumi e mari nell'esperienza giuridica romana. Profili di tutela processuale e di inquadramento sistematico*, Milano, 2003, pp. 319-320 and note 91; Id., *L'acqua da bene economico a "res communis omnium" a bene collettivo*, *Analisi Giuridica dell'Economia*, vol. 1, 2010, pp. 48-49 (= *Natura e diritto nell'esperienza romana. Le cose, gli ambienti, i paesaggi*, Lecce, 2022, pp. 296-300); P. Ziliotto, *Pubbliche vie e tutela interdittale*, in *I beni di interesse pubblico nell'esperienza giuridica romana*, vol. I, cit., pp. 696-705; also see A. Schiavon, *Interdetti*, cit., pp. 219-226.

[29] D. 43.8.2.17 (Ulp. 68 *ad ed.*): *Si quis nemine prohibente in publico aedificaverit, non esse eum cogendum tollere, ne ruinis urbs deformetur, et quia prohibitorium est interdictum, non restitutorium. si tamen obstet id aedificium publico usui, utique is, qui operibus publicis procurat, debebit id deponere, aut si non obstet, solarium ei imponere: vectigal enim hoc sic appellatur solarium ex eo, quod pro solo pendatur* [If someone builds in a public place and nobody prevents him, he cannot then be compelled to demolish, for fear of ruins disfiguring the city and because the interdict is for prohibition, not restitution. But if his building obstructs public use, it must certainly be demolished by the official in charge of public works. If it does not, he must impose a *solarium* (ground-rent) on it. This rent is so called because it is paid for the *solum* (ground) (translation A. Watson)]. On the exclusively prohibitory nature of this interdict, which also emerges in D. 43.8.2.1 (Ulp. 68 *ad ed.*), see G. Melillo, *«Interdicta» e «operis novi nuntiatio iuris publici tuendi gratia»*, in *Labeo*, 12, 1966, pp. 186-187; also see A. Schiavon, *Interdetti*, cit., pp. 205-219.

ous systematic classification to the rule previously set out by Julian, also taking into consideration the consequences of building on public land that has been done *nullo prohibente*, which remain shadowy in the Julian's fragment[30].

4. *Late antiquity and the Justinian age: greater awareness?*

In late antiquity, the need to preserve cultural heritage seems to at times emerge with greater intensity[31]. A Constantinian constitution, passed down from the Justinian *Codex repetitae praelectionis* (C.I. 8.10.6), prohibited the use of valuable materials removed from city buildings to embellish country residences[32]. In the case of non-observance of the prohibition, the constitution provided for the confiscation of the building. The same constitution, howev-

[30] On the relationship between the two texts, see F. Mattioli, *Ricerche sui capita geminata*, vol. I, *I digesta di Giuliano e i libri ad edictum di Ulpiano*, Bologna, 2019, pp. 23-32.

[31] See M.G. Caenaro, *Forma urbis. La tutela del patrimonio storico-artistico in età imperiale*, in *L'esilio della bellezza*, edited by A. Camerotto, F. Pontani, Milano/Udine, 2013, pp. 159-160.

[32] C.I. 8.10.6 (*Imp. Constantinus A. Helpidio agenti vicem pp.*, a. 321): *Si quis post hanc legem civitate spoliata ornatum, hoc est marmora vel columnas, ad rura transtulerit, privetur ea possessione, quam ita ornaverit.* 1. *Si quis autem ex alia in aliam civitatem labentium parietum marmora vel columnas de propriis domibus in proprias transferre voluerit, quoniam utrobique haec esse publicum decus est, licenter hoc faciat: data similiter facultate etiam de possessione ornatum huiusmodi ad possessionem aliam transferendi, quamvis per muros vel etiam per mediam civitatem ea transferri necesse sit, ita ut ea solummodo quae illata fuerint civitatibus exportentur* [If, after this law, anyone despoils a city by removing decoration, i.e., marble or columns, to the countryside, he shall be deprived of the possession he thus decorated. 1. But if anyone wishes to convey the marble or columns of shaky walls from his property in one city to that in another, he shall do so lawfully, since it is a public ornament that these be in one place or the other. Permission is similarly granted to convey such decoration from one possession to another, even if it must be conveyed through the (city) walls or even through the middle of the city, but only those things that are brought in may be removed from cities (translation F.H. Blume, B.W. Frier)]. On the constitution, see B. Malavé Osuna, *El esplendor de las ciudades: decus publicum y estética urbana*, in *Fundamenta iuris. Terminología, principios e interpretatio*, edited by P. Resina Sola, Almería, 2012, pp. 142-146.

er, recognised the owner's right to move valuable materials from an unsafe building to one of his other properties.

Constantius II also prohibited depriving the *civitates* of their *ornamenta* and transferring it elsewhere (C.Th. 15.1.1)[33]. Julian, in turn, prohibited the removal of statues from the province where they were located (C.I. 8.10.7)[34].

The growing difficulty of obtaining building materials led people to see ancient monuments as 'quarries' that could be drawn from for building new structures or repairing existing ones[35]. The gradual rise of Christianity, especially after the issuance of the Edict

[33] C.Th. 15.1.1 (*Imp. Constantinus* <immo: Constantius> *A. ad Flavianum P[ro]c[onsulem] Afric[ae]*, a. 357): *Nemo propriis ornamentis esse privandas existimet civitates: fas si quidem non est acceptum a veteribus decus perdere civitatem veluti ad urbis alterius moenia transferendum* [No man shall suppose that municipalities may be deprived of their own ornaments, since indeed it was not considered right by the ancients that a municipality should lose its embellishments, as though they should be transferred to the buildings of another city (translation C. Pharr)]. The constitution is at the beginning of C.Th. 15.1 *De operibus publicis*. For the dating to 357, see O. Seeck, *Regesten der Kaiser und Päpste für die Jhare 311 bis 476 n. Chr.*, Stuttgart, 1919, p. 203 and p. 437. The constitution is sometimes even attributed to Constantine: see G. Lustig, *La tutela*, cit., p. 491. On the difficulty of dating, see P.O. Cuneo, *La legislazione di Costantino II, Costanzo II e Costante (337-361)*, Milano, 1997, pp. 312-313. For an overall reading of the constitutions contained in the title, for the most part aimed towards blocking the construction of new public buildings, proceeding with the restoration of the pre-existing ones. see B. Malavé Osuna, *Hacia una urbanidad no tan nueva. Los precedentes del planeamiento sostenible en los grandes Códigos Teodosiano y Justinianeo*, Madrid, 2021, pp. 99-167.

[34] C.I. 8.10.7 (*Imp. Iulianus A. ad Avitianum vicarium Africae*, a. 362): *Nemini columnas vel statuas cuiuscumque materiae ex alia eademque provincia vel auferre liceat vel movere* [No one is permitted either to carry off or to move columns or statues of whatever material from another province or the same one (translation F.H. Blume, B.W. Frier)]. For the dating to 362, see O. Seeck, *Regesten*, cit., p. 211 and p. 442. The provision was enacted within a broader regulatory context that included the *leges iungendae* C.Th. 8.5.15, C.Th. 11.28.1, C.Th. 15.3.2.

[35] See C. Kunderewicz, *La protection des monuments d'architecture antique dans le Code Théodosien*, in *Studi in onore di E. Volterra*, vol. IV, Milano, 1971, pp. 138-140. It got to the point that the emperor Julian was driven to complain that decoration was being removed from tombs to embellish dining rooms and colonnades: C.Th. 9.17.5 pr. (= C.I. 9.19.5). On this point, also see M.G. Caenaro, *Forma urbis*, cit., pp. 166-167.

of Thessalonica, spurred the crowds to destroy temples and pagan statues[36].

The culture sphere reacted, and the rhetorician Libanius took a firm position, addressing himself to Theodosius:

> Libanio, Πρὸς Θεοδόσιον τὸν βασιλέα ὑπὲρ τῶν ἱερῶν, 8 (ed. R. Förster): σὺ μὲν οὖν οὔθ' ἱερὰ κεκλεῖσθαι <ἐκέλευσας> οὔτε μηδένα προσιέναι οὔτε πῦρ οὔτε λιβανωτὸν οὔτε τὰς ἀπὸ τῶν ἄλλων θυμιαμάτων τιμὰς ἐξήλασας τῶν νεῶν οὐδὲ τῶν βωμῶν, οἱ δὲ μελανειμονοῦντες οὗτοι καὶ πλείω μὲν τῶν ἐλεφάντων ἐσθίοντες, πόνον δὲ παρέχοντες τῷ πλήθει τῶν ἐκπωμάτων τοῖς δι' ἁσμάτων αὐτοῖς παραπέμπουσι τὸ ποτόν, συγκρύπτοντες δὲ ταῦτα ὠχρότητι τῇ διὰ τέχνης αὐτοῖς πεπορισμένῃ μένοντος, ὦ βασιλεῦ, καὶ κρατοῦντος τοῦ νόμου θέουσιν ἐφ' ἱερὰ ξύλα φέροντες καὶ λίθους καὶ σίδηρον, οἱ δὲ καὶ ἄνευ τούτων χεῖρας καὶ πόδας. ἔπειτα Μυσῶν λεία καθαιρουμένων ὀροφῶν κατασκαπτομένων τοίχων, κατασπωμένων ἀγαλμάτων, ἀνασπωμένων βωμῶν, τοὺς ἱερεῖς δὲ ἢ σιγᾶν ἢ τεθνάναι δεῖ· τῶν πρώτων δὲ κειμένων δρόμος ἐπὶ τὰ δεύτερα καὶ τρίτα, καὶ τρόπαια τροπαίοις ἐναντία τῷ νόμῳ συνείρεται [You then have neither ordered the closure of temples nor banned entrance to them. From the temples and altars you have banished neither fire nor incense nor the offerings of other perfumes. But this black-robeb tribe, who eat more than elephants and, by the quantities of drink they consume, weary those that accompany their drinking with the singing of hymns, who hide these excesses under an artificially contrived pallor – these people, Sire, while the law yet remains in force, hasten to attack the temples with sticks and stones and bars of iron, and in some cases, disdaining these, with hands and feet. Then utter desolation follows, with the stripping of roofs, demolition of walls, the tearing down of statues and the overthrow of altars, and the priests must either keep quiet or die. After demolishing one, they scurry to another, and to a third, and trophy is piled on trophy, in contravention of the law (translation A.F. Norman)].

[36] C. Kunderewicz, *La protection*, cit., pp. 140-141. On anti-pagan repression in the fourth and fifth centuries, see L. De Giovanni, *Costantino e il mondo pagano*, Napoli, 1982, pp. 77-103; R. Romano, *Introduzione*, in Libanio, *In difesa dei templi*, edited by R. Romano, Napoli, 1982, pp. 7-16; A.D. Manfredini, *Antichità archeologiche e tesori nella storia del diritto*, Torino, 2018, pp. 59-64.

The imperial chancery sometimes stepped in to protect pagan religious buildings:

> C.Th. 16.10.8: (*Imppp. Gr[ati]anus, Val[entini]anus et Theod[osius] AAA. Palladio duci Osdroenae*, a. 382): *Aedem olim frequentiae dedicatam coetui et iam populo quoque communem, in qua simulacra feruntur posita artis pretio quam divinitate metienda iugiter patere publici consilii auctoritate decernimus neque huic rei obreptivum officere sinimus oraculum. Ut conventu urbis et frequenti coetu videatur, experientia tua omni votorum celebritate servata auctoritate nostri ita patere templum permittat oraculi, ne illic prohibitorum usus sacrificiorum huius occasione aditus permissus esse credatur* [By the authority of the public council We decree that the temple shall continually be open that was formerly dedicated to the assemblage of throngs of people and now also is for the common use of the people, and in which images are reported to have been placed which must be measured by the value of their art rather than by their divinity; We do not permit any divine imperial response that was surreptitiously obtained to prejudice this situation. In order that this temple may be seen by the assemblages of the city and by frequent crowds, Your Experience shall preserve all celebrations of festivities, and by the authority of Our divine imperial response, you shall permit the temple to be open, but in such a way that the performance of sacrifices forbidden therein may not be supposed to be permitted under the pretext of such access to the temple (translation C. Pharr)].

The constitution of Theodosius issued on 30 November 382 in Constantinople aimed to protect the temple of Edessa. It is especially significant that the *simulacra* found in the temple were to be considered in terms of their artistic, not religious, value (*simulacra feruntur posita artis pretio quam divinitate metienda*)[37].

[37] C. Kunderewicz, *La protection*, cit., p. 146; M. de Dominicis, *Quelques rémarques sur le bâtiment public à Rome dans les dispositions normatives du Bas Empire*, in *Accademia Romanistica Costantiniana. Atti. I° Convegno internazionale (Spello – Foligno – Perugia 18-20 settembre 1973)*, Perugia, 1975, p. 136.

A constitution of Honorius (C.Th. 16.10.15 = C.I. 1.11.3), issued in Ravenna on 29 January 399, had an identical protective aim[38]:

> C.Th. 16.10.15 (*Impp. Arcad[ius] et Honorius AA. Macrobio vicario Hispaniarum et Procliano vicario quinque provinciarum*, a. 399): *Sicut sacrificia prohibemus, ita volumus publicorum operum ornamenta servari. Ac ne sibi aliqua auctoritate blandiantur, qui ea conantur evertere, si quod rescriptum, si qua lex forte praetenditur. Erutae huiusmodi chartae ex eorum manibus ad nostram scientiam referantur, si inlicitis evectiones aut suo aut alieno nomine potuerint demonstrare, quas oblatas ad nos mitti decernimus. Qui vero talibus cursum praebuerint, binas auri libras inferre cogantur* [Just as We forbid sacrifices, so it is Our will that the ornaments of public works shall be preserved. If any person should attempt to destroy such works, he shall not have the right to flatter himself as relying on any authority, if perchance he should produce any rescript or any law as his defense. Such documents shall be torn from his hands and referred to Our Wisdom. If any person should be able to show illicit post warrants, either in his own name or that of another, We decree that such post warrants shall be delivered and sent to Us. Those persons who ave granted the right to the public post to such persons shall be forced to pay two pounds of gold each (translation C. Pharr)].

The position taken in imperial legislation oscillated, however, and some constitutions even ordered the destruction of pagan temples, seen as sources of superstition[39].

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[38] See G. Lustig, *La tutela*, cit., p. 491 and M. de Dominicis, *Quelques rémarques*, cit., p. 136. On the constitution, see, most recently, G. Maragno, *'Punire e sorvegliare'. Sanzioni in oro imperatori burocrazia*, Napoli, 2020, pp. 386-387.

[39] C.Th. 16.10.16 (*Idem AA. ad Eutychianum p[raefectum] p[raetorio]*, a. 399): *Si qua in agris templa sunt, sine turba ac tumultu diruantur. His enim deiectis atque sublatis omnis superstitioni materia consumetur* [If there should be any temples in the country districts, they shall be torn down without disturbance or tumult. For when they are torn down and removed, the material basis for all superstition will be destroyed (translation C. Pharr)]. Also see the subsequent C.Th. 16.10.25 (*Impp. Theod[osius] et Val[entini]anus AA. Isidoro p[raefecto] p[raetori]o*, a. 435): *Omnibus*

One extremely important document relative to the situation of Roman architectural heritage in the fifth century and other pressing conservation matters noted by the imperial chancery is the Nov. 4 *De aedificiis publicis* of Majorian, the last great emperor of the *pars Occidentis*, issued in Ravenna on 11 July 458[40]. In the *principium* of the constitution, we find a strong condemnation of the practice of demolishing buildings in order to obtain building materials:

> Nov. Maior. 4 (*Impp. Leo et Maiorianus AA. Aemiliano p[raefecto] u[rbi]*, a. 458): *Nobis r(em) p(ublicam) moderantibus volumus emendari, quod iam dudum ad decolorandam urbis venerabilis faciem detestabamur admitti. Aedes si quidem publicas in quibus omnis Romanae civitatis consistit ornatus, passim dirui plectenda urbani officii suggestione manifestum est. dum necessaria publico operi saxa finguntur, antiquarum aedium dissipatur speciosa constructio et ut parvum aliquid reparetur, magna diruuntur. Hinc iam occasio nascitur, ut etiam unusquisque privatum aedificium construens per gratiam iudicum in urbe positorum praesumere de publicis locis necessaria et transferre non dubitet, cum haec, quae ad splendorem urbium pertinent, adfectione civica debeant etiam sub reparatione servari* [While We rule the State, it is Our will to correct the practice whose commission We have long detested, whereby the appearance of the venerable City is marred. Indeed, it is manifest that the public buildings, in which the adornment of the entire

sceleratae mentis paganae exsecrandis hostiarum immolationibus damnandisque sacrificiis ceterisque antiquiorum sanctionum auctoritate prohibitis interdicimus cunctaque eorum fana templa delubra, si qua etiam nunc restant integra, praecepto magistratuum destrui conlocationeque venerandae Christianae religionis signi expiari praecipimus, scientibus universis, si quem huic legi aput competentem iudicem idoneis probationibus inlusisse constiterit, eum morte esse multandum [We interdict all persons of criminal pagan mind from the accursed immolation of victims, from damnable sacrifices and from all other such practices that are prohibited by the authority of the more ancient sanctions. We command that all their fanes, temples, and shrines, if even now any remain entire, shall be destroyed by the command of the magistrates, and shall be purified by the erection of the sign of the venerable Christian religion. All men shall know that if it is should appear, by suitable proof before a competent judge, that any person has mocked this law, he shall be punished with death (translation C. Pharr)].

[40] de Dominicis, *Quelques rémarques*, *cit.*, pp. 129-131; M.G. Caenaro, *Forma urbis*, cit., pp. 167-171; C. Corbo, *Diritto e decoro urbano*, cit., pp. 21-67.

> City of Rome consists are being destroyed everywhere by the punishable recommendation of the office of the Prefect of the City. While it is pretended that the stones are necessary for public works, the beautiful structures of the ancient buildings are being scattered, and in order that something small may be repaired, great things are being destroyed. Hence the occasion now arises that also each and every person who is constructing a private edifice, through the favoritism of the judges who are situated in the City, does not hesitate to take presumptuously and to transfer the necessary materials from the public places, although those things which belong to the splendor of the cities ought to be preserved by civic affection, even under the necessity of repair (translation C. Pharr)].

After noting the damaging practice of demolition and reuse of building materials, the emperor emphasised that everything that contributes to the splendour of the city has to be preserved by the love of the citizens and restored (*quae ad splendorem urbium pertinent, adfectione civica debeant etiam sub reparatione servari*). The constitution provides for a ban, upon threat of serious pecuniary or, indeed, afflictive sanctions, on demolishing or tampering with ancient buildings[41].

[41] Nov. Maior. 4.1: *Idcirco generali lege sancimus cuncta aedificia quaeve in templis aliisque monumentis a veteribus condita propter usum vel amoenitatem publicam subrexerunt, ita a nullo destrui atque contingi, ut iudex, qui hoc fieri statuerit, quinquaginta librarum auri inlatione feriatur; adparitores vero atque numerarios, qui iubenti obtemperaverint et sua neutiquam suggestione restiterint, fustuario supplicio subditos manuum quoque amissione truncandos, per quas servanda veterum monumenta temerantur* [Therefore, by this general law We sanction that all the buildings that have been founded by the ancients as temples and as other monuments and that were constructed for the public use or pleasure shall not be destroyed by any person, and that it shall transpire that a judge who should decree that this be done shall be punished by the payment of fifty pounds of gold. If his apparitors and accountants should obey him when he so orders and should not resist him in any way by their own recommendation, they shall be subjected to the punishment of cudgeling, and they shall also be mutilated by the loss of their hands, through which the monuments of the ancients that should be preserved are desecrated (translation C. Pharr)]. On this system of sanctions, see in particular G. Maragno, *Punire e sorvegliare*, cit., pp. 486-487.

The imperial chancery planned to revoke all previous concessions that permitted the demolition of ancient buildings and reuse of the building materials[42]. Exceptions were possible in extremely limited cases, following confirmation of the impossibility of repairing the pre-existing building and solely for reasons of public interest, with the consent of the senate and subject to imperial authorisation[43].

With reference to late antiquity, we should also note imperial provisions for protecting the view of the sea that could be enjoyed

[42] Nov. Maior. 4.2: *Ex his quoque locis quae sibi conpetitorum hactenus vindicavit revocanda subreptio, nihil iubemus auferri: quae ad ius publicum nihilominus redeuntia ablatarum rerum volumus reformatione reparari, submota in posterum licentia conpetendi* [We also order that from such places nothing shall be taken away that petitioners have heretofore vindicated to themselves by surreptitious actions that must be annulled; it is Our will that such places shall nevertheless return to the public ownership and shall be repaired by the restoration of the materials which have been taken away. The right to such petitions shall be abolished in the future (translation C. Pharr)].

[43] Nov. Maior. 4.3-4: *Si quid sane aut propter publicam alterius operis constructionem aut propter desperatum reparationis usum necessaria consideratione deponendum est, hoc apud amplissimum venerandi senatus ordinem congruis instructionibus praecipimus adlegari et, cum ex deliberato fieri oportere censuerit, ad mansuetudinis nostrae conscientiam referatur, ut, quod reparari nullo modo viderimus posse, in alterius operis nihilominus publici transferri iubeamus ornatum, Aemiliane p(arens) k(arissime) a(tque) a(mantissime).* 4. *Quapropter inlustris magnitudo tua saluberrimam sanctionem propositis divulgabit edictis, ut, quae pro utilitate urbis aeternae provide constituta sunt, famulatu congruo et devotione serventur* [Of course, if any building must be torn down for necessary considerations, for the public construction of another work or on account of the desperate need of repair, We direct that such claim shall be alleged with the suitable documents before the Most August Order of the venerable Senate. When it has decreed, after deliberation, that this must be done, the matter shall be referred to the knowledge of Our Clemency, so that We may order that such building shall nevertheless be transferred to the adornment of another public work, if We should see that it can in no way be repaired, O Aemilianus, dearest and most beloved Father. 4. Wherefore, Your Illustrious Magnitude by posting edicts shall publish this most salutary sanction, in order that those provisions which have been prudently established for the welfare of the Eternal City may be preserved with suitable obedience and devotion (translation C. Pharr)].

from certain buildings, starting with the constitution of Zeno contained in C.I. 8.10.12[44].

The Anonymus Valesianus, 12.71, describes Theoderic as an *amator fabricarum et restaurator civitatum*[45]:

> Anonymus Valesianus, *Pars posterior: Theodericiana*, 12.71 (ed. M. Festy): *Erat enim amator fabricarum et restaurator civitatum. Hic aquaeductum Ravennae restauravit quem princeps Traianus fecerat, et post multa tempora aquam introduxit; palatium usque ad perfectum fecit, quem non dedicavit; portica circa palatium perfecit. Item Veronae thermas et palatium fecit et a porta usque ad palatium porticum reddidit; aquaeductum, quod per multa tempora destructum fuerat, renovavit et aquam intromisit; muros alios novos circuit civitatem. Item Ticino palatium, thermas, amphiteatrum et alios muros civitatis fecit. Sed et per alias civitates multa beneficia praestitit* [He was besides a lover of building and restorer of cities. At Ravenna he repaired the aqueduct which the emperor Trajan had constructed, and thus brought water into the city after a long time. He completely finished the palace, but did not dedicate it. He completed the colonnades around the palace. He also built baths and a palace at Verona, and added a colonnade extending all the way from the gate to the Palace; besides that, he restored the aqueduct at Verona, which had long since been destroyed, and brought water into the city, as well as surrounding the city with new walls. Also at Ticinum he built a palace, baths, and an amphitheatre, besides new city walls. He also showed many favours to the other cities (translation J.C. Rolfe)].

Profound awareness that Rome's vast heritage needed to be protected from destruction seems to emerge in Belasarius's letter to Totila, as recorded by Procopius of Caesarea in his account of the

[44] See Lustig, *La tutela*, *cit.*, pp. 561-564. In the more recent literature, see the reconstruction in F. Fasolino, *Note in tema di prospetto, veduta e panorama in diritto romano*, in *Quaderni Lupiensi di Storia e Diritto*, 10, 2020, pp. 177-210.

[45] B. Saitta, *La civilitas di Teoderico. Rigore amministrativo, "tolleranza" religiosa e recupero dell'antico nell'Italia Ostrogota*, Roma, 1993, pp. 103-138; A. Pergoli Campanelli, *Cassiodoro alle origini dell'idea di restauro*, Milano, 2013, pp. 13-14; also see M.G. Caenaro, *Forma urbis*', cit., pp. 171-174.

Gothic War[46]. It was 547 CE and the war had been dragging on for twelve years. Totila was threatening to raze Rome to the ground and had already begun to destroy the city wall. When Belisarius learned of these events, he sent his messengers with a letter for Totila[47]:

> Procopius of Caesarea, Οἱ ὑπὲρ τῶν πολέμων λόγοι, 7.22.8-16 (ed. J. Haury): […] "Πόλεως μὲν κάλλη οὐκ ὄντα ἐργάζεσθαι ἀνθρώπων ἂν φρονίμων εὑρήματα εἶεν καὶ πολιτικῶς βιοτεύειν ἐπισταμένων, ὄντα δὲ ἀφανίζειν τοὺς γε ἀξυνέτους εἰκὸς καὶ γνώρισμα τοῦτο τῆς αὐτῶν φύσεως οὐκ αἰσχυνομένους χρόνῳ τῷ ὑστέρῳ ἀπολιπεῖν. (9) Ῥώμη μέντοι πόλεων ἁπασῶν, ὅσαι ὑφ' ἡλίῳ τυγχάνουσιν οὖσαι, μεγίστη τε καὶ ἀξιολογωτάτη ὡμολόγηται εἶναι. (10) οὐ γὰρ ἀνδρὸς ἑνὸς ἀρετῇ εἴργασται οὐδὲ χρόνου βραχέος δυνάμει ἐς τόσον μεγέθους τε καὶ κάλλους ἀφῖκται, ἀλλὰ βασιλέων μὲν πλῆθος, ἀνδρῶν δὲ ἀρίστων συμμορίαι πολλαί, χρόνου τε μῆκος καὶ πλούτου ἐξουσίας ὑπερβολὴ τά τε ἄλλα πάντα ἐκ πάσης τῆς γῆς καὶ τεχνίτας ἀνθρώπους ἐνταῦθα ξυναγαγεῖν ἴσχυσαν. (11) οὕτω τε τὴν πόλιν τοιαύτην, οἵανπερ ὁρᾷς, κατὰ βραχὺ τεκτηνάμενοι, μνημεῖα τῆς πάντων ἀρετῆς τοῖς ἐπιγενησομένοις ἀπέλιπον, ὥστε ἡ ἐς ταῦτα ἐπήρεια εἰκότως ἂν ἀδίκημα μέγα ἐς τοὺς ἀνθρώπους τοῦ παντὸς αἰῶνος δόξειεν εἶναι: (12) ἀφαιρεῖται γὰρ τοὺς μὲν προγεγενημένους τὴν τῆς ἀρετῆς μνήμην, τοὺς δὲ ὕστερον ἐπιγενησομένους τῶν ἔρ-

[46] See M.G. Caenaro, *Forma urbis*, cit., pp. 174-176 and L. Solidoro, *Politiche*, cit., pp. 101-102 (= *La tutela dei beni culturali*, cit., pp. 101-102).

[47] See Procopius of Caesarea, Οἱ ὑπὲρ τῶν πολέμων λόγοι, 7.22.6-7 (ed. J. Haury): […] Γνοὺς δὲ ταῦτα ὁ Τουτίλας ἔγνω Ῥώμην μὲν καθελεῖν ἐς ἔδαφος, τοῦ δὲ στρατοῦ τὸ μὲν πλεῖστον ἐνταῦθά πη ἀπολιπεῖν, τῷ δὲ ἄλλῳ ἐπί τε Ἰωάννην καὶ Λευκανοὺς ἰέναι. (7) τοῦ μὲν οὖν περιβόλου ἐν χώροις πολλοῖς τοσοῦτον καθεῖλεν ὅσον ἐς τριτημόριον τοῦ παντὸς μάλιστα. ἐμπιπρᾶν δὲ καὶ τῶν οἰκοδομιῶν τὰ κάλλιστά τε καὶ ἀξιολογώτατα ἔμελλε, Ῥώμην τε μηλόβοτον καταστήσεσθαι, ἀλλὰ Βελισάριος μαθὼν πρέσβεις τε καὶ γράμματα παρ' αὐτὸν ἔπεμψεν [(…) But when Totila learned this, he decided first to raze Rome to the ground, and then, while leaving most of his army in that neighbourhood, to march with the rest against John and the Lucanians. (7) Accordingly he tore down the fortifications in many places so that about one third of the defences were destroyed. And he was on the point also of burning the finest and most noteworthy of the buildings and making Rome a sheep-pasture, but Belisarius learned of his design and sent envoys with a letter to him (translation H.B. Dewing)].

γων τὴν θέαν. (13) τούτων δὲ τοιούτων ὄντων ἐκεῖνο εὖ ἴσθι, ὡς δυοῖν ἀνάγκη τὸ ἕτερον εἶναι. ἢ γὰρ ἡσσηθήσῃ βασιλέως ἐν τῷδε τῷ πόνῳ, ἢ περιέσῃ, ἂν οὕτω τύχοι. (14) ἢν μὲν οὖν νικῴης, Ῥώμην τε καθελών, οὐ τὴν ἑτέρου του, ἀλλὰ τὴν σαυτοῦ ἀπολωλεκὼς ἄν, ὦ βέλτιστε, εἴης, καὶ διαφυλάξας, κτήματι, ὡς τὸ εἰκός, τῶν πάντων καλλίστῳ πλουτήσεις: ἢν δέ γε τὴν χείρω σοι τύχην πληροῦσθαι ξυμβαίη, σώσαντι μὲν Ῥώμην χάρις ἂν σώζοιτο παρὰ τῷ νενικηκότι πολλή, διαφθείραντι δὲ φιλανθρωπίας τε οὐδεὶς ἔτι λελείψεται λόγος καὶ προσέσται τὸ μηδὲν τοῦ ἔργου ἀπόνασθαι. (15) καταλήψεται δέ σε καὶ δόξα τῆς πράξεως ἀξία πρὸς πάντων ἀνθρώπων, ἥπερ ἐφ ἑκάτερά σοι τῆς γνώμης ἑτοίμως ἕστηκεν, (16) ὁποῖα γὰρ ἂν τῶν ἀρχόντων τὰ ἔργα εἴη, τοιοῦτον ἀνάγκη καὶ ὑπὲρ αὐτῶν ὄνομα φέρεσθαι." τοσαῦτα μὲν Βελισάριος ἔγραψε ["While the creation of beauty in a city which has not been beautiful before could only proceed from men of wisdom who understand the meaning of civilization, the destruction of beauty which already exists would be naturally expected only of men who lack understanding, and who are not ashamed to leave to posterity this token of their character. (9) Now among all the cities under the sun Rome is agreed to be the greatest and the most noteworthy. (10) For it has not been created by the ability of one man, nor has it attained such greatness and beauty by a power of short duration, but a multitude of monarchs, many companies of the best men, a great lapse of time, and an extraordinary abundance of wealth have availed to bring together in that city all other things that are in the whole world, and skilled workers besides. (11) Thus, little by little, have they built the city, such as you behold it, thereby leaving to future generations memorials of the ability of them all, so that insult to these monuments would properly be considered a great crime against the men of all time; (12) for by such action the men of former generations are robbed of the memorials of their ability, and future generations of the sight of their works. (13) Such, then, being the facts of the case, be well assured of this, that one of two things must necessarily take place: either you will be defeated by the emperor in this struggle, or, should it so fall out, you will triumph over him. (14) Now, in the first place, supposing you are victorious, if you should dismantle Rome, you would not have destroyed the possession of some other man, but your own city, excellent Sir, and, on the other hand, if you preserve it, you will naturally enrich yourself by a possession the fairest

> of all; but if, in the second place, it should perchance fall to your lot to experience the worse fortune, in saving Rome you would be assured of abundant gratitude on the part of the victor, but by destroying the city you will make it certain that no plea for mercy will any longer be left to you, and in addition to this you will have reaped no benefit from the deed. (15) Furthermore, a reputation that corresponds with your conduct will be your portion among all men, and it stands waiting for you according as you decide either way. (16) For the quality of the acts of rulers determines, of necessity, the quality of the repute which they win from their acts." Such was the letter of Belisarius (translation H.B. Dewing)].

Belisarius asked Totila to spare Rome, a monument for posterity of value to everyone (μνημεῖα τῆς πάντων ἀρετῆς τοῖς ἐπιγενησομένοις), from destruction, thus avoiding committing a grave crime against humanity (ἀδίκημα μέγα ἐς τοὺς ἀνθρώπους τοῦ παντὸς αἰῶνος).

According to Procopius's account, Totila, after reading and rereading the letter many times, decided to abandon his plan and cause no further damage to the city[48].

5. *Concluding thoughts*

Here, I shall limit myself to a closing observation. From this brief survey, it emerges that the protection of ancient heritage, a need felt especially starting in the fourth century, growing stronger over the next 200 years, was not dictated solely by consideration of the

[48] Procopius of Caesarea, Οἱ ὑπὲρ τῶν πολέμων λόγοι, 7.22.17 (ed. J. Haury): Τουτίλας δὲ πολλάκις ἀναλεξάμενος τὴν ἐπιστολὴν καὶ τῆς παραινέσεως ἐς τὸ ἀκριβὲς πεποιημένος τὴν μάθησιν, ἐπείσθη τε καὶ Ῥώμην εἰργάσατο ἄχαρι περαιτέρω οὐδέν. σημήνας τε Βελισαρίῳ τὴν αὐτοῦ γνώμην τοὺς πρέσβεις εὐθὺς ἀπεπέμψατο [And Totila, after reading it over many time and coming to realize accurately the significance of the advice, was convinced and did Rome no further harm. So he sent a statement of his decision to Belisarius and immediately dismissed the envoys (translation H.B. Dewing)].

economic value and aesthetic prestige of this heritage. The preservation of the legacy of antiquity was also – and perhaps most importantly – a way to permit the survival of a culture and a value system, guaranteeing the 'moral cohesiveness' of the empire in the face of factors striving towards its disintegration[49].

[49] See C. Kunderewicz, *La protection*, cit., p. 153: «Les symboles visibles de cette communauté sont avant tout les monuments d'architecture antique, et c'est pourquoi les empereurs, désireux de renforcer la cohésion morale de l'Empire, n'épargnent pas les efforts pour que ce vénérable et glorieux héritage du passé se présente toujours intact devant lex yeux de la population tout entière dans toute sa majestueuse splendeur et beauté».

Alessia Legnani Annichini

THE PROTECTION OF CULTURAL HERITAGE IN THE HISTORY OF ITALIAN LAW*

Abstract: The essay reconstructs the first legislation on the protection of cultural heritage in the Italian peninsula. Fundamental turning point were 15th-17th centuries, which saw the popes, with edicts and bulls, invite citizens to preserve the ancient buildings; the pontifical legislation was a model for most of the Italian states of the Ancient Regime.
The 19th century, as a consequence of the tragic dispossession committed by Napoleon, is notable for a revival and strengthening of the legislation for the safeguard of cultural heritage, which culminated in the Pacca's Edict (1820). The essay ends with an analysis of the first Italian regulation laws subsequent to the political unit, culminating in the law 1089/1939.

1. *Foreword*

The need to safeguard historical, artistic and cultural heritage has characterised all – or almost all – seasons of our history. From time to time, rulers have tried to emphasize, through protection, continuity with the past and show respect for its testimonies.

Before analysing the origins and evolution of the legislation *de qua*, I feel it is appropriate to make a few clarifications. Firstly, the object of protection in the past has only partially coincided with the current concept of cultural heritage: it has not always been the same, but it has grown and become more specific over the centuries and societies. Secondly, the ways of protecting what we now call 'cultural heritage' have changed over the long period of time that we want to cover here, albeit in a synthetic way for space reasons. Thirdly, the causes of protection have become more precise and diversified in different historical periods.

* Double-blind peer reviewed content.

2. *Urban decency in the Late Middle Ages*

My research starts from the Late Middle Ages, when, after the looting and demolitions of the Germanic peoples that had characterised the previous season[1], the idea that the essence of civil life should be manifested in the decorum of the nascent cities was revived in communal Italy: public buildings and churches – therefore real estate – became symbols of the city's identity, and they were considered to belong to the entire community and had therefore to be protected.

In particular, Rome, which had been devastated by the Dark Ages, began a slow recovery after the year 1000, when the popes began to issue a number of measures aimed at ensuring the preservation and decency of the architecture and the city layout, which consisted largely of private buildings with adapted classical ornaments. Between the 12th and 13th century, the Eternal City began to show signs of a building and urban renaissance: the papacy used the image of the past to consolidate its spiritual and secular supremacy[2].

In this context, it is relevant to remember the dispute – dating back to 1162 – over the ownership of the *Colonna Traiana* between the abbess of St. Cyriac and the Priest Angelo of the Church of St. Nicholas, regarding which the Roman Senate decided that the church and the column were the property of the abbess, «salvo honore publico Urbis eidem Columpne ne umquam per aliam personam obtentu investimenti huius restitutionis diruatur aut minuatur, sed ut est ad honorem ipsius ecclesie et totius populi Romani, integra et incorrupta permaneat, dum mundus durat, sic eius stante fig-

[1] The age of the Germanic kingdoms was characterised by an absolute lack of attention to ancient monuments and the sovereigns themselves, who for the most part – with the exception of Theodoric – devoted themselves to looting, demolishing and reusing classical remains. On this subject see F. Bottari, F. Pizzicannella, *I beni culturali e il paesaggio. Le leggi, la storia, le responsabilità*, Zanichelli, Bologna, 2007, pp. 87-88 and V. Curzi, *Patrimonio culturale e pubblica utilità. Politiche di tutela a Roma tra Ancien Régime e Restaurazione*, Minerva edizioni, Bologna, 2004, pp. 22-27.

[2] F. Bottari, F. Pizzicannella, *op. cit.*, pp. 91-94

ura». This is one of the first medieval documents to explicitly regulate the protection of monuments as public property; any violation is punished with the confiscation of property and death[3].

The worst years for Rome's artistic heritage coincided with the Avignon captivity. With the Pope gone, the Eternal City suffered even greater devastation than during the barbarian invasions: the perpetrators of these raids were above all those families (Orsini, Colonna, Caetani) who had become rich thanks to the support and favours of the Roman Curia[4]. Francesco Petrarca († 1374) was a witness to the miserable state of Rome, as can be seen from a letter to Cola di Rienzo († 1354), in which he regrets the situation, and he expresses his pleas to Popes Benedetto XII and Urbano V to return to the Eternal City[5].

3. *The Papal State: a forerunner in the protection of cultural heritage*

During the humanistic period, the Church strongly felt the need to restore a continuity with the past and to evoke its splendour: classicism became a model for the present and for this reason a new, albeit embryonic and circumscribed, conscience of conservation and protection of the historical-artistic heritage asserted itself. It is not yet possible to speak of real protection measures, but rather of

[3] The document traced by Carlo Fea is published in S. Romano, *Arte del medioevo romano: la continuità e il cambiamento, in Roma medievale,* edited by A. Vauchez, Laterza, Roma-Bari, 2010[2], pp. 267-280. The argument is well outlined by F. Bottari, F. Pizzicannella, *op. cit.*, p. 95 and V. Curzi, *op. cit.*, pp. 27-28.

[4] V. Curzi, *op. cit.*, p. 29.

[5] «[…] Così a poco a poco le rovine se ne vanno, ingenti testimonianze della grandezza degli antichi. E voi, tanti migliaia di forti, taceste di fronte a pochi ladruncoli che infuriavano in Roma, come in una città conquistata; taceste non dico come servi, ma come pecore, e lasciaste che si facesse strazio delle membra della madre comune» (*Lettera di Petrarca a Cola di Rienzo e al popolo romano*, F. Petrarca, *Epistole*, edited by U. Dotti, Torino, 1978, p. 903). Among others, Petrarca's complaints are reported by G. Volpe, *Manuale di diritto dei beni culturali. Storia e attualità*, Cedam, Padova, 2007, pp. 21-22 and V. Curzi, *op. cit.*, pp. 29-30.

discontinuous and fragmentary interventions conceived from time to time by the popes in order to curb predatory behaviour and avoid damage and dispersion.

I would like to recall, first of all, the bull *Etsi de cunctarum* (1425) in which Martino V († 1431) on the one hand condemned and punished damage to public buildings and on the other protected private ones, requiring owners to restore them if they were damaged[6]. This measure started the recovery of the city. Then there is the bull *Cum Almam Nostram Urbem* (1462) by Pio II († 1464), which forbade anyone from «demolire, distruggere, abbattere o trasformare in calce» ancient buildings or their ruins without a papal licence; it affirmed for the first time the importance of handing down monuments to posterity, as a enrichment for the city and a testimony to ancient virtues[7]. Lastly, the bull *Cum provida Sanctorum Patrum decreta* (1474), with which Sisto IV († 1484) introduced the protection of movable property and prohibited the sale of sacred works of art preserved in churches, providing the punishment of excommunication for those guilty of this crime-sacrilege[8]. From this moment on, the object of protection was no longer just immovable property, but also manuscripts (the first nucleus of the Vatican Library was born), finds from archaeological digs and works of sacred art, especially marbles and tombstones.

As for the ways in which, through bulls and edicts, the popes tried to protect the riches of Rome, we can identify, first of all, the

[6] For the text of the bull see A. Theiner, *Codex Diplomaticus dominii temporalis S. Sedis*, III, Torchi Vaticani, Roma, 1862, pp. 290-291.

[7] Pius Episcopus, *Cum Almam Nostram Urbem* (28 aprile 1462), in A. Emiliani, *Leggi, bandi e provvedimenti per la tutela dei beni artistici e culturali negli antichi stati italiani 1571-1860*, Nuova Alfa Editoriale, Bologna, 1996, pp. 151-152.

[8] Sixtus Episcopus, *Cum provida Sanctorum Patrum decreta* (7 aprile 1474), in A. Emiliani, *op. cit.*, pp. 152-153. On the regulatory measures of the humanist popes for the protection of cultural heritage see F. Bottari, F. Pizzicannella, *op. cit.*, pp. 96-103; G. Volpe, *op. cit.*, pp. 25-27; S. Condemi, *Dal "decoro et utile" alle "antiche memorie". La tutela dei beni artistici e storici negli antichi Stati italiani*, Nuova Alfa Editoriale, Bologna, 1987, pp. 14-19; V. Curzi, *op. cit.*, pp. 35-36; and A. Manfredini, *Antichità archeologiche e tesori nella storia del diritto*, Giappichelli, Torino, 2018, pp. 74-77, regarding specifically archaeological goods.

prohibition to demolish and damage ancient buildings, as well as the duty to restore them if they were ruined; then, the obligation to tear down new buildings close to the testimonies of the past to prevent them from obstructing the view; the establishment of magistrates *ad hoc* with the task of protection and, finally, the prohibition to plunder the memories of the past. I cannot, however, fail to point out a contradictory attitude in the policy of the humanist popes. While on the one hand they were the first to initiate a policy of protecting the historical and artistic heritage, on the other hand they did not hesitate to allow and even order the actual stripping of it in order to build and embellish new churches and palaces.

The first archaeological excavations, which brought to light sensational discoveries such as the *Apollo* and the *Laooconte*, date back to the age of Giulio II († 1513). For this reason, in addition to regulations to protect urban decency and control plundering, regulations were needed to curb clandestine excavations and protect the assets found underground[9].

It was his successor, Leone X († 1521), who in 1515 appointed Raffaello Sanzio († 1520) as *Prefetto della Fabbrica di San Pietro* (Prefect of the Fabric of St. Peter's)[10]. According to Volpe, he was the first 'technical' administrator for the cultural sector[11]. Raffaello, already *Maestro delle strade e Ispettore Generale delle Belle Arti* (Master of the Roads and Inspector General of Fine Arts), had tried to prevent the master builders from destroying the old inscriptions and appealed to the Pope to put an end to the raids that had been taking place in Rome for centuries[12]. From this moment on,

[9] F. Bottari, F. Pizzicannella, *op. cit.*, pp. 104-105.

[10] *Breve di Leone X che nomina Raffaello architetto del tempio di San Pietro*, in F. Mariotti, *La legislazione delle belle arti*, Unione cooperativa editrice, Roma, 1892, p. 205.

[11] G. Volpe, *op. cit.*, pp. 27-28, who, however, points out that the literature does not agree on this point.

[12] «[…] quanta calce si è fatta di statue et altri ornamenti antiqui, che ardirei dire che tutta questa Roma nuova che hor si vede, quanto grande ch'ella sia, quanto belli, quanto ornata di pallaggi, chiese (…) tutta è fabbricata di calce di marmi antichi! […]» (F.P. Di Teodoro, *Raffaello, Baldassar Castiglione e la lettera a Leo-*

the past appeared less and less as something to be plundered and more and more as something to be discovered and equalled. The subsequent bulls and edicts were aimed at identifying which assets to protect.

In the age of the Counter-Reformation, the Roman Church, having regained strength and authority after the crisis of the Protestant Reformation, could no longer limit itself to emphasising its links with the past, but had to bring back to memory those testimonies that linked it to the Church of the origins. For this purpose, the popes undertook powerful campaigns of intervention on Christian monuments, taking care of their protection and instituting (in 1534) the office of *Commissario delle Antichità* (Commissioner of Antiquities). He was the first real superintendent, called upon to supervise excavations, the city's monuments and ancient buildings; to prevent demolition, alienation and transformation into quarries; to order ordinary maintenance; and to prevent new buildings and walls from being built next to the monuments[13].

Between the 16th and 17th century, monuments, ancient buildings, paintings and sacred furnishings were protected, as were archaeological finds, to which the pontiffs paid increasing attention. They stipulated that, if they were sold, part of the proceeds would be assigned to the Apostolic Chamber, and they prohibited excavations without a licence[14]. Introduced by the *Editto Aldobrandini* of 1624[15] and then re-proposed in all subsequent regulatory measures, the main instrument of protection for movables was the export ban,

ne X, San Giorgio di Piano (BO), 2003, pp. 65-69). The episode is recalled by V. Curzi, *op. cit.*, p. 37.

[13] On the institution of this figure see F. Bottari, F. Pizzicannella, *op. cit.*, pp. 107-109; G. Volpe, *op. cit.*, pp. 28-29 and V. Curzi, *op. cit.*, pp. 44-46.

[14] We may recall the *Editto Aldobrandini* of 5 October 1624, the *Editto Sforza* of 29 January 1646 and the *Editto Altieri* of 1686, edited by A. Emiliani, *op. cit.*, pp. 55-66 and analysed by A. Manfredini, *op. cit.*, pp. 98-103.

[15] The text of the *Editto Aldobrandini* of 5 October 1624 is published in A. Emiliani, *op. cit.*, pp. 55-56.

the violation of which was severely punished[16]. In the middle of the 17th century, the protection legislation was perfected and extended for the first time to valuable movables held by private individuals, whose clandestine sale was prohibited.

The policy of safeguarding cultural assets in the Papal States was consolidated in the 18th century, when there was a growing awareness of the aesthetic and economic value of the artistic heritage, a source of international prestige[17]. In this period, among the many measures for the protection of cultural heritage, we can mention the *I Editto Spinola* of 1704, which explained the twofold purpose behind the conservation of ancient memories: on the one hand, knowledge of history and, on the other, the promotion of Rome's international prestige. Leaving the previous discipline for real estate to survive, this edict dealt with works of art (including manuscripts), prohibiting their exportation; with finds, imposing the obligation to report them; and with ancient inscriptions, prohibiting their removal[18].

Cardinal Annibale Albani († 1751) also intervened in the matter with two edicts. The first, dated 21 October 1726, reaffirmed the validity of the previous regulations and the importance of preserving the ancient memories from which Rome received – and still receives – so much prestige; it forbade excavations without a licence and those near ancient buildings; it innovated in the approach to fortuitous discoveries – according to the classical concept, a gift from luck or from God to the inventor –, subjecting them to a form

[16] Recalls G. Volpe, *op. cit.*, pp. 30-34 how the export ban was reiterated by the *Editto Sforza* of 1646, the *I Editto Spinola* of 1704, the *II Editto Albani* of 1733, the *Editto Valenti Gonzaga* of 1750, the *Editto Dora Pamphili* of 1802 and the *Editto Pacca* of 1820.

[17] On papal legislation between the 16th and 18th centuries see S. Condemi, *op. cit.*, pp. 19-22, 35-51, 65-74; M. Speroni, *La tutela dei beni culturali negli stati italiani preunitari, I. L'Età delle Riforme*, Giuffrè, Milano, 1988, pp. 11-48 and S. Bedin, L. Bello, A. Rossi, *Tutela e restauro nello Stato Pontificio*, Cedam, Padova, 1998, pp. 59-75.

[18] For the text of the Edict of 30 September 1704 see A. Emiliani, *op. cit.*, pp. 66-69. This measure is analysed by A. Manfredini, *op. cit.*, pp. 113-114.

of control and publicity. He also regulated the conduct of stonemasons, marble sawyers and quarrymen, prohibiting them from damaging the finds and inscriptions, and to this end he established equal penalties for each offender: loss of the object, a fine, three lengths of rope[19]. The *II Editto Albani* (1733) offered an important clarification on the nature of the object of protection, which was limited to rare artistic works, the fruit of the creative genius of the present and the past. Consequently, the cultural-historical testimonies of a people, expressions of the different tastes of each era, were not included among the assets to be protected. For the first time, tourist function was included in the reasons for protection in this legislation: rare and valuable assets are prestigious attractions that attract foreign visitors to the city[20].

The *Editto Valenti Gonzaga* (1750) dates back to the middle of the 18th century, a *summa* of all the 18th century pontifical legislation on the subject, which, in addition to the other functions already mentioned, assigned to the protection of rare, valuable and antique objects also an educational function, considering the work of art as a sure standard of study for those who apply themselves to the exercise of those noble arts, with great advantage for the public and private good[21]. It also prohibited the export of works of art from the Papal States without a licence – granted by the pope for ancient works and by the Chamberlain for modern ones – and to this end definitively established the procedure for controlling exports. A real and proper inquisitorial process was envisaged against malicious exporters, sanctioned with corporal punishment, the confiscation of the «roba» (destined for the Capitoline museums) and a fine of 500 gold ducats; it also provided for warnings and penalties

[19] The *I Editto Albani* of 21 October 1726 is published in A. Emiliani, *op. cit.*, pp. 70-71.

[20] The *II Editto Albani* of 10 September 1733 is published *ibid.*, pp. 72-75. For a reflection on these edicts see F. Bottari, F. Pizzicannella, *op. cit.*, pp. 115-116 and A. Manfredini, *op. cit.*, pp. 114-116.

[21] For the text of the *Editto Valenti Gonzaga* of 5 January 1750 see. A. Emiliani, *op. cit.*, pp. 76-84.

for accomplices. In addition, *Assessors*[22] were instituted to flank the *Commissario sopra le antichità e le cave* (Commissioner for Antiquities and Quarries), and excavations in sensitive areas were regulated.

The sale of archaeological artefacts was subject to an inspection by the *Commissario alle antichità* (Commissioner of Antiquities) in order to allow for a valuation of the goods to be sold. Failure to comply was punished with the loss of the «roba», a fine of 10 Italian gold scudi and corporal punishment. Those who had quarries, workshops or warehouses had to allow inspections and were not allowed to sell any finds before at least five days had passed, in order to allow experts to assess the case, under penalty of the same punishments.

This edict deplored the trade in altered or falsified works, which were sold to foreigners for exorbitant prices. This crime was punished with the same penalties as for illegal exports. Lastly, it forbade stonemasons, foundrymen and other metalworkers to break, take away or alter marble, statues and metal objects without the appropriate permits, punishing offenders with corporal punishment, confiscation and a fine of 25 Italian scudi[23].

4. *Legislation for the protection of cultural heritage in other Italian states of the Ancien Régime*

The legislation protecting cultural property in the Papal States since the late Renaissance was a model for most other Italian states of the *Ancien Régime*.

While in Tuscany and Naples there was considerable legislation on the subject, elsewhere (Parma – Lombardy) it was limited to

[22] One for painting, one for sculpture and one for cameos, incisions and other antiquities.

[23] This regulatory measure is analysed by G. Volpe, *op. cit.*, pp. 32-34 and A. Manfredini, *op. cit.*, pp. 117-119.

sporadic and circumscribed interventions; in the Kingdom of Sardinia it was not even present until the 19th century.

In Tuscany, the legislation on cultural heritage was aligned with that of the papacy from the 16th century onwards, and the provisions issued between the end of the 16th and 17th centuries remained in force in their fundamental lines throughout the Medici government. These provisions can be traced back to three main lines of action. The first aimed at regulating the export of ancient and modern artistic objects. The second aimed at the acquisition and conservation of semi-precious stones, and the third aimed at regulating archaeological excavations and discoveries. Under the first aspect, there is a law by Grand Duke Cosimo I, dated 30 May 1571, against the removal or violation of tablets and plaques on the walls of palaces and other buildings, public or private, in memory of their builders or founders. This provision shows, on the one hand, the desire of patrician families to defend an external sign of their prestige and, on the other, the intention to protect a cultural asset to preserve the memory of those who had built those palaces that were the ornament and splendour of Florence[24].

The subsequent legislation is closely linked to the intense activity in the field of collecting and promoting the fine arts of Cosimo I's sons, Francesco I and Ferdinando I. In particular, the latter forbade the unlicensed exportation of paintings from Siena and Florence in 1602, establishing that authorisation could never be granted for the works of certain great painters[25]. The prevalence of public interest over private property rights is evident in these measures. Moreover, he also turned his attention to archive material, which he

[24] The law, dated 30 May 1571, is published in A. Emiliani, *op. cit.*, pp. 23-24.

[25] «Michelangelo Buonarroti, Raffaello d'Urbino, Andrea del Sarto, Mecherino, Il Rosso Fiorentino, Lionardo da Vinci, Il Francia Bigio, Perin del Vaga, Jacopo da Pontorno, Titian, Francesco Salviati, Agnolo Bronzino, Daniello da Volterra, F. Bartolomeo di S. Marco, Fra Bastiano del Piombo, Filippo di Fra Filippo, Antonio Correggio, Il Parmigianino, Pietro Perugino» (Deliberation of 6 November 1602, in A. Emiliani, *op. cit.*, pp. 31-32).

began to look at with cultural intentions, due to the value of the historical document, and not only probative, that it contains[26].

In the Lorena period, the discipline of protection was no longer limited to paintings, but an *Editto del Consiglio di Reggenza* of 1754 extended the prohibition of unlicensed exportation to all works of art and to all cities of the Grand Duchy, under penalty of confiscation of the object and payment of a fine equal to twice its value. This legislation was based on the *Editto Valenti Gonzaga*, from which it differed in the application of afflictive penalties, which were not applied arbitrarily but only if the offender was unable to pay the fine[27]. Pietro Leopoldo's subsequent *motu proprio* of 1780, in contrast to the Enlightenment ideals, liberalised excavations and the antiquities trade, while maintaining the ban on exporting antique paintings without authorisation[28].

The second series of legislative provisions of this period was linked to the need to procure a large quantity of semi-precious stones for the work of the *Opificio*, founded in 1588 in Florence on the initiative of Grand Duke Ferdinando I de' Medici and destined to play a fundamental role in the history of conservation. To this end, the unlicensed extraction and trade of semi-precious stones from Siena and Florence was prohibited[29]. As for the last group of regulatory interventions, Tuscany lacked a specific law on archaeological excavations and discoveries until the years of the government of Francesco Stefano di Lorena, who regulated the matter with two rescripts (1749 and 1750), in which he established that

[26] The Medici regulations of 24 October 1602, 5 November 1602, 6 November 1602 and 11 December 1602 are edited by A. Emiliani, *op. cit.*, pp. 28-33. On the first regulations prohibiting the export of paintings from Tuscany see S. Condemi, *op. cit.*, pp. 33-34, 52-61; A. Mansi, *La tutela dei beni culturali e del paesaggio*, Padova, Cedam, 2004, pp. 14-15; M. Ainis, M. Fiorillo, *L'ordinamento della cultura. Manuale di legislazione dei beni culturali*, Giuffrè, Milano, 2015^3, pp. 167-168.

[27] *Editto* (26 December 1754), in A. Emiliani, *op. cit.*, pp. 40-41.

[28] This *motu proprio* of 5 August 1780 is published *ibid.*, pp. 43-44.

[29] The regulatory measures of 7 July 1597, 12 July 1597 and 4 July 1602 are published *ibid.*, pp. 24-26.

found objects belonged to the royal treasury and stipulated that those worthy for some rare particularity should be selected by the ducal antiquarian, leaving the remaining 1/3 to the inventor and 1/3 to the owner of the land. It made archaeological research subject to a licence and imposed the obligation to report even accidental discoveries, setting a prize equal to 1/3 of the value of the things found for the discoverer and the owner of the land. It also punished unauthorised excavation and failure to report finds, although only with the loss of the right to the prize[30].

The Neapolitan legislation of Carlo and Ferdinando di Borbone also drew on the papal model, in particular the export control systems for cultural goods laid down by the *Editto Valenti Gonzaga* of 1750. The territory of the Kingdom of Naples abounded in classical and medieval remains and ruins. For this reason, the sovereigns issued measures to protect both the archaeological and artistic heritage, prohibiting its exportation, and to regulate the excavation and collection of finds.

On the one hand, the 1755 *Prammatiche* of Carlo VII of Borbone († 1788), aimed at protecting the archaeological and artistic heritage by prohibiting the sale and export without a licence of antiquities (ancient paintings, worked stones, marble, or finds from excavations). The issuing of licences was subject to the opinion of three experts and the export ban was not absolute but limited to items that were particularly valuable because of their excellence or rarity; offenders were punished[31]. As for the second aspect, the aim

[30] *Rescritto imperiale* (21 August 1750), in F. Mariotti, *op. cit.*, p. 254. On the protection of cultural assets during the Medici and Lorena governments see M. Speroni, *op. cit.*, pp. 51-78 and F. Bisogni, *Da Pietro Leopoldo a Napoleone: tutela e dispersione dei beni culturali a Siena e in Toscana, in Ideologie e patrimonio storico-culturale nell'età rivoluzionaria e napoleonica. A proposito del trattato di Tolentino, Atti del Convegno* (Tolentino, 18-21 Settembre 1997), Ministero per i beni e le attività culturali-Ufficio centrale per i beni archivistici, Roma, 2000, pp. 563-605.

[31] The punishment was three years' imprisonment for non-nobles and three years' relegation for nobles. For the text of the *Prammatiche* of 25 September 1755, see A. Emiliani, *op. cit.*, pp. 171-179.

was to protect the 'unknown world' that was emerging as a result of the archaeological excavations in Pompei and Ercolano but also to contain the phenomenon of illegal excavations and the removal of artefacts by circumventing the State's right of pre-emption. For this reason, it was forbidden for anyone to carry out excavations without authorisation. Supervision was entrusted to special officials[32].

In the Duchy of Parma, Duke Filippo di Borbone, installed following the Treaty of Aachen in 1748, issued legislation to protect cultural assets in order to compete with what his brother Carlo had done in Naples and to control the export of works of art. This need arose from painful episodes, such as the sale of Raffaello's *Madonna Sistina* (conserved in Piacenza) to Frederick Augustus of Saxony in 1754. The centre of artistic culture in the small duchy was the Royal Academy of Painting, Sculpture and Architecture founded on 12 December 1752, which had the task of controlling the export of works of art[33].

Although Austrian Lombardy was the showcase of Habsburg reformism in Italy, it did not succeed in establishing real regulations to protect cultural assets. The only noteworthy provision is to be found, during the Theresian period, in the *Nuovi Ordini e Statuti dell'Accademia di San Luca*, founded in 1688, which forbade the alteration and unlicensed trading of ancient and modern paintings and sculptures without the authorisation of the Academy, under penalty of a fine of 25 Italian scudi[34].

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[32] On the two lines followed by Borbone legislation on protection see M. Speroni, *op. cit.*, pp. 79-113 and, more briefly, M. Ainis, M. Fiorillo, *op. cit.*, pp. 168-169.

[33] *Grazie e pribid.legi accordati dalla munificenza del Real Sovrano alla Reale Accademia delle belle arti (*Parma, 8 June 1760), in F. Mariotti, *op. cit.*, p. 305, in which it was established that no illustrious works of painting and sculpture could leave Parma without consulting the Academy, which was obliged to report its opinion to the sovereign regarding the granting of the licence. On the first legislation to protect cultural heritage in the small Duchy see M. Speroni, *op. cit.*, pp. 115-124.

[34] This Teresian regulation of 13 April 1745 is edited by F. Mariotti, *op. cit.*, pp. 277-279. On the measures adopted in Austrian Lombardy for the preservation of cultural heritage see M. Speroni, *op. cit.*, pp. 125-132.

In the 18th century, the Republic of Venice implemented advanced forms of protection of cultural assets and became an alternative model to the Papal State in two aspects. Firstly, with regard to the object of protection, which was limited to paintings owned by the State and to 'public paintings', i.e., paintings kept in ecclesiastical institutions. In ancient times, there was already a general protection of these works, which covered all Church property, the disposal of which was prohibited by a decree of the Senate. Secondly, regarding the means used to safeguard these assets, namely in the creation of a catalogue of all paintings – conceived by Anton Maria Zanetti the younger – in order to prevent their sale and in the establishment of a public restoration workshop[35].

5. *Napoleonic spoliations*

At the end of the 18th and beginning of the 19th century, Napoleon conquered a large part of the Italian peninsula and inflicted a severe blow on our artistic heritage. In the various peace treaties – from the armistice of Bologna in June 1796 to the treaties of Tolentino (19 February 1797) and Campoformio in 1797 – he required the losers to compensate for war damage with valuable works of art, which were added to the many already stolen by the French armies. Hundreds of ancient and modern works of art, precious books and manuscripts and rare archaeological finds were systematically removed from Italian territories and sent to Paris. In the Papal State, the city most affected by this spoliation was, after Rome, Bologna, from which were stolen paintings by Perugino, Guido Reni, Raffaello, Ludovico Carracci and Guercino. Napoleon's work was an enormous, methodical operation of art theft, which, on the one

[35] On the protection of cultural heritage in the Venetian Republic as an alternative model to the Papal State see L. Olivato, *Provvedimenti della Repubblica Veneta per la salvaguardia del patrimonio pittorico nei secoli XVII e XVIII*, Istituto veneto di scienze, lettere ed arti, Venezia, 1974, especially pp. 55-93; S. Condemi, *op. cit.*, pp. 61-64, 94-111 and M. Speroni, *op. cit.*, pp. 135-188.

hand, was a plundering based on the right of war, but, on the other, was undoubtedly guided by the 'enlightened' desire to build up universal collections[36].

Following Napoleon's final defeat, the European countries tried to regain possession of their stolen property. With the Treaty of Paris (30 June 1814) and the subsequent armistice agreement (3 July 1815), the protection of the artistic heritage was dealt with at international level for the first time in law, requiring France to return the stolen works of art 'since they are inseparable from the country to which they belonged'[37]. Thus, the plenipotentiary delegates of all the victorious powers arrived in Paris at the court of Louis XVIII. The State of the Church was represented by the sculptor Antonio Canova († 1822), *Ispettore generale di antichità e belle arti* (Inspector General of Antiquities and Fine Arts)[38] since 1802, who, despite his reluctance, proved to be a fine diplomat and recovered a large part of the goods taken from the Papal territories[39].

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[36] Examples include the *Leone di San Marco* and the famous bronze horses of the Venetian Basilica; precious paintings by Tiziano and Tintoretto; the *Apollo* of the Belvedere, the *Laooconte* and the *Discobolo*; paintings by Raffaello including *Santa Cecilia*; Caravaggio's *La Deposizione* and many others. For a summary see G. Volpe, *op. cit.*, pp. 38-39 and V. Curzi, *op. cit.*, pp. 68-71. See P. Wescher, *I furti d'arte. Napoleone e la nascita del Louvre*, Einaudi, Torino, 1988; D. Tamblè, *Il ritorno dei beni culturali dalla Francia nello Stato Pontificio e l'inizio della politica culturale della restaurazione nei documenti camerali dell'Archibid.o di Stato di Roma*, in *Ideologie*, cit., pp. 457-513 e V. C. Gould, *Trophy of Conquest. The Musèe Napolèon and the creation of the Louvre*, Faber & Faber, London, 1965. The exhibition *Antonio Canova a Bologna* was recently dedicated to the works brought back to Bologna by Canova. *Alle origini della Pinacoteca* (4 December 2021 - 20 February 2022).

[37] G. Volpe, *op. cit.*, p. 42.

[38] For the appointment provision, see F. Mariotti, *op. cit.*, pp. 206-207.

[39] Of the 506 paintings stolen from the pontifical territories, 249 were recovered, 248 remained in France and 9 were lost. The literature on Canova's work is extensive, without any claim to exhaustiveness see. G. Contarini, *Canova a Parigi nel 1815. Breve studio storico condotto su documenti e manoscritti originali inediti,* Premiata tipografia Panfilo Castaldi, Feltre, 1891; A. Campani, *Sull'opera di Antonio Canova pel recupero dei monumenti d'arte italiani a Parigi*, in *Archivio storico dell'arte*, III, 1892, pp. 189-197; L. Rava, *Antonio Canova Ambasciatore*, in *L'Archiginnasio*, 18, 1923, pp. 27-43; F. Boyer, *A propos de Canova et de la restitu-*

6. *Legislation in the Italian states of the Restoration*

As a consequence of the tragic plundering that took place during the Napoleonic era, the years of the Restoration saw the various states of the Italian peninsula engaged in a reinforcement of policies to safeguard cultural assets[40]. Once again, the Papal State was the leader, being concerned with safeguarding both monuments, which had to be protected and enhanced, and public and private movable artistic property, which was to be prevented from being alienated and, above all, exported. It was Abbot Carlo Fea[41] – since 1800 *Commissario alle antichità e agli scavi* (Commissioner for Antiquities and Excavations) – who suggested the legislative provisions to be promulgated on the subject of protection. At the heart of his modern and far-sighted concept was the recognition of the art object as a public good, the protection of which, within the competence of the State, had to be motivated by a dual intent: to unite the community around the assets in which it recognised itself and to pursue an economic interest, emphasising the economic benefits that a well-preserved cultural heritage could bring to a city, attracting tourists.

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tion en 1815 des oeuvres d'art de Rome, in *Rivista italiana di studi napoleonici*, 1965, pp. 18-24; B. Molajoli, *Le benemerenze di Antonio Canova nella salvaguardia del patrimonio artistico*, in *Da Antonio Canova alla convenzione dell'Aja. La protezione delle opere d'arte in caso di conflitto armato*, edited by S. Rosso-Mazzinghi, Sansoni, Firenze, 1975, pp. 13-44; M. Nagari, *Canova a Parigi nel 1815*, in *Nuova Antologia,* 1992, pp. 268-281; C. Pietrangeli, *Un ambasciatore d'eccezione: Canova a Parigi*, in *Antonio Canova*, Marsilio, Venezia, 1992, pp. 15-19; E. Jayme, *Antonio Canova, la Repubblica delle arti e il diritto internazionale*, in *Rivista di diritto internazionale*, LXXV, 1992, II, pp. 889-902 and F. Zuccoli, *Le ripercussioni del trattato di Tolentino sull'attività diplomatica di Antonio Canova nel 1815, per il recupero delle opere d'arte*, in *Ideologieo*, cit., pp. 611-627.

[40] On the legislation for the protection of cultural heritage in the pre-unitary states see M. Speroni, *op. cit.*, *passim* e C. Campanella, *Due secoli di tutela. Dagli Stati preunitari alle leggi deroga*, Alinea, Firenze, 2012, pp. 19-29; notes in G. Volpe, *op. cit.*, pp. 53-57.

[41] Carlo Fea's role in the renewed interest in the preservation of cultural heritage is underlined by F. Bottari, F. Pizzicannella, *op. cit.*, pp. 122-123.

The pontiffs used a variety of protection instruments, expressed in the *Editto Doria Pamphili* of 1802[42], and developed in the *Editto Pacca* of 7 April 1820, which can be considered the first organic legal system for the protection of cultural heritage and a model of modern Italian protection[43]. In the first place, the prohibition of demolishing or damaging ancient buildings[44] and the compilation of lists of works of art on the Venetian model[45], for which the *Commissione delle Belle Arti* (Commission of Fine Arts) was responsible[46]. Then, on the one hand, we have the ban on the export of rare and artistic objects[47] and, on the other, the regulation of imports of works of art, not subject to any customs duty[48], with the obvious aim of favouring the latter and discouraging the former. Furthermore, the regulation of sales within the State[49], the prohibition of removing objects and furnishings from churches[50] and the obligation to report finds during archaeological excavations[51]. The *Editto Pacca* was extraordinarily innovative because it embraced the concept of the public value of cultural heritage, to be guaranteed in the name of the collective good, and it placed the protection of art objects not in their exclusive aesthetic value, but in their historical and documentary value.

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[42] The edict is none other than Pio VII's chirograph – drafted by Carlo Fea – promulgated the following day by Cardinal Doria Pamphilij, the text of which is edited by A. Emiliani, *op. cit.*, pp. 86-95. On this measure see F. Bottari, F. Pizzicannella, *op. cit.*, pp. 123-125; S. Condemi, *op. cit.*, pp. 114-121; G. Volpe, *op. cit.*, pp. 42-49 and A. Manfredini, *op. cit.*, pp. 125-129.

[43] For the text of the edict see A. Emiliani, *op. cit.*, pp. 100-111. On such legislation see F. Bottari, F. Pizzicannella, *op. cit.*, pp. 127-128; S. Condemi, *op. cit.*, pp. 134-142; G. Volpe, *op. cit.*, pp. 49-53; M. Ainis, M. Fiorillo, *op. cit.*, pp. 169-170; A. Manfredini, *op. cit.*, pp. 129-135.

[44] *Editto Pacca*, cit., artt. 40-43 and 54-57.

[45] *Ibid.*, art. 7.

[46] There was a Central Commission and Auxiliary Commissions in the main cities of the Papal States (*ibid.*, artt. 1-6).

[47] *Ibid.*, artt. 12-16.

[48] *Ibid.*, art. 22.

[49] *Ibid.*, artt. 8 and 11.

[50] *Ibid.*, artt. 52-53.

[51] *Ibid.*, artt. 25-39, especially art. 33.

To a lesser extent, the other states of the peninsula tried to follow the line taken by the Papal States.

In 1854, in the Grand Duchy of Tuscany, Leopoldo II aligned the safeguarding interventions in the territories he governed with the provisions of the *Editto Pacca*, establishing the prohibition of the removal, destruction or abolition of any art object[52]. These measures, however, did not prevent Pollaiolo's *Martirio di San Sebastiano* from emigrating to the National Gallery in London in 1857, where it was joined shortly after Piero della Francesca's *Natività*[53].

In 1828, in the Duchy of Lucca, Carlo I issued a decree on the maintenance of the city, its conservation and decoration, to make it more beautiful and pleasant. To this end, a special Deputation was set up, called upon to strictly supervise, prescribing the colours to be given to the houses and obliging the owners to repair the plaster, canals and paintwork[54]. What was outlined in Lucca today would be defined as a sort of 'colour plan', aimed at protecting urban decorum.

In the Kingdom of the Two Sicilies, King Ferdinando I took two important measures in 1822. First, he ordered the necessary maintenance and restoration of the areas of Pompei, Ercolaneo and Stabia, dictating precise regulations on archaeological excavations[55]. Then he issued a decree, inspired by the *Editto Pacca*, confirming Joseph Bonaparte's measures, including a ban on the export and movement of ancient or artistic objects without authorisation and a ban on the demolition of ancient buildings. He set up the *Commissione di antichità e belle arti* (Commission of Antiquities and Fine Arts), which was responsible for supervision and control and was charged with selecting the best finds from the excavations to be

[52] Leopoldo II's Edict of 16 April 1854 is published in F. Mariotti, *op. cit.*, p. 260.

[53] F. Bottari, F. Pizzicannella, *op. cit.*, p. 133.

[54] C. Campanella, *op. cit.*, p. 28.

[55] The decree of 14 May 1822 is published in F. Mariotti, *op. cit.*, pp. 271-272.

exhibited at the Royal Museum of Capodimonte[56]. The Borbone king's reason for preserving and exhibiting the finds was the education and the decorum of the nation[57].

As already mentioned, until the 19th century, the Kingdom of Sardinia had no specific legislation on the protection of historical and artistic heritage. The turning point came with King Carlo Alberto, who in 1832 appointed a *Giunta di Antichità e belle arti* (Board of Antiquities and Fine Arts), based in Turin, to promote research and ensure the preservation of objects recognised as important for artistic and ancient studies[58]. With the *Codice Civile degli Stati di Terraferma* of 1837 and the *Codice Penale Sardo* of 1839 he sketched out an embryonic discipline in defence of monuments and archaeological excavations; in 1841 he issued a number of circulars concerning the conservation of monuments on the island of Sardinia, in particular the *nuraghi*, and with the municipal and provincial law of 1859 he provided for municipal regulations on ornamentation and policing with which to safeguard the architectural and urban decency of towns[59]. Throughout the 19th century, the legislation on protection in the Kingdom of Savoy remained fragmentary: the State exercised no rights over private property and placed no limits or preclusion on exports[60]!

In some cities of the Lombardy-Venetia Kingdom, specific commissions – with different names[61] – were set up with the task of consulting and cataloguing.

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[56] The decree of 13 May 1822 is published *ibid.*, pp. 270-271.

[57] F. Bottari, F. Pizzicannella, *op. cit.*, pp. 133-135 and M. Ainis, M. Fiorillo, *op. cit.*, p. 17.

[58] The *Regio Brevetto istitutivo of a Giunta d'antichità e belle arti* of 24 November 1832 is published in F. Mariotti, *op. cit.*, pp. 307-308.

[59] C. Campanella, *op. cit.*, pp. 27-28.

[60] F. Bottari, F. Pizzicannella, *op. cit.*, p. 136.

[61] In Venice the *Commissione per la Conservazione e la custodia degli oggetti d'arte preziosi esistenti nelle chiese e negli edifici pubblici*; in Padova the *Commissione consultiva Conservatrice di Belle Arti e Antichità*; in Vicenza the *Commissione della Conservazione della Cose Patrie.*

The Austrian government felt the need to promote a widespread and systematic protection of monumental heritage, making use of experts, even those not belonging to the state administration. The export ban, which had already been in place during the *Ancien Régime*, was reiterated in 1818[62]; in 1827 it was replaced by the government's right of pre-emption[63]. In 1849, King Franz Joseph absolutely forbade in his territory the trade in historical and artistic assets from the museums of Rome and the Vatican, Florence or Venice, as well as their import or export[64].

In the Duchy of Modena, the *Tariffa daziaria degli stati estensi*, dated 1857, prohibited the removal from the State of «those objects belonging to the fine arts and literature, the loss of which is known to be difficult to repair», providing for the confiscation of the goods in the case of attempted exportation and a fine from 10 to 10,000 Italian lire if the exportation was successful[65].

Overall, it can be concluded that the general intention of the various governments interested in keeping the historical and artistic heritage under control through the establishment of supervisory bodies with advisory and/or cataloguing functions was first and foremost a practical need for heritage conservation. This was accompanied by the need to manage archaeological finds, works of art and public monuments by adopting forms of constraint based on their conservation, a ban on exports and the granting of licences for interventions and excavations. There was also a need to protect the property of private individuals, removing valuable works from the exclusive discretion of the owners and thus configuring a broader principle of protection of the artistic heritage.

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[62] Sovereign Resolutions of 19 September and 23 December 1818, of which the *Notificazione* (Venice, 10 February 1819) informs us, in F. Mariotti, *op. cit.*, pp. 298-299.

[63] For the text of this measure of 19 April 1827 see *ibid.*, pp. 299-300.

[64] *Notificazione* (Vienna, 24 March 1849), *ibid.*, p. 302. On the Lombard-Venetian legislation see F. Bottari, F. Pizzicannella, *op. cit.*, p. 136.

[65] *Tariffa daziaria degli Stati Estensi* (Modena 1857), in F. Mariotti, *op. cit.*, pp. 305-306.

Although the intentions were good, there was a lack of adequate commitment to implementation, so that the degradation and dispersion of the historical and artistic heritage, favoured by preponderant economic interests and the widespread insensitivity of the population, did not find resistant barriers during this period.

7. *Unitary legislation*

After the unification of the Kingdom of Italy, Parliament was reluctant to intervene due to art. 29 of the *Statuto Albertino*, in accordance with 19th century liberal ideology, considered all properties inviolable[66].

After the conquest of Rome, in an attempt to stop the alienation of the museum and archive collections of patrician families, Royal Decree no. 6030 of 27 November 1870 suspended in the territories of the former Papal State the effectiveness of the provisions of the Italian Civil Code of 1865, that suppressed the fideicommissum[67]. It was an inherited institute of romanistic roots, which forever bound the possessions of a family. Law no. 286 of 28 June 1871 established the indivisibility of art collections between heirs[68] and Law no. 1461 of 8 July 1883 allowed collections to be sold only to the State or national bodies[69]. For more than 40 years, the regulations inherited from the pre-unification states regarding cultural assets (Law no. 286 of 28 June 1871)[70] remained in force, and it was

[66] *Statuto del Regno di Sardegna*, Torino, s.e., 1848, art. 29.

[67] On the inalienability and indibid.sibility of private art collections through fedecommissum see E. Fusar Poli, *«La causa della conservazione del bello». Modelli teorici e statuti giuridici per il patrimonio storico-artistico italiano nel secondo Ottocento*, Giuffrè, Milano, 2006, pp. 318-342; notes in D. Mastrangelo, *Dall'Editto Pacca ai decreti modificativi del Codice Urbani. Breve storia della normativa sui beni culturali*, Aracne, Roma, 2011, pp. 15-16.

[68] Law no. 286, 28 June 1871, art. 4, in F. Mariotti, *op. cit.*, p. 189.

[69] *Ibid.*, art. 1.

[70] *Ibid.*, art. 5. On the questionable persistence of pre-unification laws in the aftermath of unification see E. Fusar Poli, *op. cit.*, pp. 209-218.

only at the dawn of the new century with Law no. 185 of the 12 June 1902, *Sulla conservazione dei monumenti e degli oggetti d'antichità e d'arte* (On the conservation of monuments and objects of antiquity and art) – the so-called *Leggi Nasi* – that the discipline was unified throughout the country[71]. This legislation – which is deficient in many aspects, so much so that it has been called «legge inutile» (useless law)[72] – bears witness to the spread of a more profound awareness of the themes of conservation and presents several interesting and topical reasons, which have been recently underlined[73].

The main lines of the modern discipline of protection are outlined by the subsequent Law no. 364 of 20 June 1909 *Per le antichità e le belle arti* (For antiquities and fine arts) – the so-called *Legge Rosadi* – and by the implementing regulation of 1913 (R.D. no. 363 of 1913)[74], which first of all specified the object, i.e. movable

[71] C. Luchetti, *L'evoluzione delle normative sulla tutela del patrimonio culturale (la "Legge Nasi" e l'attualità delle sue previsioni)*, in *Giustamm. Rivista di diritto amministrativo*, 15, 2018, p. 2 underlines how this law stemmed from a wide-ranging and animated debate in Parliament between those who supported the free exercise of the prerogatives of private property and those, on the other hand, who upheld the State's duty to protect the nation's cultural heritage in the interest of all. On the process that led to the Nasi Law see E. Fusar Poli, *op. cit*., pp. 55-70, who also analyses its contents and limits on pp. 342-354, and A. Ragusa, *Alle origini dello Stato contemporaneo. Politiche di gestione dei beni culturali e ambientali tra Ottocento e Novecento*, Franco Angeli, Milano, 2011, pp. 120-136.

[72] R. Balzani, *Per le antichità e belle arti. La legge n. 364 del 20 giugno 1909 e l'Italia giolittiana*, il Mulino, Bologna, 2003, p. 39.

[73] For a careful and thorough investigation of this law see C. Luchetti, *op. cit.,* pp. 1-16.

[74] The text of Law no. 364 of 20 June 1909 and Royal Decree no. 363 of 30 January 1913 *Regolamento per l'esecuzione delle leggi relative alle antichità e belle arti* are published in *Rassegna di Giurisprudenza sulla tutela delle cose d'interesse artistico o storico* (L. 1 giugno 1939, n. 1089), edited by E. Capaccioli, Giuffrè, Milano, 1962, pp. 79-88. Cassese pointed out how this law represents «l'archetipo dello strumentario adottato nella prima fase legislativa: dichiarazione di interesse pubblico; obbligo di conservazione da parte del proprietario; poteri strumentali dell'amministrazione» (S. Cassese, *I beni culturali sa Bottai a Spadolini*, in Id., *L'amministrazione dello Stato - Saggi*, Giuffrè, Milano, 1976, pp. 154-155). The fine volume by R. Balzani, *op. cit.*, with a rich appendix of documents is dedicated to this legislation; see also A. Ragusa, *op. cit.*, pp. 136-143 and G. Volpe, *op. cit.*, pp. 88-93. Although dated, an exhaustive picture of the discipline *de qua* in the light of

and immovable property of historical, archaeological, palethnological or artistic interest[75]. In order to protect the latter, the regulation of the constraints, now called notification, was envisaged in terms of limiting the rights of individuals, in the name of the public interest and the free exercise of property rights[76]; the discipline of exports, with the provision of the institution of pre-emption for the State, based on the idea that the extension of public ownership of cultural heritage is the best remedy against the risks of tampering or cross-border dispersion of national assets[77]; the establishment of special state bodies with protective tasks[78]; the inventory of monuments and works of historical, artistic and archaeological interest[79], but also international agreements for the recovery of stolen goods abroad. For the first time, the prevalence of public interest over the private was affirmed[80].

The fact that the *Legge Rosadi* delimited the object of protection according to a typological criterion was not sufficient to legitimise the intervention regarding the feared demolition of Villa Aldobrandini in Rome and the use of that area for the construction of a large hotel, because the Senate had refused to add to the regulation gardens, forests, landscapes, waters and all those places and natural objects that presented such interest[81]. In order to remedy this shortcoming, Law no. 688 of 23 June 1912 was passed, which included the above-mentioned assets among those protected by the previous law[82]. Villa Aldobrandini was saved, and with it many oth-

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Law no. 364/1909 is offered by L. Parpagliolo, *Codice delle antichità e degli oggetti d'arte. Raccolta di leggi, decreti, regolamenti, circolari relatibid. alla conservazione delle cose di interesse storico-artistico e alla difesa delle bellezze naturali,* I, La Libreria dello Stato, Roma, 1932, pp. 87-190.

[75] Law no. 364/1909, cit., art. 1.

[76] *Ibid.*, art. 5.

[77] *Ibid.*, artt. 8-11.

[78] *Ibid.*, art. 4.

[79] *Ibid.*, art. 3.

[80] This is emphasised by C. Campanella, *op. cit.*, p. 45.

[81] In this sense F. Bottari, F. Pizzicannella, *op. cit.*, pp. 142-146.

[82] Law no. 688 of 23 June 1912, art. 1, in L. Parpagliolo, *op. cit.*, pp. 273-274.

ers. This measure gave rise to the legal protection of natural beauty, which was to take on an autonomous character only 10 years later with Law no. 778 of 11 June 1922, *Tutela delle bellezze naturali e degli immobili di particolare interesse storico*, the first law on landscape protection covering the entire national territory[83].

The last important piece of legislation on the protection of cultural heritage from a historical point of view dates back to the Fascist Era and it is due to Benito Mussolini, who wanted to turn Rome into the capital of the new Empire. The legislation of late Fascism represented an authentic overall programme of cultural policy[84]. This is the Law of 1 June 1939, no. 1089 *Tutela delle cose d'interesse artistico o storico* (Protection of things of artistic or historical interest)[85], divided into 8 chapters and 73 articles. The so-called Bottai reform, named after the Italian Minister of National Education Giuseppe Bottai († 1959)[86], who was responsible for the main preservation provisions of the 20th century: measures of singular wisdom that contrasted with the imposing and distorting architectural and urban interventions on ancient cities during the Fascist period.

This law defined the scope of protection by extending it to include things, whether movable or immovable, that were of artistic, historical, archaeological or ethnographic interest and specified that these should include things of paleontological, prehistoric or primitive civilisation interest; things of numismatic interest; manuscripts, autographs, correspondence, notable documents, incuna-

[83] The text of Law no. 778 of 11 June 1922 is published *ibid.*, pp. 407-412. See G. Volpe, *op. cit.*, p. 93.

[84] For the quotation see S. Cassese, *op. cit.*, p. 156.

[85] Law no. 1089 of 1 June 1939 *Tutela delle cose d'interesse artistico e storico*, published among others by R. Tamiozzo, *La legislazione dei beni culturali e ambientali*, Giuffrè, Milano, 2002², pp. 287-304.

[86] On the role played by Giuseppe Bottai in Fascist cultural policy see A. De Grand, *Bottai e la cultura fascista*, Laterza, Bari, 1978 and A. Ragusa, *op. cit*., pp. 206-221. The pages by G. Bottai, *Difesa del patrimonio artistico in tempo di guerra*, in Id., *La politica delle arti* - Scritti 1918-1943, edited by A. Masi, Editalia, Roma, 1992, are fundamental.

bula, books, prints and engravings of a rare and valuable nature; villas, parks and gardens of artistic or historical interest; immovable objects that, because of their reference to political, military, literary, artistic and cultural history, had been recognised as being of particular interest; works of contemporary art, provided that the authors were not living or were at least 50 years old[87].

In order to protect these assets, the legislation provided a set of instruments, some already known and some original. As for the former, we recall the constraint, a limitation on the freedom of private individuals, who had to submit to precise impositions in relation to the enjoyment of the property[88]; then, the inventory of objects of historical or artistic interest[89]; the prohibition of demolition[90], the prohibition of alienation of property belonging to the State or to corporate bodies[91] and the prohibition of exportation[92]. On the other hand, there were original provisions prohibiting any use that was not compatible with their historical or artistic character[93]; the obligation for private individuals to report any transfer[94] and the provision that accidental finds belonged to the State – and not to the individual – and had to be reported to the competent authority[95]. This established the public monopoly of archaeological research and the fact that finds belonged to the State.

Law no. 1089 is the core of a large body of legislation passed in 1939[96], including Law no. 1497 *Protezione delle bellezze naturali*

[87] Law no. 1089/1939, cit., artt. 1-2. V. A. Anzon, *Il regime dei beni culturali nell'ordinamento vigente e nelle prospettive di riforma, in Ricerca sui beni culturali,* I, Grafica Editrice Romana, Roma, 1975, pp. 99-102 and A. Ragusa, *op. cit.*, p. 124.

[88] Law no. 1089/1939, cit., art. 3. On the constraint in the Bottai law see A. Anzon, *op. cit.*, pp. 102-106 and R. Tamiozzo, *op. cit.*, pp. 55-73.

[89] Law no. 1089/1939, cit., art. 4.

[90] *Ibid.*, artt. 11-12.

[91] *Ibid.*, art. 24.

[92] *Ibid.*, art. 35.

[93] *Ibid.*, art. 11.

[94] *Ibid.*, art. 30.

[95] *Ibid.*, art. 44.

[96] On the Bottai Laws no. 1089/1939 for things of artistic and historical interest, no. 1497 for scenic beauty, no. 2006 for archives see G. Bottai, *Politica fasci-*

(Protection of natural beauty), which provided for territorial landscape plans to protect the so-called overall beauty[97], and Law no. 823[98], which reorganised the superintendencies, established at the beginning of the century, into four categories[99]. From the Bottai reform emerged a broad and articulated perspective on the social role of the cultural heritage: the historical, artistic and environmental heritage was considered the centre around which the identity of the Italian people was built and gathered, therefore the State had to be its guarantor, no more and no less than in Roman times[100].

The Bottai laws, in which the concepts and terms of today's protection regulations appear already acquired, were «leggi avanzatissime, le migliori del mondo non solo per la loro epoca, perché nascevano dalla tradizione italiana di tutela che […] era ed è la più antica e solida del mondo, anche sotto il profilo giuridico»[101]. They dictated a discipline that has remained substantially unchanged to

sta delle arti, Signorelli, Roma, 1940; F. Bottari, F. Pizzicannella, *op. cit.*, pp. 153-163; G. Volpe, *op. cit.*, pp. 94-96; D. Foligno, *Spunti sistematici sulla legislazione del patrimonio artistico e panoramico*, in *Rivista di diritto pubblico*, s. II, XL, 1948, II, pp. 43-45; R. Tamiozzo, *op. cit.*, pp. 1-49; *Rassegna di Giurisprudenza*, cit.; A. Ragusa, *op. cit.*, pp. 221-232; S. Cassese, *op. cit.*, pp. 153-183; A. Anzon, *op. cit.*, pp. 99-141; C. Campanella, *op. cit.*, p. 49-51 and M. Ainis, M. Fiorillo, *op. cit.*, pp. 174-176.

[97] L. Severi, *La vigente legge sulla protezione delle bellezze naturali e il suo regolamento d'esecuzione*, in *Il diritto dei beni pubblici*, XVI, 1940, pp. 371-387.

[98] On this law C. Campanella, *op. cit.*, pp. 52-53 and A. Ragusa, *op. cit.*, pp. 228-232.

[99] The reform provided for a Superintendency dedicated to antiquities; a Superintendency dedicated to monuments; a Superintendency dedicated to galleries, museums, and indibid.dual works of art from the Middle Ages and the modern age; and a mixed Superintendency dedicated to monuments and galleries.

[100] On this point, I refer to the essay by I. Pontoriero in this same volume.

[101] «highly advanced laws, the best in the world not only for their age, because they were born from the Italian tradition of protection which […] was and is the oldest and most solid in the world, also from a legal point of view». The quotation is from S. Settis, *Italia S.p.a. l'assalto al patrimonio culturale*, Einaudi, Torino, 2002, p. 30.

this day, having been formally repealed in 1999, but confirmed in content by the recent code[102].

The *Codice Civile del Regno d'Italia* of 1942 confirmed the binding legislation, as it recognises the owner's right to enjoy and dispose of things in a full and exclusive manner, but only «entro i limiti e con l'osservanza degli obblighi stabiliti dall'ordinamento giuridico»[103] and defines as state property – and, therefore, inalienable – «gli immobili riconosciuti d'interesse storico, archeologico e artistico» and «le raccolte dei musei, delle pinacoteche, degli archivi e delle biblioteche», if they belong to the State or local authorities[104]. Art. 826 includes in the non-disposable heritage «le cose di interesse storico, archeologico, paletnologico, paleontologico e artistico, da chiunque e in qualunque modo ritrovate nel sottosuolo»[105].

The World War II inflicted on the Italian heritage, but not only on it, destruction and plundering of unprecedented severity by the Germans led, at international level, to the birth of UNESCO and the establishment of the *Monuments Men*. The UNESCO convention was established in Paris on 4 November 1946, based on the awareness that political and economic agreements were not enough to build a lasting peace and that this peace had to be based on education, science, culture and cooperation between nations[106]. The

[102] *Decreto legislativo 29 ottobre 1999, n. 490 – Testo unico delle disposizioni legislative in materia di beni culturali e ambientali, a norma dell'art. 1 della legge 8 ottobre 1997, n. 352*, art. 166, in *Gazzetta Ufficiale*, 27 dicembre 1999, n. 302, s.o. n. 229.

[103] «within the limits and with the observance of the obligations established by the legal system» (*Codice civile. Testo approvato con R.D. 16 marzo 1942 n. 262*, Istituto poligrafico e zecca dello Stato, Roma, 1942, art. 832).

[104] *Ibid.*, artt. 822 and 824, «properties recognised as being of historical, archaeological and artistic interest and collections of museums, picture galleries, archives and libraries».

[105] «things of historical, archaeological, palethnological, paleontological and artistic interest, by whomever and howsoever found underground» (*ibid.*, art. 826. On this point see D. Mastrangelo, *op. cit.*, pp. 20-21).

[106] W.H.C. Laves, C.A. Thomson, *Unesco: Purpose, Progress, Prospects*, Indian University Press, Bloomington, 1957; R.P. Droit, *Humanity in the Making: Overview of the Intellectual History of Unesco 1945–2005*, UNESCO, 2005; J. Toye, R. Toye, *One World, Two Cultures? Alfred Zimmern, Julian Huxley and the*

Monuments Men were a special corps of soldiers – without any military experience – recruited from among museum directors, librarians, art scholars and architects. This unique militia was commissioned by American President F.D. Roosevelt during the World War II to rescue European works of art threatened by bombing and to recover those stolen by the Nazis[107].

This unfortunate theft was remedied by the 1947 Paris Peace Treaty, which required the return of assets taken by the Germans after 1943. Thanks to the good relations with the American authorities, the Italian delegate, Rodolfo Siviero, succeeded in obtaining the extension of the rule to goods taken before that date. A special delegation was set up in 1953 with the task of identifying the looted works and recovering them. This commission – led by Siviero – remained in operation until 1987 and in 1995 the extensive and valuable list of stolen works was published[108].

8. *Discipline in the second half of the 20th century*

With the establishment of the Republic, the protection of cultural heritage became a constitutional value. Art. 9 of the Italian Constitution, in fact, states that «la Repubblica promuove lo sviluppo della cultura e della ricerca scientifica. Tutela il paesaggio e

Ideological Origins of UNESCO, in *History*, 2010, pp. 308-331 and P. Duedahl, *A History of UNESCO: Global Actions and Impacts*, Palgrave Macmillan, Basingstoke, 2016.

[107] The valuable work of the Monuments men is outlined in R.M Edsel's book, Monuments men. *Eroi alleati, ladri nazisti e la più grande caccia al Tesoro della storia*, Sperling & Kupfler, Milano, 2013, from which the famous film is taken. To the specific actibid.ty carried out in Italy is dedicated the subsequent R.M Edsel, Monuments men. *Missione Italia,* Sperling & Kupler, Milano, 2014.

[108] On Rodolfo Siviero and the recovery of stolen works during World War II see G. Volpe, *op. cit.*, pp. 96-109 and F. Bottari, F. Pizzicannella, *op. cit.*, pp. 164-166.

il patrimonio storico artistico della Nazione»[109]. The environmental and historical-artistic heritage is declared to be an indispensable tool for the cultural development of citizens[110]. This protection concerns two objects, of which the constituent felt the analogy and connection: the landscape and the historical-artistic heritage, both of which ideally, but legally relevant, belong to the Italian nation.

In post-war Italy, which had to be rebuilt and industrialised, however, this constitutional norm appeared to be an excess of zeal on matters considered marginal and the attention paid to such delicate and urgent issues came to a halt.

A turning point came with the establishment (by Law no. 310 of 26 April 1964) of the *Commissione di indagine per la tutela e la valorizzazione delle cose di interesse storico, archeologico, artistico e del paesaggio* (Commission of Inquiry for the protection and enhancement of things of historical, archaeological, artistic and landscape interest) – the so-called Franceschini Commission –, composed of experts, which two years later published the results of its work in three volumes entitled *Per la salvezza dei beni culturali in Italia*, in which it denounced the dramatic condition of Italy's cultural and environmental heritage, outlined an organic reform project and recommended some urgent interventions[111]. The term 'cultural heri-

[109] «The Republic promotes the development of culture and scientific research. It protects the landscape and the historical and artistic heritage of the Nation» (*Costituzione della Repubblica Italiana*, Casa editrice stamperia nazionale, Roma, 1948, art. 9).

[110] On the constitutionalisation of the protection of cultural heritage, see F. Santoro Passarelli, *I beni della cultura secondo la Costituzione*, in *Studi per il XX anniversario dell'assemblea costituente*, II, Vallecchi, Firenze, 1969, pp. 429-440; F. Franceschini, *L'impegno della Costituzione Italiana per la salvaguardia dei beni culturali*, in *Studi*, II, cit., pp. 227-241; A. Anzon, *op. cit.*, pp. 93-98 and A. Ragusa, *op. cit.*, pp. 233-257.

[111] On the Franceschini Commission and its work see F. Capuano, *Sui lavori della Commissione d'indagine prevista dalla legge 26 aprile 1964, n. 310*, in *Annali della pubblica istruzione*, XII, 1966, p. 471 ss.; A. Anzon, *op. cit.*, pp. 150-162; D. Mastrangelo, *op. cit.*, pp. 24-25; F. Bottari, F. Pizzicannella, *op. cit.*, pp. 166-169; M. Ainis, M. Fiorillo, *op. cit.*, pp. 176-177 and A. Mansi, *op. cit.*, p. 23.

tage' was already mentioned in international conventions, starting with the one signed in The Hague in 1954 for the protection of such assets in the event of armed conflict[112], but it was the Franceschini Commission that introduced the term into Italian political and legal language, explaining that it referred to any asset that constitutes material evidence of the value of civilisation.

In 1974 – with the Law no. 675 of 14 December – the *Ministero per i beni culturali e ambientali* (Ministry for Cultural and Environmental Heritage) was established – since 1998 the *Ministero per i beni e le attività culturali* (Ministry for Cultural Heritage and Activities) –, which was entrusted with the task of reviewing and updating the legislation of '39, which remained unchanged until then, except for the discipline on the export of works of art, which had meanwhile implemented the agreements on the free movement of goods in the European Community, dropping the previous prohibitions[113].

It was only at the end of the 1970s that Italy began to realise the primary role of cultural and environmental heritage for the development of the national community. At that time, with great delay, the idea that these assets were not simply objects to be preserved or recovered, but resources to be put to good use in a cultural and economic perspective, appreciating their spiritual and material value, came to the fore. Law no. 184 of 6 April 1977 implemented the *Convention on the Protection of the World Cultural and Natural Heritage*, signed in Paris on 23 November 1972. The Convention provides that a special committee, set up at UNESCO, shall draw up and update every two years, on the proposal of the States concerned, a *World Heritage List* and, if necessary, a specific *List of World Heritage in Danger*. For the properties on these lists, the State

[112] *Convenzione per la protezione dei Beni Culturali in caso di conflitto armato*, The Hauge, 1954.

[113] *Decreto legislativo 20 ottobre 1998, n. 368*, art. 1, in *Gazzetta Ufficiale*, 26 ottobre 1998, n. 250. See F. Bottari, F. Pizzicanella, *I beni culturali*, cit., p. 173.

may request international assistance and participation in the financing of the necessary work from the *World Heritage Fund*[114].

It was only in 1999, 60 years after the Bottai laws, that a reorganisation of all the preservation provisions enacted in the 20th century was finally achieved with the promulgation of the *Testo unico sui beni culturali* (Legislative Decree no. 490/1999), which protected cultural, environmental and landscape assets[115]. Five years later, the *Testo* paved the way for the first real rethinking of the entire discipline: the *Codice dei beni culturali e del paesaggio*, dated 1st May 2004[116].

[114] D. Mastrangelo, *op. cit.*, p. 28.

[115] *D. lgs. no. 490/1999*, cit.

[116] *Decreto Legislativo 22 gennaio 2004, n. 42 – Codice dei beni culturali e del paesaggio, ai sensi dell'articolo 10 della legge 6 luglio 2002, n. 137*, in *Gazzetta Ufficiale*, 24 febbraio 2004, n. 45, s.o. n. 28. The legislator also recently intervened with the Law of 3 March 2022, n. 22 to regulate crimes against Cultural Heritage.

Chiara Alvisi

UNESCO CULTURAL HERITAGE AND GLOBAL COMMONS*

Abstract: The WHC provisions provide an important contribution to the debate on 'common goods' (or 'commons'), in which legal scholars specialized in several fields have been involved. As is widely known, WHC was adopted in order to safeguard and preserve cultural and natural heritage and to ensure its preservation for future generations (see article 4). The link between present and future generations as well as the general concept of cultural heritage of mankind, that inspires the WHC, is also at the heart of the concept of 'common goods' as generally held by legal theory. The concept of 'common goods' is rather controversial because it does not have a definition in the current law. Furthermore, theoretically, it includes a large and heterogeneous number of goods (both material and non-material, as well as urban spaces, etc). While there is not yet consensus on a legal definition of 'commons', legal scholarship agrees on the point that certain goods are actually vital to meet collective needs. Indeed, despite the variety of approaches and theories offered by both scholars and case-law, it is generally accepted that commons are neither public nor private goods and that their classification depends on their usefulness for satisfying both individual fundamental rights and communities' interests. Taking as a starting point the relevant WHC provisions, the proposed chapter will discuss – from a private law perspective – the theoretical notion of 'common goods' and its possible impact on cultural and natural heritage understanding and preservation.

1. *The Cultural Heritage of Mankind and the Private Law Categories: Things or Persons?*

The purpose of this essay is to examine whether the international law concept of cultural heritage of mankind can be translated into one of the Italian private law categories.

To classify an international law concept as a private law one is a prerequisite for a mutual understanding between scholarly disciplines. Indeed, although they deal, or should deal, with facts of common interest and research, they speak in different languages

that frequently do not communicate one another. To translate «cultural heritage of mankind» not only into the Italian language but also into the Italian private law categories means to lay the groundwork for an increasingly desirable interdisciplinary dialog between private law scholars and international law ones.

In a complex society marked by the diminished role of States' legislature and the multiplicity and entanglement of transnational sources of law, the search for a «common communication vocabulary»[1] is clearly not enough to simplify the interpretive process. Indeed, it could complicate it if we did not take the time to distinguish, validate, and invalidate the «plurality of meanings» that frequently underpins that process[2]. In our case, the concept of «cultural heritage of mankind» can be interpreted through widely diverse legal categories situated halfway between things and persons, at times leading to dubious practical outcomes. On the other hand, deciding against categorization means refusing to understand what «cultural heritage of mankind» means in domestic law, risking losing many opportunities for its safeguarding, as has happened for several decades in the recent past with the protection of diffuse interests[3].

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* Double-blind peer reviewed content.

[1] I am using here a phrase taken from N. Lipari, *Le categorie del diritto civile*, Giuffrè, Milan, 2013, p. 25, who, in turn, borrows it from P. Rescigno, *Sulle categorie generali del diritto privato*, in *Diritto civile*, directed by N. Lipari, P. Rescigno, I, 1, *Le fonti e i soggetti*, Giuffrè, Milan, 2009, p. 187. If not otherwise stated, all translations are by Francesco Caruso.

[2] As noted by N. Lipari, *Le categorie del diritto civile*, cit., p. 29: «un comune riferimento terminologico oggi quantomeno sottende una pluralità di significati e quindi, anziché operare quale meccanismo semplificatorio del procedimento interpretativo potrebbe finire per complicarlo» ("today, a common terminological reference implies, at the very least, a plurality of meanings, and thus, rather than 'simplifying' the interpretive process, it may end up complicating it").

[3] In this regards, N. Lipari, *Le categorie del diritto civile*, cit., p. 17, recalls that «nell'esperienza della seconda metà del secolo scorso non sono mancati casi in cui si sono incontrate resistenze a realizzare certe tutele proprio perché i fatti da tutelare non risultavano classificabili in categorie giuridiche note: basterebbe pensare, per limitarsi ad un esempio soltanto, alla difficoltà che ha incontrato nelle sue prime manifestazioni la tutela dei c.d. interessi diffusi, non riconducibili ad una sfera di titolarità previamente individuata e quindi non classificabili secondo la classica al-

The debate over the meaning of private law categories, brilliantly described by Nicola Lipari in his book *Le categorie del diritto civile*, published a few years ago, is still ongoing[4]. Some identify them with the institutions of private law; others instead perceive them more broadly as «schemes of thought», tools for knowledge that order reality by making it intelligible[5]; for others, including Lipari himself, private law categories are conceptual instruments involved in the interpretive process, keys to reading reality[6]. Finally, others, like Rodolfo Sacco, define legal categories as ways to learn about problems[7].

Traditionally, the general categories or doctrines of private law, to quote Santoro Passarelli, are those of persons, things, legal relations, facts, and juridical acts[8]. Therefore, the question is whether the cultural heritage of mankind fits into the theory of goods or in that of persons. Which to choose?

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ternativa tra diritti soggettivi e interessi legittimi» ("on several occasions in the second half of the last century, resistance was mounted against granting certain protection precisely because the facts to which protection had to be granted could not be classified according to familiar legal categories: it would suffice to mention, to cite just one example, the challenges met, early on, by the so called 'diffuse interests', which could not be traced back to a previously identified legal ownership and thus could not be classified according to the traditional division between subjective rights and legitimate interests").

[4] N. Lipari, *Le categorie del diritto civile*, cit.

[5] See G.B. Ferri, *Le stagioni del contratto e le idee di Guido Alpa*, in *Rivista del diritto commerciale*, 2013, p. 215.

[6] N. Lipari, *Le categorie del diritto civile*, cit., p. 12, «che altrimenti ci apparirebbe disperdersi in un serie infinita e scomposta di vicende e comportamenti» ("which would otherwise appear to be dispersed in an endless and disjointed series of events and conducts").

[7] R. Sacco, *Il fatto, l'atto, il negozio*, in *Trattato di diritto civile*, directed by R. Sacco, UTET, Turin, 2005, pp. 1-2: «coloro che vogliono porre ordine in ciò che sanno, far progredire il proprio sapere e comunicarlo al prossimo, debbono disporre di categorie ordinanti e di una lingua che le esprima» ("Those who want to organize, advance, and communicate their knowledge to others must have some organizing categories as well as a language in which to express them").

[8] See F. Santoro Passarelli, *Dottrine generali del diritto civile*, Jovene, Naples, 1989[9], *passim*.

To translate a foreign concept such as «cultural heritage of mankind» into a private law category entails giving things a name. However, for the positivist jurist «categories» are not predicates of beings, that is, a «form of being»[9]. For the positivist jurist, the name of the thing is not 'the name of the rose'. The name of the thing is rather the name of the action: of the action I perform with the rose, of the action with which I speak of the rose[10]. Since the language designs actions and not beings – at least according to a juridical idea of language – then 'cultural heritage', be it tangible or intangible, does not mean values, like the Beautiful, the Good, or Peace (capitalized), but resources that can be fruitfully used by everyone thereby enjoying their fundamental rights and freedoms.

It has been claimed that «cultural heritage» is an umbrella concept resulting from discussions surrounding the drafting of separate international instruments that eventually converged into the 1972 UNESCO Convention[11]. In this Convention, despite the still 'monumentalistic' definition of cultural heritage contained in Art. 1, the phrase «cultural heritage» replaces the notion of «cultural property» and broadens its scope to include intangible goods as well as the relationships that individuals entertain with cultural objects. The UNE-

[9] For Aristotle, the name of a thing is its predicate, as it describes its being, and knowing the being (that is, philosophy) is a secret activity reserved for a select few. N. Lipari, *Le categorie del diritto civile*, cit., p. 13, nt. 3, after recalling the Aristotelian theory (*Metaphysics*, 1017a 22-27) for which being is 'said' according to the different categories, and to each categorization concretely, substantially, and actually corresponds a different way in which being 'is', notes that in modern culture, and especially in legal modern culture, there is a «gap», an ultimately unbridgeable separation between being and language.

[10] See G.B. Contri, *Il nome della cosa*, *29-30 gennaio 2011*, in *Think! L'ordine giuridico del linguaggio*, Sic edizioni, Milan, 2017: «il nome della cosa è nome dell'azione: dell'azione che compio con la rosa, dell'azione con cui parlo della rosa».

[11] See A.A. Yusuf, *Article 1 – Definition of Cultural Heritage*, in *The 1972 World Heritage Convention: A Commentary,* edited by F. Francioni, F. Lenzerini, Oxford University Press, Oxford, 2008, p. 23 ss. The three categories of properties comprised in the notion of cultural heritage («monuments, groups of buildings and sites») must pass a «test of authenticity» (p. 46).

SCO Convention on intangible heritage of 2003[12] and that of 2005 on the «protection and promotion of the diversity of cultural expressions», where this diversity is defined «common heritage of humanity»[13], have brought that semantic extension to completion.

As opposed to the concept of property, heritage also indicates the use value for all mankind of cultural and natural resources that are classified as having «outstanding universal value». As a result, their protection affects all mankind as well as each individual person, transcending the national boundaries of a given property's State of origin and extending the chronological boundaries beyond the present generation, to the extent of protecting even the cultural interests of the unborn: indeed, the 1972 UNESCO Convention binds the present generations, beginning with the States Parties, to safeguard valuable historical, cultural, and natural entities for posterity.

The Operational Guidelines (henceforth: OG)[14], which establish the criteria for determining the outstanding universal value of cultural resources to be inscribed in the World Heritage List, have adjusted the definition of cultural heritage, ensuring its flexible and evolving application for the years to come. According to the OG application practice, a cultural resource has «outstanding universal value» if it is «the best of the best» in a cultural area, region, theme, or historical period.

In turn, the so-called Global Strategy[15], whose aim is to identify and fill gaps in the List, has led to a further broadening and

[12] 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage.

[13] 2005 UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions.

[14] The Operational Guidelines for the implementation of the World Heritage Convention are compiled by the United Nations Educational, Scientific and Cultural Organisation and the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage and are periodically revised to reflect the decisions of the World Heritage Committee.

[15] *Global Strategy for a Balanced, Representative and Credible World Heritage List*, proposed by the Expert Meeting in 1992 and with contribution from the Word Heritage Centre and ICOMOS.

transformation of the concept of cultural heritage in a relational sense, incorporating advancements in knowledge and in scientific thought, as well as relationships between cultures, in order to include in the List the various manifestations of outstanding universal value across diverse cultures[16].

This process has resulted in the evolution of the notion of cultural heritage[17], from a purely monumentalistic conception to an inclusive and diverse anthropological understanding of the richness and diversity of human cultures; from an approach aimed at selecting the world's most iconic wonders to a different one aimed at picking «the best of the best» based on relational, comparative, and representative listing criteria[18].

According to international law, the heritage of mankind thus includes not only tangible properties but also intangible ones, works of art, that is, products of the mind, and bodies of knowledge, and comprises contributions made by individuals, groups, and peoples. The heritage of mankind is protected inasmuch as it is deemed to represent prized cultural identities of interest to all humanity. This conception is based on a pluralistic understanding of the world and public space in which different cultures are, to quote Hanna Arendt, the «in-between» that keeps us from trampling on another and becoming massified, enabling us to relate to one another as

[16] See A.A. Yusuf, *Article 1 – Definition of cultural heritage*, cit., p. 35: «The Global Strategy led to the broadening of the notion of cultural heritage and to the establishment of a process of taking into account developments in knowledge, scientific thought, and view of relationships among cultures so that the List would become more receptive to the varied manifestations of outstanding universal value in different cultures». This development has made it possible to apply the 1972 Convention also to intangible heritage when tangible heritage is «directly or tangibly associated with events, living traditions, beliefs, ideas or artistic and literary works of outstanding universal significance».

[17] See also F.P. Cunsolo's essay published in this volume: *The Long Goodbye: The Shift from Cultural Property to Cultural and Natural Heritage in the World Heritage Convention*.

[18] See A.A. Yusuf, *Article 1 – Definition of cultural heritage*, cit., p. 48.

free individuals[19]. This cultural – that is, civic – public space is antithetical to mass psychology and ensuing conformism[20] and must be identified, preserved, and made accessible to all, including future generations. The ratification of the UNESCO Convention imposes on the Italian legislator the constitutional obligation (under Art. 117, para. 1 Const. [It.]) to recognize and protect individuals' and the community's right to access this pluralistic public space.

Once the notion of cultural heritage of mankind is transposed into domestic law and subject to a constitutionally oriented interpretation aimed at protecting the person, then the private law scholar sees it as the content of a subjective liberty (political, civil, cultural, of thought). To the international safeguard of the cultural heritage of mankind seems to be corresponding, in the domestic legal order, the recognition of every individual's homogeneous interest in accessing (i.e. being able to see, know, and judge) the 'best of the best' of other people's actions and discourse in the public space, that is, a space visible and accessible to everybody –

[19] See H. Arendt, *The Human Condition*, The University of Chicago Press, Chicago, 1998, p. 52.

[20] The ratification of the 1972 and 2003 UNESCO Conventions, as well as the 2005 UNESCO Convention on cultural diversity, could, for example, limit prohibitions such as that contained in Art. 28 of the French Loi du 9 décembre 1905 «concernant la séparation des Eglises et de l'Etat», when these works are inscribed in the World Heritage List. The latter provision states that «Il est interdit, à l'avenir, d'élever ou d'apposer aucun signe ou emblème religieux sur les monuments publics ou en quelque emplacement public que ce soit, à l'exception des édifices servant au culte, des terrains de sépulture dans les cimetières, des monuments funéraires, ainsi que des musées ou expositions».

As is well known, the French ban on the display of religious symbols in public places (with the exception of museums) was recently enforced in two cases. In the first, in response to an appeal by two 'free-thinking' associations to compel the mayor of the municipality of Sable d'Holonne to remove a statue of Archangel Michael from a public square, despite its artistic value, because it was deemed a religious symbol (Cour adminsitrative d'appel de Nantes, ruling of 16 September 2022, nos. 22NT00333, 22NT01448). In the second, in order to compel the mayor of La Flotte to remove from a public square a statue of the Virgin donated to that municipality after WWII, a sculpture which had been displayed there for a long time until restoration work was completed (Tribunal Administratif de Poitiers, ruling of 3 March 2022, no. 2100952).

qualities that are the conditions of the individual's freedom to action and discourse in that very same public space. We are speaking of interests that are subjective but not exclusively individual, as they are linked to resources that cannot be exclusively appropriated[21] and are currently under severe threat from mainstream ideology's and cancel culture's iconoclastic attitudes[22] as well as from totalitarian-like normalization and Web 2.0-imposed conformism. The transposition of the UNESCO Convention into the domestic legal order by virtue of a constitutionally oriented interpretation of its law of ratification[23] would allow for an enhancement of the constitutional protection of individuals, for it recognizes the access to cultural heritage as an individual as well as superindividual interest deserving of protection. However, even recently the Strasbourg Court has opposed this reasoning. Following a restrictive conception of world heritage of mankind as the object of human rights, the ECHR has denied that its system protects the right of people to access UNESCO's cultural heritage, recognizing and protecting it only as the right of minorities to free enjoyment of their culture, and as the right of indigenous peoples to conserve, control, and protect their cultural heritage[24].

[21] According to an objective criterion, a 'collective or diffuse interest' is an interest linked to the use or enjoyment of an indivisible property capable of being used or enjoyed by more people at the same time, see U. Ruffolo, *Interessi collettivi o diffusi e tutela del consumatore*, I, *Il problema e il metodo – Legittimazione, azione e ruolo degli enti associativi esponenziali*, Giuffrè, Milan, 1985, p. 21 ss., nt. 2: «gli interessi diffusi, che pure possono organizzarsi, non assumono carattere 'corporativo' ma restano caratterizzati dalla possibilità di pari soddisfacimento per tutti i membri della collettività» ("Even though they may be the focus of organized enjoyment, diffuse interests continue to be distinguished by the possibility of equal satisfaction for all community members").

[22] See F. Rampini, *Suicidio occidentale: Perché è sbagliato processare la nostra storia e cancellare i nostri valori*, Mondadori, Milan, 2022.

[23] L. n. 184/ 1977 (*Ratifica ed esecuzione della convenzione sulla protezione del patrimonio culturale e naturale mondiale, firmata a Parigi il 23 novembre 1972*).

[24] In its ruling on Ahunbay and Others v. Turkey (29 January 2019, Section II), although the «Court did not, a priori, rule out the existence of a joint European and international stance on the need to protect access to the cultural heritage», nevertheless it argued that «the international protection as it currently stands usu-

In contrast, in the domestic legal system, within the constitutional framework safeguarding the individual and their autonomy (the so-called subsidiarity principle), the protection of the cultural heritage of mankind implies the qualified recognition of the need of all individuals not only to see and become acquainted with 'the best of the best' of their own and of other people's culture, but also to participate – individually or through representative bodies, other than the local public bodies, protecting individual and collective interests – to the decision-making process of the policies concerning the natural and cultural resources constituting the heritage of mankind (from the nomination of the heritage entity to be listed to its inscription and management). Such a need for participation underlies a diffuse interest that can be enforced through an *actio popularis*, which grants an individual and collective legal standing to sue for injunction or damages also against public bodies that are responsible for the policies concerning the cultural heritage if they fail to fulfil the obligations imposed to State Parties by the rules set by the UNESCO Conventions[25].

There are, however, numerous passages in which the OG, as updated as of 31 July 2021, recommend that States Parties involve civil society in the various stages of «identification, nomi-

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ally concerns situations and regulations appertaining to the cultural rights of national minorities and the right of indigenous peoples to conserve, control and protect their cultural heritage». Indeed, the Court «currently saw no "European consensus", or even any trend among Council of Europe member States, potentially necessitating a reworking of the scope of the rights in question or allowing the Court to infer from the provisions of the Convention a universal individual right to the protection of a specific cultural heritage» (trans. *https://laweuro.com/?p=554*). This decision makes evident the conceptual gap between the positivist legal notions of 'subjective rights' (as the way to protect minorities and oppressed people) as they are expressed in the various constitutional systems and the notion of 'human rights' (namely the protection of the person themselves) as it is expressed in international law and case law. On this last point, see H. Kelsen, *Pure Theory of Law*, trans. M. Knight, Lawbook Exchange Ltd., Newark N. J., 2008[5].

[25] This position is based on an 'ecologic interpretation' of the provisions on civil liability as recently proposed, albeit on a different matter, by U. Mattei, A. Quarta, in *Punto di svolta. Ecologia, tecnologia e diritto privato. Dal capitale ai beni comuni*, Aboca Edizioni, Sansepolcro (AR), 2018, p. 205.

nation, management and protection processes of World Heritage properties»[26].

[26] By examining the OG, we can infer that only State Parties can present nominations to the Committee: indeed, the nomination dossier must contain «the original signature of the official empowered to sign it on behalf of the State Party» (III B 132.9). However, concerning the preparation of the Tentative List, the OG read: «States Parties are encouraged to prepare their Tentative Lists with the full, effective and gender-balanced participation of a wide variety of stakeholders and rights-holders, including site managers, local and regional governments, local communities, indigenous peoples, NGOs and other interested parties and partners. In the case of sites affecting the lands, territories or resources of indigenous peoples, States Parties shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before including the sites on their Tentative List» (II C 64). Similarly, and with regards to the sub-stage of the Nomination Process (which follows the preparation of the Tentative List), the OG stress the need to guarantee «effective and inclusive participation in the nomination process of local communities, indigenous peoples, governmental, non-governmental and private organizations and other stakeholders» in order to «enable them to have a shared responsibility with the State Party in the maintenance of the property. States Parties are encouraged to ensure that Preliminary Assessment requests involve appropriate stakeholders and rights-holders engagement. They are also encouraged to prepare nominations with the widest possible participation of stakeholders and shall demonstrate, as appropriate, that the free, prior and informed consent of indigenous peoples has been obtained, through, inter alia, making the nominations publicly available in appropriate languages and public consultations and hearings. Where appropriate, States Parties are also encouraged to consult potentially concerned States Parties, including neighbouring States Parties, to promote consensus, collaboration and to celebrate cultural diversity» (III A 123). It should also be noted that the Committee, too, can involve «other international and non-governmental organizations with appropriate competence and expertise to assist in the implementation of its programmes and projects, including for Reactive Monitoring missions» (I H 38). Also with regards to what the Management System should contain, the OG indicate, among other things, «the development of mechanisms for the involvement and coordination of the various activities between different partners and stakeholders» (II F 111), noting that «States Parties are responsible for implementing effective management activities for a World Heritage property. States Parties should do so in close collaboration with property managers, the agency with management authority and other partners, local communities and indigenous peoples, rights-holders and stakeholders in property management, by developing, when appropriate, equitable governance arrangements, collaborative management systems and redress mechanisms» (II F 117).

In turn, Art. 11 of the 2005 UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions obliges States Parties to «encourage the active participation of civil society in their efforts to achieve the objectives of this Convention», since the Signing Parties «acknowledge the fundamental role of civil society in protecting and promoting the diversity of cultural expressions».

The line of reasoning that has been pursued here entails that in order to «ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory» (Art 5, 1972 UNESCO Convention) the State Parties shall not only adopt public policy measures «which aim to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes» (Art. 5, a) but also all those legal measures encouraging the individuals' and communities' involvement in developing the public policies concerning the cultural (and natural) heritage of mankind. Individuals and communities shall be involved in the process of nomination, and citizens shall be granted standing so that they can cooperate and exert judicial control over the public policies concerning the cultural and natural heritage, given that these legal measures are included among those that the States Parties are required to take for the «identification, protection, conservation, presentation and rehabilitation of this heritage» (Art. 5, d).

There is no trace of such involvement in the 1977 law of ratification, which merely reproduces the text of the 1972 Convention, nor in the subsequent L. n. 77/2006 – containing «Special measures for the protection and use of Italian sites and elements of cultural, landscape and environmental interest, inscribed in the World Heritage List and placed under the protection of UNESCO» – which mandated the adoption of a Management Plan concerning all the sites inscribed in the World Heritage List, viewed as a tool to en-

sure their conservation and enhancement[27]. In contrast, some regional laws have recently provided for participatory processes for the nomination and management of cultural heritages, involving «public and private stakeholders that are interested in the preservation, enhancement, and enjoyment» of sites[28].

2. *Cultural Heritages of Mankind and Theory of Commons*

In one of his last writings[29], Stefano Rodotà viewed the common heritages of mankind as an instance of the theory of the commons, noting that the latter represents the point of arrival of a way of thinking about modernity. This theory has sought to limit the scope of property rights seen as an exclusionary model, and to formulate a new concept of property shaped by the individuals and their fundamental rights, which also implies a new concept of distribution of power. To quote Rodotà: in nature there is no such a thing like 'com-

[27] Art. 4 of L. n. 77/ 2006 states that the «supporting measures» are adopted «by Decree of the Minister of Culture in agreement with the Minister of the Environment and the Protection of the Territory and the Sea [as of today, Ministry of Ecological Transition], the Minister of Agricultural, Food and Forestry, and with the Permanent Conference for relations between the State, the Regions and the autonomous Provinces of Trento and Bolzano», and does not mention private stakeholders.

[28] See the regional law 11/2019 of Friuli Venezia Giulia – containing *Supporting measures in favor of the regional heritage inscribed in the World Heritage List and placed under the protection of UNESCO* – which specifies that the candidacy to inscribe «a material or intangible cultural good located in the territory [of the region]» in the UNESCO list can be advanced by a «local authority» (Art. 14) but may involve other parties: in fact, the law specifies that the authorities managing the sites (for instance the Municipalities in whose jurisdiction falls the UNESCO sites, Art. 2, para. 2) must adopt 'Programmi operativi annuali' [«Annual Operational Programs»] which, among other things, define the «strategic guidelines for promoting and supporting the conservation and enhancement of the site» according to a «participatory process involving public and private stakeholders that are interested in the conservation, enhancement and enjoyment of the site» (sec 5).

[29] S. Rodotà, *I beni comuni. L'inaspettata rinascita degli usi collettivi*, La scuola di Pitagora, Naples, 2018, p. 59.

mons'. Commons is a legal construct concerning material and intangible resources considered for their capacity to meet collective needs and fulfil fundamental rights. Commons are characterized by diffuse entitlement, belong to everyone and nobody, meaning that everyone must have access to them but no one can claim exclusive rights to them. They must be managed in accordance to the principle of solidarity, and everyone must be able to protect them, even by taking legal action to safeguard a common good located far from where they live («I beni comuni sono a titolarità diffusa, appartengono a tutti e a nessuno, nel senso che tutti devono poter accedere ad essi e nessuno può vantare pretese esclusive. Devono essere amministrati muovendo dal principio di solidarietà […] e ciascuno deve essere messo nella condizione di difenderli, anche agendo in giudizio a tutela di un bene lontano dal luogo in cui vive»)[30]. Since access to commons is the tool that makes the property immediately usable by those interested, without further mediation, the identification or recognition of a commons requires the construction of new social subjectivities that independently or with the help of public authorities are entitled to take legal action to protect those properties even in the form of direct and participatory management. However, these subjectivities need to be identified with greater accuracy, in order to avoid the risk of a return to abstraction and to leave no room for authoritarian logic, for those who appropriate the power to speak in the name of Mankind or Nature («Ma questi soggetti devono essere individuati con maggiore precisione per evitare i rischi di un ritorno all'astrazione e per non lasciare spazio a logiche autoritarie, a soggetti che si appropriano del potere di rappresentare l'Umanità o la Natura»)[31].

In this regard, one cannot fail to mention that global trend that proposes to subjectivize Nature or parts of it and grants them status as a legal person entitled to appear before a court for injunction or damages claims in order to protect themselves. Indeed, as has happened with the constitutions of Bolivia and Ecuador, which have de-

[30] *Ivi*, p. 67.
[31] *Ivi*, pp. 52, 53, 81, 83, 85, *passim*.

clared that Pacha Mama, Mother Earth, is a legal person, enforcing its rights by virtue of a series of constitutional mechanisms[32]. In turn, New Zealand's Parliament granted legal personality to the Whaganui River and appointed two legal representatives to protect its interests. Shortly thereafter, an Indian court followed suit, granting personality to the Ganges and its main tributary, the Yumana[33]. These conceptions go back a long way: Ugo Mattei has pointed out that in the famous case Sierra Club v. Rogers Morton, Secretary of the Intern of the United States[34], the splendid dissenting opinion by Justice William O. Douglas of the Supreme Court was grounded on the idea that the environment (and its parts) must be granted *locus standi* when they are the object of an environmentally harmful activity[35].

[32] *Ivi*, p. 88.

[33] Reported and discussed by U. Mattei, A. Quarta in *Punto di svolta*, cit., pp. 137 and 206, respectively.

[34] U.S. Supreme Court, Sierra Club v. Rogers C. B. Morton, Secretary of the Interior of the United States, 405 U. S. 427 (1972), decided 19 April 1972.

[35] In Justice Douglas' words: «The critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers, and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation (see Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 *S. Cal. L. Rev*. 450 [1972]). This suit would therefore be more properly labelled as *Mineral King v. Morton.* Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. The corporation sole – a creature of ecclesiastical law – is an acceptable adversary, and large fortunes ride on its cases. The ordinary corporation is a "person" for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes. So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes – fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water – whether it be a fisherman, a canoeist, a zoologist, or a logger – must be able to speak for the values which the river represents, and which are threatened with destruction».

Justice Douglas' poetic words can be answered by Hans Kelsen's, who stated that primitive legal systems used to refer conducts and sanctions not only to human beings but also to animals and inanimate objects. Due to the lack of more sophisticated legal tools and, more importantly, since the principle of causality as an explanation for naturalistic events, which only came with the birth of science in the modern era, had not yet been proposed, in primitive animism «the behavior of animals, plants, and even inanimate objects was also regulated by a legal order»[36].

Stefano Rodotà criticizes these examples of attribution of legal personality, in which the constitutionalism of rights turns into a veritable cosmogony in which collective rights and public duties are more deeply rooted («dove il costituzionalismo dei diritti si converte in una vera e propria cosmogonia, nella quale si radicano più profondamente i diritti collettivi e i doveri pubblici»)[37] and of which individuals are ultimately dispossessed in favour of priest-like curators that monopolize them. In the personification of Nature we see an extensive use of *persona ficta* and a severe lack of democracy.

There is no need to revamp the ancient *genius loci* in order to provide effective protection in the domestic legal system for cultural and natural resources that are necessary for full human development: it is sufficient to embrace the theory of commons, which transcends the proprietorship model centred around the alternative public/private and the legal limitations that are supposed to guarantee the social function of private property[38]. As a result, the theory of commons advocates for a new humanism, a more extensive

[36] H. Kelsen, *Pure Theory of Law*, cit., p. 31 [adapted translation].

[37] S. Rodotà, *I beni comuni*, cit., p. 88 [adapted translation].

[38] Lipari acknowledges that the category of common goods is a classification criterion that goes beyond the principles contained in Art. 42 [of the Italian] Constitution on the social function of private property, for it has no links whatsoever to obligations or conducts imposed on their owner (N. Lipari, *Le categorie del diritto civile*, cit., p. 129, la categoria dei beni comuni è «un criterio che va al di là dello stesso principio consegnato all'art. 42 cost. sulla funzione sociale della proprietà perché non si riconnette in alcun modo ad obblighi o comportamenti imposti al titolare»).

constitutionalization of the person fostered by international sources of law: these have introduced in the domestic legal systems – as is the case with Art. 117 of the Italian Constitution – the protection of the common heritage of mankind that comprises resources (natural, cultural, productive) that are essential to the full development of human life.

In an important book on UNESCO heritage, edited by Elisa Baroncini, with regards to their work on the nomination of the Porticoes of Bologna, Valentina Orioli and Federica Legnani wrote that promoting the protection of this particular cultural heritage meant working to promote peace[39]. The theory of commons corroborates the truth of this statement: commons have indeed a «distinctive relational character» and bring about «social relations»[40]. Working to establish social relations means to promote peace.

3. *The End of Actio Popularis for the Protection of Collective Use of Third-Party Property and New Collective and Class Action Standing*

As is well known, Art. 825 of the 1942 Italian Civil Code signalled the end of *actio popularis* for the protection of collective use of third-party property, despite the fact that the Supreme Court of Cassation recognised it as late as the end of the nineteenth and the

[39] See V. Orioli, F. Legnani, *Bologna e i portici: Storia della candidatura alla* World Heritage List UNESCO, in *Tutela e valorizzazione del patrimonio culturale mondiale nel diritto internazionale*, edited by E. Baroncini, Bononia University Press, Bologna, 2021, p. 479 ss.

[40] See S. Rodotà, *I beni comuni*, cit., p. 82, and N. Lipari, *Le categorie del diritto civile*, cit., p. 129, who notes that the public-private alternative can no longer absorb the whole theory of commons, because some properties are so inextricably connected with the most basic needs of human life that they escape any form of appropriation and can only belong to everyone («l'alternativa pubblico-privato non è più in grado di assorbire tutta la teoria dei beni, perché vi sono beni così intimamente connessi alle più essenziali esigenze di vita dell'uomo che si sottraggono a qualunque forma appropriativa non potendo che appartenere a tutti»). See also *ivi*, pp. 130-134.

beginning of the twentieth century[41] (as in the case of the closing of the gates of the Princes Borghese's Villa)[42]. On the other hand, the very same Civil Code opted to bring collective uses under State ownership. As a result, private citizens could not take legal action to afford legal protection to collective uses of Third-Party Properties since Art. 823, para. 2 gave the public authority the monopoly on the protection of publicly owned property.

This said, with the four joint-sections decisions (14-17 February 2011)[43] on the fishing valleys of the Venetian Lagoon (although they fell within the category of the so called *demanio necessario*), the Court of Cassation, «given the direct applicability» of Arts. 2, 9 and 42 of the Italian Constitution, stated «the principle of protection of human personality and its appropriate fulfilment also with regards to landscape, not only with reference to […] public and State-owned property, but also to those properties that […], on the basis of a comprehensive interpretation of the whole corpus of the

[41] Cass., 4 July 1934, n. 2722 recognized the right to collective used on publicly owned or third-party property as an enforceable civil right, see A. Di Porto, Res in usu publico *e "beni comuni". Il nodo della tutela*, Giappichelli, Turin, 2013, pp. 61-65.

[42] Cass., 9 March 1887, which granted the people the *ius deambulandi* ('right to roam') in the gardens of the villa, which was still in private hands, and ordered the re-opening of the gates, as discussed by A. Di Porto, Res in usu publico, cit., p. 53 ss. The author reconstructs the 1880s debate on public goods, which was strictly connected to the State-building process and popular legitimacy. In particular, he points out that R. Von Jhering in its *Law as Means to an End* (or. publ. 1877-1883, trans. I. Husik) emphasized the profound difference between an idea of State «produced by modern absolutism and the police State among the nations of modern Europe», a conception founded on the juxtaposition between the individual and the State, and the different concept of *res publica* in Roman Law for which «the State is nothing else than its citizens» and *res publica* is what the citizens «have in common with all the others», hence *actio popularis*, with which «the plaintiff, defending the common interest, defends also his own».

[43] Cass., sez. un., nn. 3665, 3811, 3812, 3936, 3937, 3938, 3939 of 2011, with commentary by E. Pellecchia, entitled *Valori costituzionali e nuova tassonomia dei beni: Dal bene pubblico al bene comune*, in *Foro italiano*, 2012, I, c. 573 ss.

law, are instrumental to pursue the interests of society», that is, of all citizens[44].

The decisions of the Court of Cassation were influenced by the opinions of distinguished public law scholars (Giannini, Cassese, Cerulli Irelli) as well as by the work of Paolo Grossi and the text of the bill presented by the Rodotà Committee established in June 2007. Although it did not produce any legislative outcome, the Rodotà Committee proposed to introduce in the Civil Code, in addition to private and public properties, a third category of property, common goods (which also included «archaeological, cultural, and environmental properties as well as other protected landscapes»). Art. 1 of the bill proposed to grant commons legal protection (injunction) with 'diffuse' standing («anyone can take legal action to protect the rights connected to the protection and enjoyment of common goods») without prejudice to the State's exclusive right «to sue for damages regarding common goods»[45]. In turn, private law scholarship took a step forward when it viewed in the category of commons an extension of the protection of the person, that is, superindividual legal rights to access, safeguard, enjoy and enhance common goods, for the protection of which private citizens can take individual and collective legal action.

But if the cultural heritage of mankind comprises common properties, what happens if the States signing the World Heritage Convention (WHC) do not adequately fulfil the obligations deriving from it? We know that the only sanction for failing to meet

[44] In this regard, A. Di Porto, Res in usu publico *e 'beni comuni'. Il nodo della tutela*, cit., p. 46 ss., notes that on the basis of a constitutionally oriented systematic interpretation, the Court of Cassation has identified «a category of common goods that, regardless of ownership, well being able to belong to both public and private entities, are by their intrinsic connotations, particularly environmental and landscape ones, intended to serve the interest of the citizens».

[45] See bill n. 2031, transmitted to the Senate President Office on 24 February 2010 and «delegating the Government the power to make amendments to the civil code concerning publicly-owned property». The bill was proposed by senators Casson, Finocchiaro, Zanda, Latorre, Bianco, Adami and others (published in *Atti parlamentari*. *XVI Legislatura – Disegni di legge e relazioni – Documenti*).

WHC obligations is for the property to be added to the List of World Heritage in Danger or be removed from the World Heritage List. These are merely reputational sanctions[46]. In consonance with the theory of commons, it can be argued that after its incorporation in the Italian domestic legal system by means of L. n. 184/1977, the WHC recognizes all citizens a subjective but not exclusively individual interest in that the signing States guarantee the identification, effective protection, and transmission to future generations of properties and bodies of knowledge of «outstanding universal value» (see Arts. 4-6 of WHC). The issue is, then, whether this interest can be enforced in the domestic legal system.

As is well known, diffuse interests – that is, an undifferentiated group's interests to pursue a so called *bene della vita*, which could be expressed as meaning everything capable of rightfully satisfying a human need – cannot be defended in court because of the lack of standing of a plaintiff who cannot lay a concrete and particularized claim on a property[47] under Art. 100 C.p.c. (Italian civil procedural

[46] It should also be noted that the control on the signing Parties' compliance with the obligations deriving from the WHC is for the most part demanded to a complex monitoring and reporting system articulated into: I. Periodic reporting (under Art. 29 WHC); II. Reactive monitoring, concerning properties «under threat» (see OG 2017, para. 169); III. Reinforced monitoring, concerning properties that have been already inscribed in the List of World Heritage in Danger. At the same time, although the involvement of single individuals and other stakeholders in the implementation of WHC policy is formally recognized, it has not been yet concretely actualized, see V. Guèvremont, *Compliance Procedure: Convention Concerning the Protection of the World Cultural and Natural Heritage*, 2019, published by *Oxford Public International Law* and freely accessible at: *https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3246.013.3246/law-mpeipro-e3246*.

[47] It has been observed, however, that «the fact that administrative acts adopted in violation of the considerable interests of a community may escape judicial review just because nobody is entitled to take legal action to protect those interests from a personal and specific position of advantage inevitably clashes with people's and legal common sense». What is a stake here, indeed, are «the fundamental goods and rights recognized by our [i.e., Italian] Constitution, such as health, environment, culture, education, freedom of thought, religious liberty, non-discrimination, equal opportunities, free market, and others, which cannot be infringed without causing enormous damage to the whole community» (N. Durante, *La tutela giurisdizionale degli interessi diffusi*, keynote speech held at Università della

law code). Since the 1970s, legal practice and theory have sought in the current legal system remedies capable of protecting superindividual interests distinct from public interests[48]. It was argued in this regard that a diffuse interest becomes a collective interest as long as a private body of any legal nature lays a claim to it and may legitimately stand for a non-occasional group of individuals who share or enjoy that interest[49].

Representative legal actions for the protection of consumers' collective interests have now become a general remedy by virtue of Directive 2009/22/CE (on injunctions) in the first place, and also of Directive 2020/1828/UE (on both injunctions and redress measures), whose transposition deadline was 25 December 2022[50]. At

Calabria, Cosenza, 29 April 2015, p. 2, freely accessible at: *www.forgionegianluca.it/PROCEDIMENTI_AMMINISTRATIVI/DOTTRINA/SITUAZIONI_LEGITTIMANTI/interessi_diffusi_collettivi_la_tutela_giuridsizionale_durante.pdf*).

[48] See, *ex multis*, U. Ruffolo, *Interessi collettivi o diffusi e tutela del consumatore*, Giuffrè, Milan, 1985, *passim*.

[49] Therefore, it can be argued that as long as interests are not subjectivized, we are dealing with diffuse interests, as per the ruling by Cons. Stato, sez. VI, 15 April 2008, n. 3507 (published on *Federalismi.it – Rivista di diritto pubblico italiano, comparato, europeo*, 2008, 15). In this decision, the court has specified that the private organizations' representative capacity, on which is grounded their *locus standi* to bring a lawsuit in order to enforce collective interests, is to be inferred from a number of requirements set by the courts of law over the last thirty years (and also considering dissenting opinions). More recently, Cons. Stato, ad. plen., 20 February 2020, n. 6, set forth the principle of law according to which «the representative bodies that are included in user and consumer associations lists, or those organizations possessing the requirements set down by case law [representativeness] can legitimately enforce the collective legitimate interests of specific communities or groups. More specifically, they can bring an annulment action before a court performing judicial review of administrative acts, even in the absence of a specific statutory provision».

[50] The European Court of Justice has addressed the matter of representative legal actions for the protection of people's collective (civic and not consumerist) interest in the safeguard of their personal data under Art. 80 of the EU General Data Protection Regulation (GDPR). In ruling on Meta Platform Ireland Limited v. Bundesverband der Verbraucherzentralen und Verbraucherverbände (28 April 2022), C-319/2020, L. S. Rossi (Rapporteur), the Court has stated that Art. 80, para. 2 GDPR does not prevent Member States from introducing legislation that allows a consumer protection association to bring legal proceedings «in the absence of a mandate conferred on it for that purpose and independently of the in-

first glance, there appears to be no similarly broad standing granted for the protection of superindividual cultural interests concerning UNESCO heritages. In contrast to other legal systems (such as Portugal's)[51], the Italian one does not expressly provide for class actions in cultural heritage cases. Nevertheless, L. n. 349/1986 states that environmental associations satisfying the requirements of the law are granted standing to protect environmental interests in the strict sense (pertaining to the physical and natural conditions of a certain area or territory)[52] as well as in the broader sense. The latter includes precisely the preservation and enhancement of cultural properties, the environment in large, urban, rural and natural landscapes, monuments, cities historical centres, the quality of life – all

fringement of specific rights of the data subjects, against the person allegedly responsible for an infringement of the laws protecting personal data, on the basis of the infringement of the prohibition of unfair commercial practices, a breach of a consumer protection law or the prohibition of the use of invalid general terms and conditions, where the data processing concerned is liable to affect the rights that identified or identifiable natural persons derive from that regulation».

[51] The Portuguese legal system provides for *class actions* in several cases, as with the so called *Cultural Heritage Law* (Lei n. 107/2001 de 8 Setembro) mentioned by N. Salazar Casanova, M. Afra Rosa*, Portugal*, in *The Class Actions Law Review*, edited by C. Sanger, Law Business Research Ltd., London, 2022[6] (freely accessible at: *https://thelawreviews.co.uk/title/the-class-actions-law-review/portugal*).

[52] In this regard, Art. 13 of L. 349/1986 states that «Nationwide environmental associations and those that are present in at least five Regions are identified by a decree issued by the Minister of the Environment on the basis of the strategic policy goals and the internal democratic system as contained in their by-laws as well as the continuity of their activity and public relevance, and after consultation with the National Counsel for the Environment to be held by ninety days from its request». Under Art. 18, «The associations identified according to Art. 13 of the present law have the right to intervention in litigations for environmental damage and to bring annulment actions before administrative courts». Therefore, these provisions, which allow environmental associations that possess certain legal requirements and are included in a special list to take action before a court for environmental damage, do so «in order to enhance the democratic control over any aspect concerning the protection, preservation and enhancement of the environment in the broader sense», as decided by Cons. Stato, sez. IV, 9 October 2002, n. 5365, in *DeJure*.

ideal goods and values capable of characterizing a geographical area or territory in a way that is unique, distinctive, and unrepeatable[53].

In May 2021, amendments to the Italian civil procedure code concerning two collective proceedings came into effect, namely, the new class action under Arts. 840*bis* and ff. C. p. c., and the collective injunction pursuant to Art. 840*sexiesdecies* C.p.c. With L. n. 31/2019, both were 'unhooked' from consumer law to be eventually 'de-consumerized' and transformed into general actions or remedies[54]. Each member of a class of holders of «individual homogeneous rights» (not necessarily consumers) may bring a compensatory class action, as may collective bodies whose statutory objectives pursue the protection of those same «individual homogeneous rights», provided that they are registered in a special list held by the Ministry of Justice. Despite the objections raised by eminent civil procedure scholars, the fact that a class action can only be filed to protect individual homogeneous rights under Art. 804bis C.p.c. does

[53] *Ibidem*. For similar conclusions, see the decision by Cons. Stato, sez. IV, 14 April 2011, n. 2329, in *DeJure*. In contrast, although it appears to be a minority position, see the ruling by Cons. Stato, sez. VI, 31 July 2013, n. 4034, according to which the environment, despite being a single intangible resource, is made up of various components that can be regulated, handled, and protected singularly and separately, as is the case of cultural properties. Hence, in order to establish whether environmental protection associations can be granted standing, it must be determined whether the protected interest pertains to the environment considered as a unit, or to the individual cultural property, singularly and separately. More particularly, in the case in point, a restoration project –that is a «direct intervention on a property by means of a set of operations aimed at the material integrity and the recovery of the aforesaid property, the protection and the transmission of its cultural values» (Art. 29, para. 4, D. Lgs. n. 42/2004) or, more specifically, a sponsorship agreement stipulated with the aim of restoring a cultural property – is an occurrence that does not fall within the scope of the protection of the environment but, rather, in that of public cultural properties, governed by the Cultural Property Management Office by means of authorizations pursuant to Arts. 21 and 24 of the aforementioned legislative decree. As a result, the status of environmental protection association does not grant standing to CODACONS [a consumer association; Translator's note] (The case here discussed concerns a sponsorship for the restoration of the Colosseum).

[54] See E. Minervini, *La tutela collettiva dei consumatori e la l. 12 aprile 2019, n. 31*, in *Le nuove leggi civili commentate*, 2020, 2, p. 346.

not prevent the use of this instrument to protect superindividual interests such as those connected with the common heritage of mankind. It has been argued that this laconic provision would limit class action remedies only to the protection of «individual rights, and not of collective or diffuse, or otherwise "ownerless" interests»[55]. While it is true that diffuse interests are essentially ownerless because they lack a legitimate holder, the same cannot be said of collective interests, which differ from the former in that they have a holder or centre of reference, which is typically identified with the representative body of a non-occasional group[56]. It should also be added that the formal structure of collective interests has been authoritatively argued to consist of subjective interests that are not exclusively individual as long as they are serial, that is, homogeneous for more or less extensive groups of individuals[57]. Indeed, these may join forces

[55] For Claudio Consolo, private associations and organizations that satisfy the requirements under Art. 840bis, para. 2 C.p.c. «may bring a class action and be granted standing in a lawsuit filed by a member of the class. The news is that they are able to do so independently and not as "representatives" (or agents). In this case, however, the class action will pursue a plurality of individual rights and not of collective, diffuse or somewhat "ownerless" rights» (C. Consolo, *Codice di Procedura Civile – Commentario, Artt. 840bis-840sexiesdecies. La nuova azione di classe e la nuova inibitoria*, Wolters Kluwer Italia, Milan, 2019, p. 8). Others have expressed a contrary and more convincing opinion, considering it unreasonable that a class action lawsuit cannot be filed to protect collective interests, see G. Finocchiaro, *Ammesse azioni nei confronti delle Pa e in sede penale*, in *Guida al diritto*, 2019, 23, especially p. 26. See also U. Ruffolo, *La nuova* class action *all'americana rischia di fare davvero troppi danni*, in *Milano Finanza*, 28 July 2022, p. 14, and E. Ferrante, *Diritti soggettivi e processo di massa*, in *Azione di classe: La riforma italiana e la prospettiva europea*, edited by V. Barsotti, Giappichelli, Turin, 2020, p. 67, and especially p. 81, nt. 37.

[56] M.S. Giannini, *La tutela degli interessi collettivi nei procedimenti amministrativi*, in *Le azioni a tutela di interessi collettivi*, Cedam, Padua, 1976, p. 351 ss., «when a diffuse interest finds a holder, it becomes either collective or public, depending on how this occurrence is framed by the positive law», a position echoed in U. Ruffolo, *Interessi collettivi o diffusi*, cit., p. 21.

[57] See V. Vigoriti, *Interessi collettivi e processo. La legittimazione ad agire*, Giuffrè, Milan, 1979, p. 17 ss., who contends that a collective interest can be structured as a concurrence or relation among subjective interests with the same content, that is, a concurrence or relation based on the individual's awareness that the interrelated interests do not present a solely individual dimension and can, in

in the court of law for the purpose of class action. Furthermore, the fact that the aforementioned amendments attribute the capacity to be sued in a class action (or in a collective injunction lawsuit) exclusively to companies, providers of public services, and public utilities authorities[58], does not appear to be an impediment to resorting to class action to protect cultural heritage of mankind: in fact, the public authorities involved in the protection and enhancement of the common heritage of mankind can be seen as providers of public services, not unlike what has happened, for instance, with museums[59].

4. *Conclusions*

To conclude, while it is true that currently the effectiveness of social remedies has progressively reduced, it is also true that the law has offered stimuli to the development of nature[60] – and of culture,

fact, gather together to pursue the very same goal. See also U. Ruffolo, *Interessi collettivi o diffusi*, cit., p. 22, who recalls the argument presented by Aldo Corasaniti, for whom «the distinctive trait of the diffuse interests is to be identified in the homogeneous content of the positions held by the members of the group», which may also be a class or a category (A. Corasaniti, *La tutela degli interessi diffusi davanti al giudice ordinario*, in *Rivista di diritto civile*, 1978, p. 180 ss.).

[58] We fail to see why class actions cannot be used to protect people's fundamental interests in enjoying the cultural heritages of mankind when public policies in this area are inadequate. We do not see an impediment to resort to this legal remedy in the fact that while Art. 140, para. 1 Cod. cons. ['Consumer Code'] in its broad formulation, did not limit the capacity to be sued, both Arts. 840*bis* C.p.c. and 840 *sexiesdecies* para. 2 C.p.c. require that individual as well as collective class actions can be brought only against companies, providers of public services, and public utilities authorities with respect to acts and conducts engaged in while carrying out their activities.

[59] See, in this sense, G. Piperata, *Scioperi e musei: una prima lettura del d.l. 146/2015*, in *Aedon. Rivista di arti e diritto online*, 2015, 3; C. Zoli, *La fruizione dei beni culturali quale servizio pubblico essenziale: il decreto legge 20 settembre 2015, n. 146, in tema di sciopero*, *ibidem*; M. Cammelli, *L'ordinamento dei beni culturali tra continuità e innovazione*, *ivi*, 2017, 3.

[60] As noted by U. Mattei, A. Quarta, *Punto di svolta*, cit., p. 207 ss.

it could be added. However, research by legal scholars on the scope of the transposition of UNESCO Conventions on the cultural heritage of mankind into domestic law is still ongoing. If we understand the heritages of mankind from the perspective of commons, they can broaden the constitutional protection of the person, make the world larger and extend the public realm, because the world is what appears to all and is what is real[61]. We have then discovered a new type of *res publica*, which is so not because it belongs or pertains to the State but because it is common to all, that is, it is essential to the complete fulfilment of each person. In the common world as it is envisaged by the UNESCO Conventions, reinterpreted in the light of the theory of commons, plurality stands out, that is, a world made up of the many and the different[62]. The UNESCO Conventions then encourage us to consider that the world is only certain and real when everyone can recognize differences, and that eradicating plurality entails the loss of the world and the demise of the public sphere.

[61] I am referring to the concepts of «world», «public realm» and «reality» (i.e., something that is being seen by others and can be shared) as defined by H. Arendt, *The Human Condition*, cit., pp. 50, 93, 136.

[62] Arendt examines "plurality" (which is a different concept from pluralism) in *ivi*, p. 127 ss.

Francesco Paolo Cunsolo

'THE LONG GOODBYE': THE SHIFT FROM CULTURAL PROPERTY TO CULTURAL AND NATURAL HERITAGE IN THE WORLD HERITAGE CONVENTION*

Abstract: The introduction of the notion of 'world heritage' by the 1972 World Heritage Convention represents one of the most important steps in the evolution of international cultural heritage law. Still today, the passage from the concept of 'cultural property' to the idea of 'heritage', as a component of world community interest, is a pivotal moment of this discipline, that produced a profound impact on the international policy for the protection of culture.

The present work aims to retrace the origins of the 'world heritage' principle, concerning those cultural and natural sites of outstanding universal value that must be protected in the interest of humanity as a whole, and how the 1972 UNESCO Convention deals with this principle. The concept of 'world heritage' goes well beyond that of cultural property: it brings together cultural and natural values (the category of 'cultural landscapes', for instance), capturing the intangible meanings attributed to a land, in terms of traditions and spiritual linkage, and highlighting the intergenerational significance of these sites of universal importance.

This change of perspective, which considers a cultural or natural site not just a property belonging to a State, but a common good of humankind, keeping, at the same time, the fine balance between national sovereignty and the general interest of the international community, is one of the major achievements of the World Heritage Convention. The purpose of this paper is to examine the notion of 'world heritage' at the test of time: after 50 years of its application, it's important to assess how it has enforced the international framework for the protection and promotion of cultural heritage, taking into account its strenghts and shortcomings, especially in the light of the continuous international challenges concerning the safeguard of culture.

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1. *Preliminary remarks*

The introduction of the notion of 'world heritage' with the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage (World Heritage Convention – WHC) represents one of the most important steps in the evolution of international cultural heritage law. Still today, the passage from the concept of 'cultural property' to the idea of 'heritage', as a component of world community interest, is a pivotal moment of this discipline, that produced a profound impact on the international policy for the protection of culture.

The present paper aims to retrace the origins of the 'world heritage' principle, concerning those cultural and natural sites of outstanding universal value that must be protected in the interest of humanity as a whole, and how the World Heritage Convention deals with this principle. The concept of 'world heritage' goes well beyond that of cultural property: it brings together cultural and natural values (the category of 'cultural landscapes', for instance), capturing the intangible meanings attributed to a land, in terms of traditions and spiritual linkage, and highlighting the intergenerational significance of these sites of universal importance.

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2. *Introducing the special value of the 1972 World Heritage Convention in international law*

After the Second World War, with the unprecedented cultural destruction and looting that characterized it, the need to protect culture, especially from the devastating consequences of armed conflicts, became a prior objective of the international community. Through the institution of the United Nations system and its special agency UNESCO, the word 'culture' entered with strength in the international political and legal language, as a universal concern itself but also as a powerful means for the maintenance of peace and the promotion and protection of human rights. The human experience gained through historical ages since the creation of fire proved an undeniable truth, perfectly synthesized by Mary-Theres Albert: «Cultures are made by people, just as they are destroyed by them»[1]. This crude but powerful maxim seems to recall the iconic phrase of the Preamble in the UNESCO Constitution, finding in it the most definitive commitment: «Since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed»[2]. The value of this statement, which constitutes the starting point of all UNESCO's actions, resides in the central role assigned to human beings and their responsibilities, in line with the experience of the International Military Tribunal of Nuremberg[3] and the

[1] M.-T. Albert, B. Ringbeck, *40 Years World Heritage Convention: Popularizing the Protection of Cultural and Natural Heritage*, De Gruyter Inc., Berlin, 2015, p. 1.

[2] UNESCO Constitution, London, 16 November 1945, Preamble.

[3] As widely well-known, the jurisprudence of the International Military Tribunal was crucial for the subsequent elaboration of international criminal norms and the principle of individual responsibility for international crimes: «Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced». *International Military Tribunal*, Judgment, 1 October 1946, in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*.

recognition of human rights as a universal concern and means for the construction of peace after the Second World War.

Since the birth of UNESCO, the protection of all manifestations of culture as a purpose of the international community has known a continuous and expansive evolution, constantly adapting the safeguard of cultural expressions to the changing political and social needs, within an international scenario increasingly based on global concerns rather than specific and domestic interests. In this context, among the numerous international cultural agreements, the World Heritage Convention, adopted on 16 November 1972, played a fundamental role in the progressive development of international cultural heritage law, marking the passage from the concept of 'cultural property' to the more complex notion of 'cultural heritage' and paving the way for the subsequent cultural conventions, as well as a more comprehensive approach in the protection of all cultural expressions[4].

According to Francesco Francioni, the special value of the WHC within the ever-expanding body of international cultural heritage law can be explained by three different reasons: first, the number of States Parties to the Convention (194), which makes it a truly universal treaty in force for the protection of cultural heritage. Moreover, the WHC brought together the protection of cultural properties and natural properties under the same system of international cooperation. And finally, as already said, it reconceptualized the notion of 'cultural property' introducing the more dynamic concept of 'cultural heritage', which means the inherited patrimony of culture that embraces also intangible values[5], highlighting the spiritu-

[4] For an analysis of the UNESCO's cultural conventions, see *Tutela e valorizzazione del patrimonio culturale mondiale nel diritto internazionale*, edited by E. Baroncini, Bononia University Press, Bologna, 2021.

[5] See F. Francioni, *World Cultural Heritage*, in *The Oxford Handbook of International Cultural Heritage Law*, edited by F. Francioni, A. F. Vrdoljak, Oxford University Press, Oxford, 2020, p. 251. See also M. Frigo, *Cultural Property v. Cultural Heritage: A "Battle of Concepts" in International Law?*, in *International Review of the Red Cross*, 86, 2004, pp. 367-378.

al linkage and meanings of cultural expressions and their role in the identity-making process of human communities.

However, for understanding the importance of the notion of 'cultural heritage' and the contribution of the WHC over the last five decades, it is essential to start from the first steps of the UNESCO action in the cultural field and the emergence of the notion of 'cultural property'.

3. *The notion of 'cultural property' in the 1954 Hague Convention*

The adoption of the *UN Charter* in June 1945 and the corresponding birth of a new international order in the period following the Second World War marked a revolutionary breaking point in the history of international law. The horrors of the war and the intentional acts of persecution and massive killings pushed the international community to rethink the principles of its functioning, based on the protection of universal concerns, the creation of an international cooperation system for the achievement of common objectives and the identification of shared and inviolable rules.

The prohibition of the use of force under Art. 2(4) of the UN Charter[6] and the incorporation of the fundamental principles of human rights and humanitarian law into the Universal Declaration of Human Rights of 1948 and into the Geneva Conventions of 1949 expressed the strong willingness to ban war, violence and all the outrageous offences to the human conscience from the international relations, in order to promote a solid cooperation among States founded on the respect of human rights, the intercultural dialogue and a pacific disputes settlement. In this context, the time was favorable for a new and comprehensive international effort for the protection of cultural properties, under the direction of the newly estab-

[6] UN Charter, art. 2(4): «All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations».

lished United Nations Educational, Scientific and Cultural Organization. In the light of the systematic destructions of cultural properties occurred during the war, the priority was the adoption of an instrument for the protection of movable and immovable cultural properties from the consequences of military actions, which found an embodiment in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts[7]. Thanks to this instrument it was introduced, for the first time in multilateral standard-setting, the definition of 'cultural property', understood as a comprehensive and uniform category of objects «[…] worth protecting because of their specific cultural value, rather than simply because of their undefended or civilian character»[8].

The definition provided by the 1954 Hague Convention represents the first step and a fundamental passage in the progressive evolution of cultural property as an international legal asset and identifies in detail what constitutes a 'cultural object'. According to Art. 1 of the 1954 Convention, the term 'cultural property' includes, aside from origin and ownership: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, archaeological sites, groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections; (b) buildings containing cultural objects that fall into the first category, such as museums, large libraries and refuges intended to shelter, in the event of armed conflict, the movable cultural property; (c) centers containing monuments.

From an accurate reading of this definition, it is possible to identify two different criteria for the qualification of an object as cultural

[7] The Hague, 14 May 1954.

[8] F. Francioni, *A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage*, in *Standard-setting in UNESCO, Vol. I: Normative Action in Education, Science and Culture. Essays in Commemoration of the Sixtieth Anniversary of UNESCO*, edited by A. Y. Abdulqawi, UNESCO Publishing/Martinus Nijhoff Publishers, Leiden/Boston, 2007, p. 225.

property: first, the object needs to be universally important ('*of great importance to the cultural heritage of every people*'), which seems to anticipate the principles and the legal framework that later will be introduced by the WHC. In second instance the object, in order to be 'cultural' under the 1954 Convention, must fulfill a typological criterion and fall into one of the three specified groups (movable or immovable property, like monuments, archeological sites and works of art; buildings containing cultural objects; centres containing monuments). Although it is not explicitly mentioned in the definition introduced by Art. 1, there is also a third criterion, which emerges from the international protection provided by the 1954 Convention: this is the 'listing method', consisting in the inscription of a particular cultural property into a list for 'special protection'[9].

The importance of the above-mentioned criteria, beside their practical use, lies in the capacity of the 1954 Hague Convention to give a legal and complete technical definition of cultural property, filling a gap that, until the Second World War, had characterized international law. Moreover, with this Convention, 'cultural value' finally became an essential and distinguishing element for the identification of certain properties, providing them a specific protection in the light of their historical, artistic and scientific nature, rather than simply because of their generic undefended or civilian character.

Perhaps the most important aspect of the 1954 Hague Convention, which highlights its legal value in the evolution of the concept of cultural property in international law, is the clear intention behind the use of the term 'property' referred to cultural objects, which was not related to the need of emphasizing their economic value, considering them just 'goods' to be bought and sold. On

[9] 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, art. 8(6): «Special protection is granted to cultural property by its entry in the 'Inter-national Register of Cultural Property under Special Protection'. This entry shall only be made, in accordance with the provisions of the present Convention and under the conditions provided for in the Regulations for the execution of the Convention».

the contrary, the purpose of the 1954 Hague Convention is totally different, because it assigns to the expression 'cultural property' the role of an element of the 'cultural heritage of mankind'. When it proclaims 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»[10], the 1954 Convention is giving two essential information: first, cultural properties are not generic objects, but a specific international asset that needs protection for its inherent characteristics. And secondly, more importantly, the text of the Convention clearly suggests the existence of a 'cultural heritage of mankind', which includes cultural properties as defined by Art. 1, without exhausting in them. This passage is fundamental because, in addition of giving birth to a brand-new field in international law, where the protection of well-defined cultural elements from the effects of war is a concern of the community of States, it opens the door to the future developments of the discipline. Namely the more complex notion of 'cultural heritage', which is central in the legal framework introduced by the WHC. This is a concept that «[…] transcends the material character of what is to be protected and includes objects without owners that must nonetheless be protected because their conservation is in the general interest of the international community as a whole»[11].

Also, the provision of the 'list' (or the 'Register', in the language of the 1954 Convention) as a tool for strengthen the protection of particularly significant cultural properties, seems to anticipate the most celebrated instrument introduced by the WHC, the World Heritage List.

In this sense the 1954 Hague Convention, paving the way to the WHC and the consecration of the notion of 'world heritage', shows that, since the dawn of this international discipline, the pro-

[10] 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Preamble.

[11] F. Francioni, *A Dynamic Evolution*, cit., p. 226.

tection of cultural heritage has always been an ever-expanding flow, progressively marked by the constant evolution of the concept of 'cultural heritage' and the international agreements in this field[12]. Among which, as we will see, the 1972 World Heritage Convention constitutes a revolutionary step still today.

[12] For the sake of completeness, it should be pointed out that the term 'cultural property' can be found in other international agreements and UNESCO Recommendations: the most important is the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris, 14 November 1970), where the protection of 'cultural property' from illicit trade is not related to the safeguard of private rights, but on the general international community interest to preserve and protect cultural properties from the risks of loss and dispersion. Also, in the period preceding and following the adoption of the 1970 Convention, the UNESCO practice confirms that the term 'cultural property' is always used beyond the private interest of the possessor or the original owner, but invoking other values connected to cultural objects, primarily the concern of the country of origin and the international public interest in avoiding dispersion and loss: for instance, the UNESCO Recommendation on International Principles Applicable to Archaeological Excavations (New Delhi, 5 December 1956) stresses the importance and value of discovering archeological objects to the territorial State, as well as to the international community intellectual enrichment and to the promotion of mutual understanding between nations. Also, the UNESCO Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works (Paris, 19 November 1968) invites the States to safeguard cultural properties, which it describes as 'treasures of humanity' «[…] the product and witness of the different traditions and of the spiritual achievements of the past and thus an essential element in the personality of the peoples of the world» (Preamble). Still, after the adoption of the WHC in 1972, UNESCO adopted two recommendations which contributed to the identification of the complex meaning of cultural property: the UNESCO Recommendation concerning the International Exchange of Cultural Objects (Nairobi, 30 November 1976), where cultural property is described as a source of enrichment for different cultures, pointing out, in line with the World Heritage Convention provisions, that «[…] all cultural property forms part of the common cultural heritage of mankind and that every State has a responsibility in this respect, not only towards its own nationals, but also to the international community as a whole» (II. Measures Recommended). Furthermore, the UNESCO Recommendation for the Protection of Movable Cultural Property (Paris, 28 November 1978), which provides a definition of 'movable cultural property' consisting of «[…] all movable objects which are the expression and testimony of human creation or of the evolution of nature and which are of archaeological, historical, artistic, scientific or technical value and interest» (Art. 1(a)).

4. *Towards the notion of 'cultural heritage': the origins of the World Heritage Convention*

It would be wrong and highly naive to presume that the idea of protecting universally significant places came out of nowhere a few years before the adoption of the World Heritage Convention. On the contrary, it was the result of a long and articulated process that started decades before the beginning of the negotiations.

Although the WHC is a perfect product of its time, which reflects the zeitgeist or the spirit of the era, especially the new global sensitivity to urban development and environmental degradation[13], the concepts of common heritage and international cooperation, as well as a distinctive style of international diplomacy, began to emerge during the 1920s and 1930s, under the auspices of the League of Nations[14]. The seeds of these ideas, which would have found their way into the WHC, can be identified in the 1931 Athens Conference organized by the League's International Museums Office, which hosted the first International Congress of Architects and Technicians of Historic Monuments. This Congress gave birth to the Athens Charter for the Restoration of Historic Monuments, which includes the statement that «[…] the conservation of the artistic and archaeological property of mankind is one that interests the community of the States, which are wardens of civilisation»[15]. For this reason, it is correct to argue that the League of Nations activities served as an inspiration for the subsequent UNESCO actions, especially related to the protection of world heritage, fostering «[…] the idea of a common heritage of humankind deserving of international conservation through international cooperation and col-

[13] See C. Cameron, M. Rössler, *Many Voices, One Vision: the Early Years of the World Heritage Convention*, Routledge, London, 2013, p. 1.

[14] S. Titchen, *On the construction of outstanding universal value: UNESCO's World Heritage Convention (Convention concerning the Protection of the World Cultural and Natural Heritage, 1972) and the identification and assessment of cultural places for inclusion in the World Heritage List*, Canberra, 1995, pp. 12-24.

[15] Athens Charter for the Restoration of Historic Monuments, Art. VII(a).

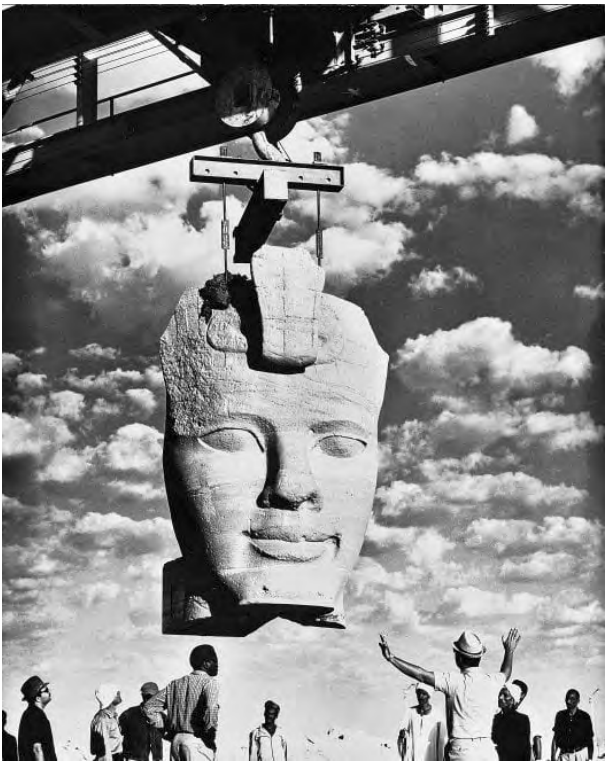
laboration – a style and an idea that were to feature again when the functions of the League were taken over by UNESCO in December 1946. From these origins came the development of the World Heritage Convention»[16].

Clearly, as already explained in the previous paragraphs, the move to protect special places gained new impetus after the Second World War, as part of a more general international response to the unparalleled destruction of heritage. However, in 1960s, with memories of war grew distant, the international community started to face new concerns related to the preservation of extraordinary places at risk: in particular, the unstoppable industrialization and urban development were the most severe threats to the survival of ecosystems and cultural monuments. Since the end of the war, beside the adoption of legal instruments, the international community began to show a new sense of universal commitment towards the protection of cultural treasures at risk, thanks also to the growing influence gained by the international organizations, UNESCO foremost.

The years between 1950s and 1970s were a remarkable workshop for the international cooperation in cultural protection, under the coordinated guide of UNESCO. These are the years of the first extraordinary UNESCO campaigns for the rescue of cultural masterpieces from the risks of disappearance, which gave an enormous contribution preparing the ground for the adoption of the World Heritage Convention, inspiring and enforcing a sense of participation and political cohesion between States. The iconic first international campaign to save the Nubian monuments in Abu Simbel and Philae in Egypt (1960-1968) from being drowned during construction of the Aswan Dam, is universally considered one of the events that laid the ground to the adoption of the World Heritage Convention. This renowned campaign, championed by UNESCO Director-General René Maheu, put into practice, for the first time, the principle of shared international responsibility for conserving

[16] S. Titchen, *op. cit.*, p. 35.

the outstanding heritages of humanity[17]. The prestige and visibility of this impressive project consolidated UNESCO's leadership in the field of cultural heritage[18].



The reconstruction of the Abu Simbel site (1964-1968)

Thanks to the success of the Abu Simbel campaign and the reputation gained, during the 1960s UNESCO took several new initiatives to preserve cultural heritage and to foster international coop-

[17] UNESCO, *Records of the General Conference eleventh session*, Paris, 1961, p. 51.

[18] See C. Maurel, *Histoire de l'UNESCO - les trente premières années. 1945-1974*, Paris, 2012, p. 287.

eration, starting from the XI Session of the General Conference in 1961, where it was proposed to take a recommendation concerning «[…] the safeguarding of the beauty and character of sites as well as of the landscape»[19]. This proposal seemed to foreshadow the development of a more holistic approach to cultural conservation in the decade to follow. All the initiatives adopted by UNESCO in that period and in the following years, while still *ad hoc* responses to specific situations, were rooted in ideas and values aimed at creating a climate of peace and friendship. With the emergence of the notion of common heritage belonging to all humanity, it was possible to observe a philosophical shift from the previous decade: the idea of conservation for its own sake was replaced by a new concept, where cultural monuments and sites were valued for their social and economic role in daily life. Cultural heritage was finally seen as part of its context, especially the urban context, and this new perspective brought forth the challenge of conserving individual static monuments in an evolving environment[20]. In this decade it was introduced the notion of urban and rural setting, with the integration of cultural heritage into land planning as part of the development of an ecosystem-wide approach for natural heritage protection. At the same time, during the 1960s emerged the idea to consider natural areas as part of culture, in the social sense of setting for community life.

The new UNESCO instruments and initiatives adopted through that decade demonstrate the progressive development of international action. The first instrument, as already mentioned, was the 1962 Recommendation concerning the Safeguarding of the Beauty and Character of Landscapes and Sites[21], that recognized, beside the cultural and aesthetic values of landscapes, their «[…] powerful physical, moral and spiritual regenerating influence, while at the same time contributing to the artistic and cultural life of peoples»[22].

[19] UNESCO, *Records*, cit., p. 51.

[20] See C. Cameron, M. Rössler, *Many Voices*, cit., p. 12.

[21] UNESCO Recommendation concerning the Safeguarding of the Beauty and Character of Landscapes and Sites, Paris, 11 December 1962.

[22] *Ibid.*

Despite its non-binding nature, this Recommendation represented an important innovation in the evolution of international cultural heritage law, mainly because it added nature protection to a cultural instrument, introducing a transversal approach where cultural and natural properties are perceived as two faces of the same coin, in this way anticipating the principles of the Stockholm Declaration and the World Heritage Convention.

In 1964, the Second International Congress of Architects and Specialists of Historic Monuments adopted the International Charter for the Conservation and Restoration of Monuments and Sites (also known as the *Venice Charter*), an international code for conservation practice[23]. UNESCO took part to the adoption of this document, through the presence of its Director-General René Maheau at the opening session and the participation of Hiroshi Daifuku, head of the UNESCO's Cultural Sector at that time[24]. The Venice Charter invokes the concept of a common heritage, and it widens the scope of interest beyond specific monuments to their wider urban and rural setting[25]; however, while expressing the will to encompass the new social needs, it still gives precedence to aesthetic and historical values[26]. Beyond the Venice Charter, during the same international congress it was adopted a resolution, put for-

[23] International Congress of Architects and Specialists of Historic Monuments, *International Charter for the Conservation and Restoration of Monuments and Sites*, Venice, 1964.

[24] See R.V. Keune, *An interview with Hiroshi Daifuku*, in *CRM: The Journal of Heritage Stewardship*, 8/1 and 2, 2011, pp. 31-45.

[25] In this regard, see the definition of 'historic monument' provided by Article 1 of the Venice Charter: «The concept of a historic monument embraces not only the single architectural work but also the urban or rural setting in which is found the evidence of a particular civilization, a significant development or a historic event. This applies not only to great works of art but also to more modest works of the past which have acquired cultural significance with the passing of time».

[26] Especially when it provides a definition of 'restoration' (Art. 9), focusing on the expertise needed and the objectives: «The process of restoration is a highly specialized operation. Its aim is to preserve and reveal the aesthetic and historic value of the monument and is based on respect for original material and authentic documents».

ward by UNESCO, for the creation of the International Council of Monuments and Sites (ICOMOS), which came from the need «[…] to coordinate international effort for the preservation and the appreciation of the *world heritage of historic monuments*»[27]. The presence of the expression 'world heritage of historic monuments' in the resolution seemed to anticipate the role of ICOMOS within the World Heritage Convention framework: in fact, as well known, ICOMOS is the advisory body of the World Heritage Committee during the evaluation process of cultural properties nominated by the States for the inscription in the World Heritage List[28].

Moreover, in this exciting new context marked by innovative ideas and professional exchange, new ideas emerged on the need to deal with threats posed by new building projects and a vision for a comprehensive international system for heritage protection. In response to concerns about the increasing threat to cultural heritage caused by uncontrolled growth, urban development and engineering works, the UNESCO General Conference adopted in 1968 a Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works[29], which defines im-

[27] International Congress of Architects and Specialists of Historic Monuments, *Resolution concerning the creation of an international non-governmental organization for monuments and sites*, Venice, 1964. Emphasis added.

[28] As indicated by paragraphs 34-35 of the Operational Guidelines for the Implementation of the World Heritage Convention (WHC.21/01, 31 July 2021). 34: «ICOMOS (the International Council on Monuments and Sites) is a non-governmental organization with headquarters in Charenton-le-Pont, France. Founded in 1965, its role is to promote the application of theory, methodology and scientific techniques to the conservation of the architectural and archaeological heritage. Its work is based on the principles of the 1964 International Charter on the Conservation and Restoration of Monuments and Sites (the Venice Charter). 35: The specific role of ICOMOS in relation to the Convention includes: evaluation of properties nominated for inscription on the World Heritage List, monitoring the state of conservation of World Heritage cultural properties, reviewing requests for International Assistance submitted by States Parties, and providing input and support for capacity building activities».

[29] UNESCO Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works (Paris, 19 November 1968), in *Records of the General Conference fifteenth session*, Paris, 1969, pp. 139-145.

moveable cultural heritage in terms of historic districts and traditional structures, not as selected isolated monuments, emphasizing the importance of urban and rural settings on a territory-wide basis.

All the initiatives mentioned were strong contributors to the elaboration of the 'world heritage' notion and prepared the ground for the adoption of a new binding international instrument, that summed up all the new ideas and sensibilities that marked the shift from the concept of cultural property to the more comprehensive notion of cultural heritage. As already noted, the experience of the Abu Simbel campaign had the merit to show the value of solidarity and shared responsibilities between States, in relation to the protection of cultural sites of exceptional importance for humanity as a whole. On one hand, the success of this project encouraged the launch of similar campaigns around the world for the safeguard of cultural sites at risk, as the catastrophic floods in Florence and Venice in 1966, which saw an international race to restore the priceless heritage of the Renaissance[30]. On the other, it pushed UNESCO to enforce the normative activity towards the adoption of a new international instrument for the protection and preservation of immovable cultural properties.

An important contribution in this regard came in November 1965 from the President of the US Council on Environmental Quality, Russell E. Train, during The White House Conference on International Cooperation. On this occasion, Train proposed the institution of a 'World Heritage Trust', a financial fund «[…] that would be responsible to the world community for the stimulation of international cooperative efforts to identify, establish, develop, and manage the world's superb natural and scenic areas and historic sites

[30] Among the many campaigns conducted by UNESCO over the years, it is worth mentioning that for the preservation of the temple of Borobudur, one of the most important Buddhist temples in the world, dating from the IX Century and located on the island of Java. The restoration of the temple, damaged by centuries of tropical rain, started in 1972 and ended in 1985; in 1991 the complex was registered in the WHL. The campaign for the preservation of the site of Moenjodaro, in the Pakistani region of Sindh, started in 1974 and aimed at recovering the archaeological heritage of the city, seriously damaged by a series of floods.

for the present and future benefit of the entire world citizenry»[31]. This proposal, putting at the same level the protection of cultural properties and natural sites[32], was enthusiastically welcomed both from UNESCO and the International Union for Conservation of Nature (IUCN), a non-governmental organization founded in 1948 and working in the field of nature conservation and sustainable use of natural resources. For the first time, the international community considered the revolutionary idea to put under the same regime the protection of cultural and natural heritage; this would have become one of the most important and celebrated aspects of the notion of world heritage.

The activities for the creation of the new international instrument took off in 1966, when the UNESCO General Conference, during its XIV session, authorized the Director-General «to study the possibility of arranging an appropriate system of international protection, at the request of the States concerned, for a few of the monuments that form an integral part of the cultural heritage of mankind»[33], and also «to co-ordinate and secure the international adoption of appropriate principles and scientific, technical and legal criteria for the protection of cultural property, monuments and sites»[34]. In response to this assignment, in 1970 the Director-General submitted to the XVI session of the General Conference a document entitled *Preliminary Study on the Legal and Technical Aspects of a Possible International Instrument for the Protection of Monuments and Sites of Universal Value*, declaring that the creation of an international system for the protection of monuments and sites of uni-

[31] *Remarks of the Honourable Russell E. Train*, Venice, 16 November 2002. See also R.L. Meyer, *Travaux Préparatoires for the UNESCO World Heritage Convention*, in *Earth Law Journal*, 1976, p. 45 ff.

[32] The United States' proposal was submitted as a new draft treaty entitled 'World Heritage Trust Convention'. For its text, see UNESCO, *International Regulations for the Protection of Monuments, Groups of Buildings and Sites*, Doc. SHC/MD/18 Add.1, Paris, 10 March 1972.

[33] UNESCO, *Resolution 14C/3.341*, in *Records of the General Conference fourteenth session*, Paris, 1966, p. 61.

[34] UNESCO, *Resolution 14C/3.342*, in *ivi*, p. 62.

versal value was «not only possible but desirable»[35]. The results of the research activities led to the elaboration of a draft text entitled *Preliminary Draft Convention concerning the Protection of Monuments, Groups of Buildings and Sites of Universal Value*, that was submitted to the General Conference in 1971[36]. However, the draft proposal was still limited to the safeguard of specific cultural properties (namely monuments, groups of buildings and sites), without even defining them as 'cultural heritage'.

In April 1972, the Director-General convened in Paris a Special Committee of Government Experts in order to examine and finalize the draft instrument, which came up with the idea of putting the three categories of cultural properties subject to protection in the proposed Convention under the concept of 'cultural heritage'[37]. During the same meeting, the Director-General proposed to extend the scope of the new convention to the protection of natural sites, especially in response to the emergence of a new environmental awareness. This explains the decision to abandon the concept of 'property' and use the expression 'cultural heritage', which responded to the necessity of accommodating cultural and natural sites in the same legal instrument: indeed, as correctly stated in literature, «[i]t would have been quite impracticable […] to bring under the concept of 'property' natural sites that cannot be properly defined in terms of 'natural property'»[38].

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[35] UNESCO, *Desirability of Adopting an International Instrument for the Protection of Monuments and Sites of Universal Value*, Doc. 16C/19, Annex II, Paris, 1970, para. 93

[36] UNESCO, *Resolution 3.412 on the 16th Session of the UNESCO General Conference*, Doc. SHC/MD/17, 1971, Annex 2, p. 3.

[37] See the Report *Special committee of government experts to prepare a draft convention and a draft recommendation to Member States concerning the protection of monuments, groups of buildings and sites*, Doc. SHC.72/CONF.37/19, Paris, 21 April 1972.

[38] F. Francioni, *A Dynamic Evolution*, cit., p. 229. See also J. Blake, *On Defining the Cultural Heritage*, in *The International and Comparative Law Quarterly*, 49, 2000, pp. 61-85.

The final input to the adoption of a comprehensive legal instrument for the protection of cultural and natural sites came from the new international movement for the protection of the environment, which brought in June 1972 to the convocation in Stockholm of the United Nations Conference on the Human Environment, marking the birth of international environmental law. At the end of the conference, it was adopted the United Nations Declaration on the Human Environment, which established that «both aspects of man's environment, the natural and the man-made, are essential to his well-being and the enjoyment of basic human rights – even the right to life itself»[39]. This statement represented a tremendous contribution to the development of international cultural heritage law and international environmental law, because it pointed out the essential value of both natural sites and cultural properties for the full realization of human rights, thus identifying in the human environment a common heritage to transmit to future generations[40]. In this regard, the Stockholm Declaration's Action Plan appropriately indicated that «Governments should: a) noting that the draft convention prepared by UNESCO concerning the protection of the world natural and cultural heritage marks a significant step toward the protection, on an international scale, of the environment, examine this draft convention with a view to its adoption at the next General Conference of UNESCO»[41].

For all the above reasons, the international community welcomed the proposal to include natural assets within the scope of

[39] United Nations Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, Preamble.

[40] See M.L. Pecoraro, *Uomo, natura e cultura e la Convenzione del 1972 sul patrimonio mondiale*, in *La protezione del patrimonio mondiale culturale e naturale a venticinque anni dalla Convenzione dell'UNESCO*, edited by M.C. Ciciriello, Editoriale Scientifica, Napoli, 1997, p. 291 ss.; S.I. Dailoo, F. Pannekoek, *Nature and Culture: A New World Heritage Context*, in *International Journal of Cultural Property*, 2008, p. 25 ss.; E.J. Goodwin, *The World Heritage Convention, the Environment, and Compliance*, in *Colorado Journal of International Environmental Law and Policy*, 2009, p. 157 ss.

[41] See *Report of the United Nations Conference on the Human Environment*, Doc. A/CONF.48/14/Rev.1 (Stockholm, 5-6 June 1972), p. 25.

the new UNESCO convention, which was adopted on 16 November 1972, during the XVII session of the UNESCO General Conference, with the title 'Convention for the Protection of the World Cultural and Natural Heritage'. This international binding instrument, gathering the new demands and sensitivities that had developed in previous years, marked a turning point in the international protection of cultural heritage, replacing the dominant idea of a static culture isolated from the world with the more dynamic and complex conception of an inherited cultural patrimony.

5. *The definition of 'cultural heritage' under the 1972 Convention and its dynamic evolution*

The first thing to highlight is that the World Heritage Convention, despite its title, does not define the meaning of 'world heritage'; however, it establishes the basic requirement that such heritage must have an 'outstanding universal value', which must be assessed in accordance with a formal procedure regulated by the Convention itself. In other words, the meaning of 'world heritage' does not originate from an explicit definition, but from the overall text of the Convention, from its dispositions and the specific criteria for the identification of these special examples of cultural and natural heritage.

After affirming, in the Preamble, the existence of parts of cultural and natural heritage of outstanding universal value and the need to preserve them as part of the world heritage of mankind, recalling the commitment of the international community to participate in their protection[42], the WHC introduces the definitions of 'cultural heritage' (Article 1) and 'natural heritage' (Article 2), indicating their elements and scope. According to Article 1, 'cultural heritage' consists of the following elements:

[42] UNESCO Convention for the Protection of the World Cultural and Natural Heritage, Preamble, Principles 6 and 7.

- Monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combination of features, which are of outstanding universal value from the point of view of history, art or science;
- Groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or the place in the landscape, are of outstanding universal value from the point of view of history, art or science;
- Sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view[43].

At the same time the definition provided by Article 2 follows a similar structure, identifying natural features, geological and physiographical formations, and natural sites of outstanding universal value as part of the 'natural heritage' protected by the WHC.

The three categories indicated in Article 1 constitute both the definitional and constitutive elements of cultural heritage, for the purposes of the 1972 Convention. Over the 50 years of its application, the meaning and scope of these cultural elements have undergone a steady and profound change, without resorting to a formal amendment of the Convention itself but through the constant practice of the World Heritage Committee (hereinafter Committee), which is responsible for the implementation of the Convention, and the revision of the *Operational Guidelines for the Implementation of the World Heritage Convention* (hereinafter Guidelines)[44], which have become an important working tool and a general reference document for the Committee, as well as for the States. This continuous adjustment and reinterpretation of the notion of 'cultural heritage', over the years, led to a remarkable expansion of the scope of

[43] *Ivi*, Art. 1.

[44] The first edition of the Guidelines was adopted by the World Heritage Committee in 1977. Since then the Guidelines have been periodically revised and updated (the latest version being that 2021).

operation of the Convention, constantly adapting it to the changing technical and political needs of World Heritage conservation. And this represents one of the most important contributions of the 1972 Convention, which paved the way to the dynamic evolution of the concept of 'cultural heritage', embracing more complex and intangible values and shaping the international law to come.

The expansion of the scope and content of the notion of 'cultural heritage' under Article 1 was due to the numerous questions and imbalances identified through the effective implementation of the Convention and the establishment of the World Heritage List (hereinafter List), which shed light on the shortcomings of the notion in its original definition. Perhaps the most relevant flaw of the notion of 'cultural heritage', as originally defined in the text of Convention, was the European monumental vision that had inspired it, focused on the physical dimension of cultural heritage rather than its intangible aspects[45]; in addition, it didn't properly consider the social and spatial aspects of cultural heritage, also emphasizing too much cultural outputs at expense of cultural processes and associated values[46].

In order to overcome these gaps, starting from the 1980s a series of global studies were undertaken, paying attention not only to the definitional elements of cultural heritage under Article 1, but most-

[45] This idea of heritage clearly linked to the Western conception of cultural masterpieces, based on the existence of an 'outstanding universal value' from the aesthetic and historical point, was already present in the *travaux preparatoires* of the Convention. In fact the Director General of UNESCO, in his report on the preliminary draft of the Convention, stated that the system of protection established «[…] can be accorded only to such examples of the property defined in Article 1 as merit designation, by virtue of their exceptional aesthetic or natural interest or their great importance as unique evidence of vanished civilizations or as irreplaceable architectural masterpieces typifying a particular period, an historical past or the genius of a people. as monuments. groups of buildings and sites of universal interest». See *Preliminary report drawn up in accordance with Article 10. 1 of the Rules of Procedure concerning Recommendations to Member States and International Conventions covered by the terms of Article IV, paragraph 4 of the Constitution*

[46] A.Y. Abdulqawi, *Part II Commentary, Art. 1 Definition of Cultural Heritage*, in *The 1972 World Heritage Convention: A Commentary*, edited by F. Francioni, Oxford University Press, Oxford, 2008, p. 29.

ly to the qualities and conditions required for the inscription of such elements in the List. Among these conditions, the concept of 'outstanding universal value' is the most important for sure and represents not just the lowest common denominator between the different categories of cultural and natural heritage, but also the fundamental quality that the above cultural and natural elements must possess to receive the international protection, and the consequent collective responsibility for their preservation, under the Convention.

However, the text of the Convention does not resolve the question of what must be understood as 'outstanding universal value': Articles 1 and 2, indeed, refer to this concept as a qualifier of cultural and natural heritage, without providing a legal definition. But even without a specific definition, the content of the notion of 'outstanding universal value', which means «[…] cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity»[47], is determined by the criteria indicated in the Guidelines, on which the Committee bases its assessments for the inscription of a property in the List. Moreover, the Convention assigns to the Committee itself the duty to define these criteria for the evaluation of the outstanding universal value[48]; these last are currently ten and they are specified at paragraph 77 of the Guidelines, with the first six dedicated to cultural heritage and the last four to natural heritage[49].

[47] Operational Guidelines, par. 49.

[48] UNESCO Convention for the Protection of the World Cultural and Natural Heritage, Article 11.5: «The Committee shall define the criteria on the basis of which a property belonging to the cultural or natural heritage may be included in either of the lists mentioned in paragraphs 2 and 4 of this Article». On the functioning of the Lists' system, the States' duties of identification and protection of cultural and natural heritage and the WHC control mechanims, see M. Gestri, *Teoria e prassi di un accordo pionieristico nella gestione di beni di interesse generale: la Convenzione del 1972 sul Patrimonio Mondiale*, in *Tutela e valorizzazione del patrimonio culturale. Realtà territoriale e contesto giuridico globale*, edited by M.C. Fregni, M. Gestri, M.C. Santini, Giappichelli, Torino, 2021, pp. 113-150.

[49] Operational Guidelines, par. 77 (last revision, 2021): «The Committee considers a property as having Outstanding Universal Value […] if the proper-

The progressive evolution and adaptation of these criteria, which will be examined in the next paragraph, is fundamental to understand what scholars call the 'silent evolution' of the WHC[50] and the impact it had on the development of international law in this field, definitively marking the transition from the concept of cultural property to the broader and more comprehensive notion of cultural heritage. In fact, it was the Committee's constant review and application of the criteria for assessing whether an asset possesses the exceptional and universal qualities necessary for inclusion on the List to enable the evolution of the notion of cultural heritage over the years; in this sense, these criteria have become one of the most important tools for ensuring the flexible application of the notion of 'cultural heritage', as well as the engine of its evolution. However, this constant process of revision has not changed the es-

ty meets one or more of the following criteria. Nominated properties shall therefore: (i) represent a masterpiece of human creative genius; (ii) exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design; (iii) bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared; (iv) be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history; (v) be an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change; (vi) be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance. (The Committee considers that this criterion should preferably be used in conjunction with other criteria); (vii) contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance; (viii) be outstanding examples representing major stages of earth's history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features; (ix) be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals; (x) contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of Outstanding Universal Value from the point of view of science or conservation».

[50] See F. Francioni, *World Cultural Heritage*, cit., p. 252.

sential elements of the concepts of cultural and natural heritage under the Convention, but has broadened their scope by going beyond the material and aesthetic dimension of culture and nature, finally taking into account other aspects such as the development of knowledge and scientific thought, the value of cultural traditions, biodiversity and the growing importance of cultural diversity in the world. In other words, and this is an aspect that deserves to be underline, «[…] the centre of gravity of the notion of 'cultural heritage' move from the definitional elements themselves to the quality that such elements must possess to qualify as cultural heritage»[51].

In the next paragraph we will analyze in detail the main evolutionary stages of the notion of 'cultural heritage' under the Convention, especially in the framework of the Global Strategy undertaken by UNESCO to fill the gaps within the World Heritage List.

6. *The Global Strategy for a Representative, Balanced and Credible World Heritage List*

As already mentioned in the previous paragraph, since the very first years of application of the Convention it was immediately clear the need to overcome the limits of the definition of 'cultural heritage' and to expand its scope, notably in the light of the first entries in the World Heritage List. As well noted in literature, considering the great variety and specificity of the cultures of the world, with their spiritual and creative expressions and the complexity of cultural diversity in general, it was obvious that an approach based on universal standards, especially the marker of the 'iconic' value with regard to cultural properties, could not simply be adopted in the application of the notion of cultural heritage under the Convention[52].

[51] A.Y. Abdulqawi, *Part II Commentary*, cit., p. 32.

[52] *Ivi*, p. 33. On the 'iconic' approach adopted in the earlier years of application of the Convention, see also C. Cameron, *Evolution of the application of "outstanding universal value" for cultural and natural heritage*: «[i]n the first five years of the Convention, there was a strong tendency to list iconic sites. By iconic, I mean

During the first decade of its existence, the World Heritage List compiled by the Committee and the criteria for assessing the exceptional universal significance of the candidate properties suffered from numerical imbalances and lack of representativity of different categories of cultural heritage, as well as representation of different regions and cultures of the world[53]. The first revision of the 'outstanding universal value' criteria was conducted in 1980 and it seemed to privilege a 'monumentalistic' approach, favouring in this way the European nominations over less materialistic heritage expressions from other parts of the world. Among the innovations introduced by the 1980 revision there was also the new third criterion, whose old wording (*be unique, extremely rare, or of great anitiquity*) was replaced with the new benchmark of 'civilization which has disappeared', which excluded in this way living traditions from the List.

The limits of the approach adopted with the 1980 revision were a subject of reflection in the following years. A study conducted by a

sites that transcend cultural affiliation, sites that are unique and widely known. These properties clearly meet the benchmark of "best of the best". […] If outstanding universal value began as the "best of the best", it soon began to shift towards "representative of the best"». This is part of a speech presented at the Special Expert Meeting of the World Heritage Convention: The Concept of Outstanding Universal Value (Kazan, Republic of Tatarstan, Russian Federation, 6-9 April 2005), Doc. WHC-05/29.COM/INF.9B, 15 June 2005.

[53] The first group of sites and monuments was inscribed on the WHL in 1978, during the second session of the Committee. The sites inscribed were the followings: L'Anse aux Meadows National Historic Park (Canada); Nahanni National Park (Canada); Galapagos Islands (Ecuador); City of Quito (Ecuador); Simien National Park (Ethiopia); Rock Hewn Churches, Lalibela (Ethiopia); Aachen Cathedral (Federal Republic of Germany); Cracow's Historic Centre (Poland); Wieliczka - salt mine (Poland); Island of Goree (Senegal); Mesa Verde (United State of America); Yellowstone (United State of America). See WHC, *Final Report*, Doc. CC-78/CONF.010/10 Rev., Paris, 9 October 1978. On the lack of international representativity of the WHL, see also C. Lévi-Strauss, *Diversité, universalité et représentativité dans la liste du patrimoine Mondial*, in *Protezione internazionale del patrimonio culturale: interessi nazionali e difesa del patrimonio comune della cultura*. Atti del Convegno, Roma, 8-9 maggio 1998 (International Protection of Cultural Heritage: National Interests and Protection of the Common Cultural Heritage. Proceedings of the Meeting, Rome, 8-9 May 1998), edited by F. Francioni, A. Del Vecchio, P. De Caterini, Giuffrè, Milano, 2000, p. 21.

group of experts[54] at the XVII session of the Committee, held in Colombia in December 1993, highlighted a number of gaps and imbalances within the List: Europe was over-represented compared to the rest of the world (out of 320 goods registered at the time, 55% belonged to European States, 22% to the Asia-Pacific Region, 9% to Latin American States, 8% to Arab States and only 5.5% to African States); historic towns and religious buildings were over-represented in relation to other types of property, and so also Christianity compared to other religions and 'elitist' architecture in relation to vernacular architecture[55]. As a result, it was proposed to start choosing the properties to be inscribed in the List not only for their aesthetic characteristics, but also for historical, anthropological, economic and social aspects. The WHL, in fact, must reflect the cultural, intellectual, religious, aesthetic and sociological diversity of humanity; in other words, it is not the result of a simple chronicle of historical or artistic events, but must review the manifestations of much of the cultural identities that make up the heritage of humanity.

For the above reasons, in 1994 the Committee launched the Global Strategy for a Representative, Balanced and Credible World Heritage List which is designed, according to paragraph 55 of the Guidelines, «[…] to identify and fill the major gaps in the World Heritage List». Through the Global Strategy, the Committee aimed to broaden the definition of 'world heritage', in order to reflect the full spectrum of world's cultural and natural treasures. The Strategy finds its *ratio* in a new, comprehensive and clear vision, which finally «[…] goes beyond the narrow definitions of heritage and strives to recognize and protect sites that are outstanding demonstrations of human coexistence with the land as well as human interactions, cultural coexistence, spirituality and creative expression»[56]. In line

[54] This study was carried out by ICOMOS from 1987 to 1993.

[55] See *Report of the Expert Meeting on the 'Global Strategy' and Thematic Studies for a representative World Heritage List* (UNESCO Headquarters, 20-22 June 1994), Doc. WHC-94/ CONF.003/INF.6, 13 October 1994, p. 3.

[56] See the official web page dedicated to the Global Strategy: *https://whc.unesco.org/en/globalstrategy/#objectives*.

with the objectives of the Strategy, States Parties to the Convention were encouraged to consider «whether their heritage is already well represented on the List and if so to slow down their rate of submission of further nominations» by, for instance, proposing properties falling into categories under-represented[57].

It is therefore within the framework of the Global Strategy that the process of evolution of the notion of 'cultural heritage' has developed, entering the phase of its maturity and definitively abandoning the material garments of 'cultural property'. This has been possible thanks to a deeper and more careful reading of the concept of 'world heritage' and of the true meaning it embodies, which encompasses cultural diversity in all its manifestations as a heritage to be passed on to future generations.

Over the years the Global Strategy, also adapting to the strategic objectives established by the Budapest Declaration on World Heritage in 2002[58], has produced significant results both in terms of increasing membership of the Convention, both through the promotion of new types of 'world heritage', such as the categories of itineraries, industrial heritage, deserts, coastal-marine sites and, above all, 'cultural landscapes'. These represent one of the main innovations introduced by the World Heritage Convention, as well as one of the most important vehicles for the evolution of the concept of cultural heritage. The identification of this new category was made possible by the juxtaposition between cultural and natural heritage in the text of the Convention, which gave the opportunity for exploring the interactions between the two types of heritage in the context of its implementation[59].

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[57] Operational Guidelines, par. 59.

[58] Adopted during the 26th session of the World Heritage Committee (Budapest, 28 June 2002), Doc. CONF 202 9. The Declaration sets four objectives in order to support the World Heritage Convention: a) strengthen the credibility of the WHL; b) ensure the effective conservation of world heritage properties; c) promote the development of effective capacity-building measures; d) increase public awareness and support for world heritage through communication.

[59] For a detailed analysis of the category of 'cultural landscapes', see K. Whitby-Last, *Part II Commentary, Art. 1 Cultural Landscapes*, in *The 1972 World Heri-*

The starting point, in this case, was the definition of 'sites' provided by Article 1, referred to *inter alia* as 'the combined works of nature and of man'. Based on this provision, in 1992 the Committee identified the new category of 'cultural landscapes', which represent a clear manifestation of the interaction between humankind and its natural environment. According to paragraph 47 of the Guidelines, this particular type of cultural heritage is «[…] illustrative of the evolution of human society and settlement over time, under the influence of the physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces, both external and internal». Cultural landscapes fall into three main types[60]:

(i) Landscape designed and created intentionally by people, like gardens and parklands constructed for aesthetic reasons (e.g. the Lednice-Valtice Cultural Landscape in Czechia)[61].

Lednice castle with gardens (Czechia)

tage Convention: A Commentary, edited by F. Francioni, Oxford University Press, Oxford, 2008, p. 51 ss.; see also, for a description of the three types of landscapes, M. Rössler, *Linking Nature and Culture: World Heritage Cultural Landscapes*, in *Cultural Landscapes: The challenges of conservation*, World Heritage Papers, Series No. 7, 2002, pp. 10-16.

[60] See Operational Guidelines, par. 47bis.

[61] Inscribed in the WHL in 1996.

(ii) Organically evolved landscape, which results from an initial social, economic or religious imperative and has developed its present form by association with and in response to its natural environment, reflecting that process of evolution in its component features. This type of landscape includes the *relict or fossil landscape* (where the evolutionary process came to an end – e.g. the Cornwall and West Devon Mining Landscape, in United Kingdom)[62] and the *continuing landscape*, which plays an active role in contemporary society[63].

Cornwall and West Devon Mining Landscape (United Kingdom)

(iii) Associative cultural landscape, where the powerful religious, artistic or cultural associations of the natural element prevails on the material cultural evidence (e.g. Tongariro National Park, in New Zealand)[64].

[62] Inscribed in the WHL in 2006.

[63] For example the Ligurian coast between Cinque Terre and Portovenere, in Italy, inscribed in the WHL in 1997.

[64] Originally this site was inscribed in the WHL as 'mixed cultural and natural heritage' in 1990. In 1993 ICOMOS recognized its extraordinary value as a cul-

The above definitions not only focus on the material elements of the landscape, but also consider the intangible values (religious, spiritual, social) that it represents. Therefore, the preservation of a place, in the case of 'cultural landscapes', becomes the tool for promoting respect for the traditions and cultural identities which it testifies. In legal terms, this means to expand the concept of safeguard beyond the cultural property itself, also considering and protecting the rights of the human communities directly related to it.

A view of the Tongariro National Park (New Zealand)

For example, the Tongariro National Park is a site characterized by extraordinary cultural landscapes, on which the descendants of the Maori group still live. Consequently, undertaking activities that could compromise the physical characteristics of the site would, on the one hand, damage its physical integrity and, on the other hand,

turally associative landscape under criterion (vi).

undermine the cultural identity of the minority living there. This is because the mountains at the heart of the park «[…] are of great cultural and religious significance to the Maori people and are potent symbols of the fundamental spiritual connections between this human community and its natural environment»[65].

The spiritual link between the cultural element and the natural environment, which finds a synthesis in this new category of cultural heritage, is also reflected in the criteria for identifying the outstanding universal value[66]: in addition to criteria that insist on the aesthetic and architectural characteristics of cultural heritage (i, ii, iv), it is possible to find others that take into account the relationship between cultural assets and the environment in which they are inserted (v), as well as on the linkage between the preservation of tangible cultural heritage and the protection of the intangible (iii, vi). According to these last two criteria, a cultural asset can be considered of outstanding universal value if it provides a unique testimony on a cultural tradition or a present or past civilization, and if it is directly or materially «[…] associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance»[67].

These references to the intangible manifestations of culture contained in the above provisions of the Guidelines have definitively paved the way for the further development of the notion of 'cultural heritage'; according to the doctrine, they would even extend the scope of the WHC also to intangible heritage, if it is «[…] closely associated with intangible heritage»[68].

And this last point leads us to some concluding remarks.

[65] ICOMOS, *Advisory Body Evaluation*, Doc. No.421rev, October 1993, p. 139.

[66] See note 48.

[67] Operational Guidelines, par. 77.

[68] A.Y. Abdulqawi, *Part II Commentary*, cit., p. 37.

7. *Conclusions*

The development process of the notion of 'cultural heritage' within the WHC undoubtedly represents a turning point in the evolution of international cultural heritage law. The progressive introduction, as we have seen, of references to the intangible expressions of culture, to the symbolic meaning that a site can have for the communities that identify themselves in it, and to the often inseparable link between culture and nature, has not only given a truly universal value to the concept of 'world heritage', that is representative of all cultural diversity, but has also launched a new reflection on what constitutes cultural heritage, and consequently what it means to safeguard it.

In this sense the WHC really had a pioneering value, because it anticipated the concepts and perspectives that would have been developed in the following decades, placing itself as a bridge between a past where the notion of 'cultural property' was bound to its exclusively material dimension, and a time when culture is a legacy of values to be passed on to future generations, whatever form they take.

The category of 'cultural landscapes', notably, has introduced a new perspective, which focuses on the relationship between all the components of cultural heritage – both tangible and intangible – affirming the need for a non-sectoral approach, but unitary to its preservation. This approach was subsequently confirmed by the provisions of the main UNESCO instruments dedicated to the protection of the intangible heritage or the promotion of the diversity of cultural expressions[69]; in particular, the Preamble of the

[69] See, for example, Article 7 of the *Universal Declaration on Cultural Diversity* (Paris, 2 November 2001), which states that «[…] heritage in all its forms must be preserved, enhanced and handed on to future generations as a record of human experience and aspirations, so as to foster creativity in all its diversity and to inspire genuine dialogue among cultures», and Article 4 of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Paris, 20 October 2005), which affirms that 'cultural diversity' is manifested «[…] not only through the var-

Convention for the Safeguarding of the Intangible Cultural Heritage[70] makes an important reference to the role played by the WHC in safeguarding intangible culture, when it explicitly recalls «[…] the deep-seated interdependence between the intangible cultural heritage and the tangible cultural and natural heritage», as well as it states that «existing international agreements, recommendations and resolutions concerning the cultural and natural heritage need to be effectively enriched and supplemented by means of new provisions relating to the intangible cultural heritage».

It is evident, therefore, how the notion of 'world heritage' and its protection mechanism under the WHC, thanks to the (r)evolutionary process that has characterized it, is placed inside a more complex system for the safeguard of culture based on three fundamental pillars: the protection of tangible cultural heritage, respect for human rights and the promotion of the cultural identity of minorities. The aforementioned example of the Tongariro National Park is perfectly significant of the close link between the safeguard of culture and the protection of human rights, which expresses the evolution, since the beginning of the XXI century, of the universal juridical conscience «[…] towards a clear recognition of the relevance of cultural diversity for the universality of human rights and vice-versa»[71]. And within what has been called a new *jus gentium*, deeply rooted in a process of humanization of international law, the WHC and its contribution to the constant evolution of the notion of 'cultural heritage' still play a leading role today.

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ied 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».

[70] Paris, 17 October 2003.

[71] Inter-American Court of Human Rights, *Yakye Axa Indigenous Community v. Paraguay, Interpretation of the Judgment of Merits, Reparations and Costs*, Series C, No. 142, Judgment, 6 February 2006, Concurring Opinion of Judge A.A. Cançado Trindade, par. 12. See also A.A. Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium (Third Revised Edition)*, Brill, Leiden, 2020.

Irene Sacchetti

RETHINKING CULTURAL HERITAGE FOR THE ANTHROPOCENE: LEARNING FROM ALTERNATIVE APPROACHES TO MOVE TOWARDS A PLURALIST CONCEPTUALIZATION*

Abstract: Although the introduction of 'heritage' with the UNESCO World Heritage Convention (WHC) in 1972 does represent a relevant conceptual shift in the protection of cultural and natural heritage, it still bears problematic aspects. This is partly because the concept of cultural heritage and its international legal protection are the result of the hegemony of a Western and Eurocentric sensibility. The domination over the protection, preservation, and management of cultural places all over the world does nothing but amplify discrepancies with non-Western thinking systems. It also reinforces colonial legacies through heritage best practices, which silence and marginalize diverse conception of heritage. Indigenous, non-Western understandings of cultural heritage and living heritage conservation practices inspire a revisitation of the traditional parochial concept of heritage anchored in the WHC and replace it with an all-embracing paradigm which is sensitive to alternative worldviews. In this way, a pluralist conceptualization of heritage provides a new model for rethinking heritage for the Anthropocene to address new challenges and realities.

Introductory Remarks

The continuous evolution of the concept of cultural heritage throughout the past century well exemplifies the dynamic processes behind its formulation and protection. It is usually dictated by a plurality of interests: either for preserving aesthetic value or for val-

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uing cultural and national identity of significant objects and sites. There are several international legal regimes safeguarding cultural heritage, each of them with a specific rationale[1]. The aim at the core of the UNESCO World Heritage Convention[2] (WHC), adopted in 1972, is to protect cultural and natural heritage of outstanding and universal value for posterity. Since its adoption, exactly 50 years ago, the concept of cultural heritage has continuously developed and demanded new interpretations to embrace different interests and values not covered by the original formulation. Its redefinition has also been supported by increasing attention to a more comprehensive vision that evaluates world cultural diversity and embraces human values, living cultures, the interface between culture and nature and human interaction with the natural environment.

Nevertheless, the way cultural heritage is conceptualized and protected under the WHC reflects strong Western domination which reinforces divides such as nature/culture, tangible/intangible, and state-based/local management, hindering a more holistic paradigm of heritage which embraces culturally different worldviews and making it unable to address new challenges and realities introduced by the Anthropocene.

The analysis is divided into three main sections. First, I explore the main developments since the adoption of the 1972 WHC, the shift from 'cultural property' to a more dynamic concept of 'cultural heritage', and the main tensions arising from Western domination over the cultural heritage discourse. More specifically, I critically analyse the culture/nature and tangible/intangible divides, as

[1] See for example: UN Educational, Scientific and Cultural Organization (UNESCO), Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954; UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972; UNESCO, Convention for the Protection of the Underwater Cultural Heritage, 2 November 2001; UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003.

[2] UN Educational, Scientific and Cultural Organization (UNESCO), Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972.

well as state-oriented management in contrast with local heritage protection strategies. Second, I suggest that a reconceptualization of cultural heritage demands more sensitivity to non-Western understandings and practices of heritage and needs to take Indigenous perspectives and alternative worldviews into consideration. Third, I argue that the Anthropocene's challenges and realities reinforce the necessity to rethink heritage as a pluralist concept, which goes beyond artificial Western boundaries and practices thereby supporting the inclusion of non-Western conception of heritage into the existing formulation of heritage in the WHC.

Overall, rethinking cultural heritage for the Anthropocene requires overcoming intrinsic dichotomies to the WHC's model of cultural heritage as the legacy of Western domination over the UNESCO framework. A re-imagination of cultural heritage, inclusive of alternative and Indigenous visions and approaches, or at least capable of encompassing cultural diversity of non-Western ways of thinking and knowing, enables a more holistic view of heritage conservation and management.

1. *The evolving concept of cultural heritage*

The adoption of the WHC in 1972 embodies the evolution of the concept of cultural heritage and the crucial conceptual shift from 'cultural property', as encapsulated in previous international legal instruments, to a broader and dynamic view of 'cultural heritage'. Despite its adaptability and ability to expand, the concept of cultural heritage as set out in the WHC also features problematic aspects. The influence of Western ways of thinking is deeply rooted in the WHC, in the culture/nature, tangible/intangible and universal/local divides, a common characteristic of a Western conceptualization of heritage, and a symptom of the global North/South imbalance in the UNESCO framework.

1.1. *The shift from property to heritage*

The 1972 World Heritage Convention embodied a conceptual shift from the international protection of cultural 'property' to cultural 'heritage'. Earlier international legal instruments, such as the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict[3], were based upon the same objective of protecting cultural heritage, but for different reasons, and they referred to cultural goods as 'cultural property'[4]. The Hague Convention in fact centres on protecting cultural treasures from the destructive consequences of conflicts, mirroring a common sentiment of fear of times to come, but also the hope of reconciliation and the prevention of future conflicts, as it was adopted in the aftermath of the Second World War[5]. By contrast, the WHC is shaped by the increasing concern for environmental impacts on both cultural and natural elements. It was here that the concept of 'heritage' started to take root.

While the legal category of property has an intrinsic rationale to protect the individual's interests and rights of the owner, the concept of heritage as introduced by the WHC shifted the focus from individual to collective interests of all humanity in the preservation of cultural goods[6]. The innovative idea characterizing the concept of heritage aims at preserving cultural values and their relationship with cultural or natural objects, rather than exclusively protecting the object itself as in the case of property. The WHC elaborated

[3] UN Educational, Scientific and Cultural Organization (UNESCO), Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954.

[4] For a broader understanding of the development of cultural property protection, see J. Blake, *On Defining the Cultural Heritage*, in *International and Comparative Law Quarterly*, 49, 2000, 1, p. 61 ss.

[5] For a deeper understanding of the Hague Convention, see K. Chamberlein, *War and Cultural Heritage: A Commentary on the Hague Convention 1954 and its Two Protocols*, Institute of Art and Law, Leicester, 2013[2].

[6] L.V. Prott, P.J, O'Keefe, *Cultural Heritage or Cultural Property?*, in *International Journal of Cultural Property*, 1, 1992, 2, p. 309.

the core concept of a 'common heritage of humankind', indicating the collective ownership of heritage of all human beings in opposition to the idea of property being closely interlinked with economic and individual ownership notions. In fact, the concept of 'property' rather than being inclined toward people's needs carries a Western individualistic tendency that privileges the exclusive rights of the single legal person[7] and implies the idea of assigning a market value to cultural artefacts[8]. However, the notion of heritage 'property' is still embedded in the WHC's framework, and it occurs frequently in the Convention's terminology to indicate that cultural heritage has met the criteria enshrined in Article 1 and that this heritage can thus follow the listing process. The idea is that cultural heritage is possessed by the world community, who assumes a 'right of possession', reinforcing the conception of preserving and managing cultural heritage as a captured and frozen object[9].

1.2. *Western influence over the World Heritage Convention*

Although the introduction of 'heritage' in 1972 does represent a relevant conceptual shift in the protection of cultural and natural heritage, it still bears problematic aspects. This is partly because the concept of cultural heritage and its international legal protection are the result of the hegemony of a Western and Eurocentric sensibility. The Western approach to heritage in the WHC overshadows multiple ways of seeing and understanding heritage, fails to embrace humanity's cultural differences, local heritage practices and non-Western cultural ideological frameworks[10]. Such domi-

[7] L. Lixinski, *Intangible Cultural Heritage in International Law*, Oxford University Press, Oxford, 2013, p. 6.

[8] J. Blake, *On Defining the Cultural Heritage*, cit., p. 66.

[9] R. Handler, *Cultural Property and Cultural Theory*, in *Journal of Social Archeology*, 3, 2003, 3, p. 363.

[10] K.D. Silva, *Paradigm Shifts in Global Heritage Discourse*, in *Space and Communication*, 1, 2015, 1, p. 7.

nating approach to heritage is referred to, using Smith's expression, as the 'authorized heritage discourse', which «takes its cue from the grand narratives of Western national and elite class experiences and reinforces ideas of innate cultural value tied to time depth, monumentality, expert knowledge and aesthetics»[11].

The burden of Western approaches to heritage protection and management is already visible in the ideas of 'outstanding universal value' and 'authenticity' or 'integrity' as conditions set out in the Operational Guidelines for the Implementation of the Convention[12] for properties to be protected under the Convention's umbrella. After all, values vary between cultures; they transform over time and across generations, thereby challenging the conception of an immutable and imposed notion of cultural heritage[13]. One of the critiques of the conceptual influence of Western powers and values pertains to the way the WHC lays the foundation of a framework that controls the past, universalizes criteria to protect it, and uses the past to legitimize certain forms of identity within Western societies. This system has been particularly criticized by Indigenous people and non-Western cultures due to its failure to incorporate culturally relevant concepts of heritage[14] which differ from the conceptualization and management of cultural heritage as set out in the WHC.

There are plural and divergent conceptualizations of history and heritage that are neither included nor reflected within the UNESCO legal framework. They come from non-Western countries, but

[11] L. Smith, *Uses of Heritage*, Routledge, New York, 2006, p. 314.

[12] UN Educational, Scientific and Cultural Organization (UNESCO), Operational Guidelines for the Implementation of the World Heritage Convention, 30 June 1977, Ch. II A, n. 47.

[13] A. Rapoport, *The Meaning of the Built Environment: A Nonverbal Communication Approach*, SAGE Publications, New York, 1990.

[14] H. Cleere, *The Uneasy Bedfellows: Universality and Cultural Heritage,* in *Destruction and Conservation of Cultural Property*, edited by R. Layton, P.G. Stone, J. Thomas, Routledge, New York, 2001; See also D. Munjeri, *Tangible and Intangible Heritage: From Difference to Convergence*, in *Museum International*, 56, 2004, 1-2, p. 12 ss.

they also emerge within Western contexts. For instance, the understanding of history and heritage in the United States varies according to communities' sensitivity to the past: Euro-Americans' conception is different from that of Africans Americans or Native Americans: in the former case, it is more related to a national and authorized narrative tied to past times, monumentality, expert knowledge and aesthetics, whereas in the latter it is more oriented towards a community and family sense of heritage[15].

The influence of Western forms of knowledge in cultural heritage protection and conservation is also reflected in persistent dichotomies implicit in the concept of cultural heritage within the WHC framework, despite its continuous evolution and redefinition to cover a broader spectrum of objects and sites. The WHC embodies the culture-nature, material-immaterial, universal-local interfaces that, instead of being diluted over time, are still intrinsically attached to the WHC's concept of cultural heritage.

1.2.1. *The cultural versus the natural dimension of heritage*

The idea of culture and nature as separate domains is a recurring feature in the concept of cultural heritage under the WHC. This is not immediately visible, as the Convention's originality lies in the fact that culture and nature are both seen as heritage of humanity, contrary to previous approaches which considered the two as separate problems. While at the time of its adoption, the Convention drew a line between the two types of heritage as they are respectively protected under two separate articles (Article 1 and Article 2), with the adoption of the first Operational Guidelines in the following years, the sharp nature-culture divide started to fade away. In 1992, new 'breakthrough' criteria were introduced for the

[15] R. Rosenzweig, D. Thelen, *The Presence of the Past: Popular Uses of History in American Life*, Columbia University Press, New York, 1998.

inclusion of 'cultural landscapes' within the World Heritage List[16], where all heritage protected under the WHC is inscribed. The Operational Guidelines define them as «cultural properties and represent the "combined works of nature and of man" designated in Article 1 of the Convention». Under the threefold notion of cultural landscapes (landscape designed intentionally by people, organically evolved landscape, and associative cultural landscape) the intertwined character of cultural heritage with the natural environment is reflected in a new range of interlinkages that recognize the dynamic process of association and evolution of both material and immaterial implications with traditional ways of life. Efforts undertaken by Indigenous people to regain their rights to traditional lands and to halt further loss and destruction of sacred sites for their cultural belief are a significant demonstration of the subjective nature of human responses to landscape and the continuing links between humans and cultural and spiritual associations with the natural world[17]. In fact, the first cultural landscapes to be inscribed in the World Heritage List were the Tongariro National Park in New Zealand and the Uluṟu-Kata Tjuṯa Australian National Park, illuminating the cultural and religious significance of the mountains for Indigenous communities.

Despite the fact that the recognition of cultural landscapes is mainly considered an attempt to merge culture and nature under the WHC[18], it also led to further separation in the protection and management of cultural and natural heritage, as in the same year existing language pointing to interactions and combinations between culture and nature were removed from the criteria enshrined in the

[16] A. Gfeller, *Negotiating the Meaning of Global Heritage: 'Cultural Landscape' in the UNESCO World Heritage Convention*, in *Journal of Global History*, 8, 2013, 3, p. 483 ss.

[17] M. Simpson, *Heritage: Non-Western Understandings*, in *The Encyclopedia of Archeological Sciences*, 2018, p. 2, available at *https://doi.org/10.1002/9781119188230.saseas0300*.

[18] F. Francioni, F. Lenzerini, *The 1972 World Heritage Convention: A Commentary*, Oxford Commentaries on International Law, Oxford, 2008, p. 59.

Operational Guidelines[19]. Moreover, cultural landscapes are recognized only under cultural criteria (i)-(vi) set out in the Guidelines, making many interlinkages invisible and omitting several sites under the consideration of the WHC. The culture-nature dichotomization in the World Heritage system could be seen as partial and simply artificial as there has been an evolution towards more holistic approaches to heritage protection[20], including attention given to the significance of heritage and the recognition of integrated values when assessing inscription criteria of a property in order to bridge the culture-nature interface. However, in practice, cultural criteria are evaluated separately from those pertaining to nature: the International Council on Monuments and Sites (ICOMOS) operates for the former, while the International Union for Conservation of Nature (IUCN) for the latter. The notion of 'mixed cultural and natural heritage' offers a potential bridge for mirroring the culture-nature integration in practice, as this type of heritage is characterized by a 'juxtaposition' of cultural and natural values[21].

Their separation is also reflected in the way cultural heritage is managed, even if some steps have been taken to dilute it over time. This is clear in the two spheres of activity of ICOMOS and IUCN, which means that «World Heritage managers on the ground, as well as the sites they try to protect and the communities they endeavour to engage, continue to suffer the consequences, including communal division and the loss of knowledge associated with properties as well as the loss of physical fabric in such places»[22]. In South Africa, the culture-nature binary has bedevilled heritage management in an already complex post-colonial context, where the Western under-

[19] P.B. Larsen, G. Wijesurya, *Nature-Culture Interlinkages in World Heritage: Bridging the Gap*, in *The George Wright Forum*, 34, 2017, 2, p. 148.

[20] F. Francioni, F. Lenzerini, *The 1972 World Heritage Convention: A Commentary*, cit.

[21] P.B. Larsen, G. Wijesurya, *Nature-Culture Interlinkages in World Heritage: Bridging the Gap*, cit., p. 11.

[22] S. Bockwell, S. O'Connor, D, Byrne, *Transcending the Nature-Culture Divide in Cultural Heritage: Views from the Asia-Pacific Region*, ANU Press, Canberra, 2013, p. 19.

pinnings of the existing approach do not recognize the indissoluble relationship between cultural heritage and the surrounding natural environment, along with cultural differences and values[23].

1.2.2. *The tangible versus the intangible*

The parochial formulation of cultural heritage protection under the 1972 WHC is strictly based on physical and tangible cultural and natural objects, reflecting the Western perspectives on the material and historical relevance of heritage. Since the adoption of the Convention 50 years ago, revisions of some criteria for assessing the outstanding universal value enshrined in the Operational Guidelines have contributed to the dynamic nature of cultural heritage, such as the inclusion of 'living' cultural traditions or civilizations, in addition to those that have disappeared[24]. However, such efforts have been insufficient to expand the idea of heritage and give justice to the increasing frustration felt by countries from the global South that their rich and diverse cultural expressions were hardly reflected in the monument- and material-centric Western perception of cultural heritage, resulting in an imbalanced World Heritage List[25]. The lack of consideration for immaterial cultural heritage on the international stage being an integral part of the cultural and social

[23] M. De La Torre, *Values and Heritage Conservation*, in *Heritage & Society*, 60, 2013, 2, p. 155 ss. See also M. Duval, *Contributions of a Heritage Values-Based Approach in Rock Art Management. Lessons from the Maloti-Drakensberg World Heritage Site*, *South Africa,* in *Conservation and Management of Archaeological of Archaeological Sites*, 20, 2018, 2, p. 89 ss.

[24] S. Labadi, *A Review of the Global Strategy for a Balanced, Representative, and Credible World Heritage List 1994-2004*, in *Conservation and Management of Archaeological Sites*, 7, 2005, 2, p. 89 ss.

[25] N. Aikawa-Faure, *From the Proclamation of Masterpieces to the Convention for the Safeguarding of Intangible Cultural Heritage*, in *Intangible Heritage*, edited by L. Smith, N. Aikawa-Faure, Routledge, New York, 2009, p. 13 ss.

identity of human communities[26], that led to its preservation mainly at the local level.

According to Smeets, UNESCO's heritage activities are carried out in a way that reflects dichotomies whereby «a main distinction is made, within the domain of tangible heritage, between cultural and natural heritage, which then as a whole is opposed to intangible heritage»[27]. The increasing awareness of the importance of immaterial forms of heritage led to the UNESCO General Conference in 1989 and to the adoption of the Recommendation on the Safeguarding of Traditional Culture and Folklore[28]. Several international instruments reinforced the protection of intangible heritage, including the Nara Declaration on Authenticity (1994)[29], revisions to the Burra Charter in 1999[30], the UNESCO Universal Declaration on Cultural Diversity (2002)[31], and culminated in the adoption of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage in 2003[32]. Immaterial manifestations of culture represent the variety of living heritage of humanity and

[26] F. Lenzerini, *Intangible Cultural Heritage: The Living Culture of People*, in *European Journal of International Law*, 22, 2011, 1, p. 105.

[27] R. Smeets, *Intangible Cultural Heritage and its Link to Tangible Cultural and Natural Heritage*, in *Utaki in Okinawa and sacred spaces in Asia - community development and cultural heritage*, edited by Okinawa International Forum, Okinawa, Japan, 2004, p. 144.

[28] UN Educational, Scientific and Cultural Organization (UNESCO), Recommendation on the Safeguarding of Traditional Culture and Folklore, 16 November 1989. Available at *www.un-documents.net/folklore.htm*.

[29] UN Educational, Scientific and Cultural Organization (UNESCO), Nara Declaration on Authenticity, 21 November1994. Available at *https://whc.unesco.org/archive/nara94.htm*.

[30] Australia International Council on Monuments and Sites (ICOMOS), The Burra Charter, 19 August 1979. Revisions were adopted on 23 February 1981, 23 April 1988 and 26 November 1999. Available at: *https://australia.icomos.org/publications/burra-charter-practice-notes/burra-charter-archival-documents/#BC1999*.

[31] UN Educational, Scientific and Cultural Organization (UNESCO), Universal Declaration on Cultural Diversity, 4 September 2002. Available at *https://unesdoc.unesco.org/ark:/48223/pf0000127162*.

[32] UN Educational, Scientific and Cultural Organization (UNESCO), Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003.

the most important vehicle of cultural diversity. They are defined by Article 2 as:

> «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».

It is true that the adoption of the Convention for the Safeguarding of Intangible Cultural Heritage recognizes the significance of local practices and immaterial forms of heritage more broadly, but it also creates two different legal regimes that fail to explore the interdependence and symbiosis between tangible and intangible heritage. Bouchenaki's words exemplify this indissoluble bond well: «Cultural heritage operates in a synchronized relationship involving society (that is, systems of interactions connecting people), and norms and values (that is, ideas and belief systems that define relative importance). Heritage objects are the tangible evidence of underlying norms and values, and thus they establish a symbiotic relationship between the tangible and intangible»[33].

While tangible heritage is based on the objective evaluation of its outstanding universal value, intangible heritage is evaluated by the subjective perspective of its creators and bearers through a process of self-identification by the concerned communities and individuals[34]. Again, while intangible heritage is, by definition, a living

[33] M. Bouchenaki, *A Major Advance Towards a Holistic Approach to Heritage Conservation: the 2003 Intangible Heritage Convention*, in *International Journal of Intangible Heritage*, 2, 2007, 3, p. 108.

[34] F. Lenzerini, *Intangible Cultural Heritage: The Living Culture of People*, cit., p. 109.

entity capable of constantly adapting in response to the historical and social evolution of its creators, this 'living' dimension is rather absent in the static nature of tangible heritage depicted by the WHC. Overall, having two separate conventions and lists protecting different forms of cultural heritage also generated conceptual and practical problems in managing cultural heritage[35].

1.2.3. *State-oriented versus local heritage protection*

The way cultural and natural heritage are protected under the WHC and the UNESCO framework more generally are illustrative of the tension between a state-oriented protection mechanism and a locally based heritage protection mechanism. The division between a top-down approach where the state has the duty to protect and preserve cultural heritage, rather than a bottom-up strategy more sensitive to local communities' wisdom and practices to heritage management, is the symptom of the authorized heritage doctrine at the heart of the UNESCO regime[36]. In fact, native or Indigenous worldviews of the concept of heritage and how to protect it are not incorporated in the authorized heritage discourse at all.

In Article 4 of the Convention, reference to state-oriented protection is very clear: «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 Article 1 and 2 and situated on its territory, belongs primarily to that State». However, proper preservation of heritage should provide for involvement of communities and groups, as cultural heritage, whether tangible or intangible in its nature, is usually strictly interrelated with the cul-

[35] K.D. Silva, *Tangible and Intangible Heritages: The Crisis of Official Definitions*, in *Housing and Building Research Journal*, 6, 2010, Special Issue, p. 12 ss.

[36] E. Waterton, L. Smith, E. Campbell, *The Utility of Discourse Analysis to Heritage Studies: The Burra Charter and Social Inclusion*, in *International Journal of Heritage Studies*, 12, 2006, 4, p. 339 ss.

tural identity[37] of a specific community not only locally geographically defined, but also communities bound together by common social, cultural, economic and/or political experiences[38].

In response to the criticism of the universalization of a Western conception of cultural heritage, particularly by non-Western nations, the 2003 Convention on Intangible Heritage attempts to recognize non-Western ways of understanding heritage[39]. Among innovative approaches to considering cultural heritage, it includes a reference to communities' participation, which undoubtedly can be informative if applied in the context of the WHC. Article 11(b) of the Intangible Heritage Convention requires a state party to «identify and define the various elements of the intangible cultural heritage present in its territory, with the "participation of communities", groups and relevant non-governmental organizations». However, there is no explicit provision explaining what community participation means and the kind of expertise needed to collaborate with the state's practice of conservation and management. States' duty to ensure the widest possible participation of communities in the active management of intangible cultural heritage is reinforced by Article 15 as well as by the Operational Directives for the Implementation of the Convention on Intangible Heritage to encourage states parties «to establish functional and complementary cooperation among communities, groups and, where applicable, indi-

[37] F. Lenzerini, *Intangible Cultural Heritage: The Living Culture of People*, cit., p. 111. According to Lenzerini, community participation in the protection of intangible cultural heritage is essential because of its connotation of being closely connected with the cultural identity of its bearers. Building on this idea, I believe the same argument can be transferred to the protection of tangible forms of cultural heritage, even more so because of the intertwined nature of tangible and intangible heritage.

[38] L. Smith, *Uses of Heritage*, cit., p. 28.

[39] J. Blake, *Developing a New Standard-Setting Instrument for the Safeguarding of Intangible Cultural Heritage: Elements for Consideration*, in UNESCO Documents, 2001. Available at *https://unesdoc.unesco.org/ark:/48223/pf0000123744*.

viduals who create, maintain and transmit intangible cultural heritage»[40].

Community participation in heritage management, interpretation and conservation work is often defined as an 'Indigenous issue', which questions the legitimacy and power of controlling history and memory for creating cultural identity and who has the authority to do so[41]. However, many other communities from Western countries echoed such critiques to challenge traditional and authorized heritage practices for greater involvement in heritage policies and rework a new understanding of heritage[42].

2. *Non-Western approaches to cultural heritage: knowledge and practices*

The existing legal framework protecting cultural and natural heritage under the WHC remains problematic for the Western influence reinforcing the nature-culture, tangible-intangible and state-local divides, as intrinsic part of the concept of cultural heritage, and foundational to the Western ontological model. There are, however, non-Western ways of seeing, knowing, and protecting heritage, such as the Indigenous perceptions of heritage and non-Western worldviews, that suggest an alternative and pluralist elaboration of heritage to the current paradigm proposed by the WHC legal framework.

[40] UN Educational, Scientific and Cultural Organization (UNESCO), Operational Directives for the Implementation of the Convention on Intangible Heritage, 19 June 2008, Para. 79. Available at *https://ich.unesco.org/doc/src/ICH-Operational_Directives-7.GA-PDF-EN.pdf#p170*.

[41] See L. Smith, *Uses of Heritage*, cit.

[42] P. Shackel, *Public Memory and the Search for Power in American Historical Archaeology*, in *American Anthropologist*, 103, 2001, 3, p. 655 ss.

2.1. *Indigenous perceptions of heritage*

There are substantial cultural differences between Indigenous perceptions of heritage[43] and the binary system of thought at the basis of the WHC's conceptualization of cultural heritage. Since there is not one single Indigenous point of view or cultural tradition, the aim of this section is to point out an alternative approach to cultural heritage to inform and revisit its Western-imposed conceptualization in the UNESCO framework. Broadly speaking, Indigenous perceptions of the legal and heritage management process do not recognize separations between culture/nature and tangible/intangible do not exist. Informed by Indigenous traditions and beliefs of the community, cultural heritage is understood as «the objects, places, knowledge, customs, practices, stories, songs and designs, passed between generations, that define or contribute to a person's or group's identity, history, worldview and well-being»[44]; this emphasizes the intangible dimension of heritage, as well as the relationships and responsibilities deriving from it. Many Indigenous cultures are centred on oral history and oral traditions, passed down through generations, as sources of information and knowledge. Indigenous traditional knowledge is rooted in the cultural experience of hundreds of generations, situated in an Indigenous worldview, and conveyed through oral traditions and ritual practices[45]. Such localized knowledge, having emerged in non-Western historical contexts, is a form of 'living heritage' which keeps evolving throughout a spatial and a temporal scale as a form of cultural continuity of heritage.

[43] Broadly speaking, I am referring to Indigenous communities from North America, Australia and New Zealand, Africa, Japan and Scandinavia.

[44] G. Nicholas, *Recommendations for Decolonizing British Columbia's Heritage-Related Process and Legislation*, in *First Peoples' Cultural Council*, prepared by D.M. Shaepe, G. Nicholas, K. Dolata, 2020, p. 10.

[45] M. Bruchac, *Indigenous Knowledge and Traditional Knowledge,* in *Encyclopedia of Global Archeology*, vol. X, edited by C. Smith, Springer, New York, 2014, p. 3814.

In addition to intangible forms of knowledge being in tension with the more monument- and material-based Western approach to cultural heritage and thus being relegated to a separate international convention from the WHC, the failure to acknowledge the legitimacy of oral history jeopardizes the Indigenous propagation of cultural knowledge[46]. In many Indigenous communities, elders are respected for their wealth of experience and knowledge, and essential for the transmission and continuity of traditional knowledge. The process of intangible heritage is a key mechanism for the facilitation of cultural renewal and for healing the effects of post-colonial trauma[47].

Contrary to the binary system of the Western concept of cultural heritage, Indigenous perceptions do not contemplate the separation of the past and the present, but rather have an integrative worldview[48]. This means that cultural heritage can be imagined as a process where past and present interact and are intertwined with one another. In other words, depending on its understanding, cultural heritage can be conceptualized as an experience with both tangible and intangible aspects. The Indigenous 'philosophy of becoming', in which life and place combine to bind time and living beings into generations of continuities in particular places[49], gives an idea of the holistic approach of Indigenous worldviews.

Another fundamental aspect of the Indigenous worldview, which facilitates a broader view of cultural heritage moving beyond narrow and static Western dichotomies, is the inextricable culture-nature connection. Aboriginal Australians have a strong attachment

[46] G. Nicholas, *The Persistence of Memory; the Politics of Desire: Archaeological Impacts on Aboriginal Peoples and their Response,* in *Indigenous Archaeologies: Decolonizing Theory and Practice*, edited by C. Smith, H.M. Wobst, Routledge, New York, 2005, p. 89.

[47] M. Simpson, *Heritage: Non-Western Understandings*, cit., p. 3.

[48] G. Nicholas, *Recommendations for Decolonizing British Columbia's Heritage-Related Process and Legislation*, cit., p. 85.

[49] R. Harrison, D. Rose, *Intangible Heritage*, in *Understanding Heritage and Management*, edited by T. Benton, Manchester University Press, Manchester, 2010, p. 250.

to landscape as it forms the basis for familial connections between humans and other-than-humans[50]. In the Indigenous Australian view, the concept of 'kinship' well exemplifies the profound relationship between the human and non-human world. In this worldview, kinship is a major basis of life, according to which «the natural world and humans are participants in life processes. Relationships are based on the kinship-based concepts of enduring solidarity, responsibility, and care»[51]. In other words, individuals and collective are linked with plant and/or animal species as part of an overall system that organizes relationships among all sentient beings, both human and non-human. This means that humans are connected by bonds of kinship with the natural environment, and it is impossible to divide the cultural from the natural. Despite more frequent use in natural heritage management, the term 'ecological connectivity'[52] depicts the entanglement between people and the natural world, as opposed to Western thought where culture has been understood not only as a completely separated domain from nature, but also as hierarchically superior to it. From Indigenous perspectives, the relationship between humans and non-humans are social: humans, animals, plants, and all natural elements interact in a single social domain where the persistent culture/nature dichotomy automatically dissolves[53].

Overall, exploring alternative heritage onto-epistemologies provides new models for rethinking heritage protection and management in a more holistic and harmonious way. I have already point-

[50] R. Harrison, *Beyond Natural and Cultural Heritage: Toward an Ontological Politics of Heritage in the Age of Anthropocene*, in *Heritage and Society*, 8, 2015, 1, p. 27 ss.

[51] D. Rose, *Sharing Kinship with Nature: How Reconciliation is Transforming the NSW National Parks and Wildlife Service*, Report prepared for NSW National Parks & Wildlife Service, 2003, p. 3.

[52] *Ibidem*.

[53] E. Viveiros De Castro, *Perspectivism and Multinaturalism in Indigenous America*, in *The Land Within: Indigenous Territory and the Perception of the Environment*, edited by A. Surralles, P. García Hierro, IWGIA, Copenhagen, 2005.

ed out the strong Western domination over the WHC and the UNESCO framework more generally, as a relentless colonial legacy that is also reflected in the cultural heritage discourse. This suggests the need to elaborate a concept of cultural heritage capable of embracing its multifaced nature while also considering non-Western ways of knowing and thinking that value the culture-nature entanglement and the intangible dimension of heritage. Different perceptions of cultural heritage that better accommodate its fluidity and overcome symmetrical Western dualisms have fundamental implications for heritage conservation practices.

2.2. *Alternative heritage conservation and protection*

Broadening the perspective through which cultural heritage can be conceptualized by considering Indigenous worldviews and non-Western ways of thinking that sterilize the complex interaction between the cultural and natural dimensions will also imply further reflection on cultural heritage management and protection. The dissolution of what I referred to as Western dichotomies within the concept of cultural heritage produces an expanded field for heritage and the consequent need for rethinking management practices and different layers of protection. In contrast with the Western perception of cultural heritage as something essentially static that should be preserved and frozen in museums, there are different ethics of conserving cultural or natural sites. In fact, the idea of heritage as a process is at the core of non-Western ways of thinking, especially in Indigenous communities and more generally in Asian cultures. Holtorf and Kristensen suggest that heritage should be understood as perpetually undergoing change through a combination of natural processes and human activity, meaning that loss and destruction are a natural feature of heritage[54]. This is in line with Bud-

[54] C. Holtorf, T. Kristensen, *Heritage Erasure: Rethinking protection and preservation*, in *International Journal of Heritage Studies,* 21, 2015, 4, p. 313 ss.

dhist thought, which values fluidity and processes of meaning-making over the preservation of fixed objects and their values; indeed, a conservation paradigm using this approach would better accommodate change and transformation over time. In deference to the Buddhist paradigm, Kimball uses the expression 'empty heritage' to contrast the essentialist Western heritage conservation paradigm[55]. Using the term 'postcard heritage', Kimball indicates a fixed, fantasized and essentialized manifestation of cultural heritage which should be rendered permanent against the passage of time, according to the Western tradition[56]. A Buddhist perspective on cultural heritage challenges assumptions that are foundational to postcard heritage by offering a dynamic, impermanent and constantly changing nature of cultural heritage. The example of the Tibetan Buddhist rituals of the sand mandala, whose finely and elaborated construction takes weeks to complete and is eventually destroyed, well depicts what Buddhist philosophy expresses through tangible and intangible cultural heritage, and manifests the inexorable, cyclical process of decay for living beings, inanimate objects, places, and mental and social constructs alike[57].

Recognizing the impermanence of cultural heritage brings a different perspective on heritage and heritage conservation, clearly diverging from the Western conservation ethic aiming at arresting decay and erosion. In some cultures, including some Indigenous communities, the decay and eventual destruction of heritage items is a cultural purpose, or a part of a natural cycle whose interruption is even a cultural disservice[58]. Emphasizing the 'living nature' of cultural heritage requires shifting the focus away from the conservation of tangible and intangible cultural heritage. Instead, conservation of living heritage implies the inclusion of local communities in cultur-

[55] M. Kimball, *Our Heritage is Already Broken: Meditations on a Regenerative Conservation for Cultural and Natural Heritage*, in *Human Ecology Review*, 22, 2016, 2, p. 54.

[56] *Ibidem*.

[57] *Ivi*, p. 55.

[58] L. Smith, *Uses of Heritage*, cit., p. 302.

al heritage management as they are sustained and enlivened by such reciprocally evolutionary processes.

The Western discipline of cultural heritage conservation creates discontinuity between preservation of the past and its links with people of the present. The conservation theory of the Western world does not embrace the connection between communities and traditional cultural and natural heritage values. This is reflected in the lack of an official World Heritage mechanism to ensure community involvement in the nomination and inscription process, and the fact that this is not a prerequisite for inscription on the World Heritage List[59]. Nevertheless, there has been progress that challenges the conventional material-based approach to a more dynamic model of heritage conservation, one which places the living dimension at the core and considers continuity and fluidity of processes as key themes. This 'living heritage approach' (already experimented with in Thailand) recognizes communities as the long-term custodians of their heritage sites; it empowers communities in conservation and management processes and benefits from their traditional values and practices; and it links conservation to the sustainable development of communities[60]. Overall, a living heritage approach gives continuity to cultural heritage in its association with communities and enables embracing the culturally different Indigenous and non-Western mentalities.

3. *Rethinking heritage for the Anthropocene*

The dominant concept of heritage due to the strong Western influence on the WHC and on the UNESCO framework more generally remains problematic as it reflects sterile dichotomies such as the

[59] S. Labadi, *UNESCO, Cultural Heritage and Outstanding Universal Value: Value-Based Analysis of the World Heritage and Intangible Cultural Heritage Conventions*, AltaMira Press, Plymouth, 2013, p. 86 ss.

[60] I. Poulios, *The Past in the Present: A Living Heritage Approach - Meteora, Greece*, Ubiquity Press, London, 2014, p. 28.

culture/nature, tangible/intangible and state-oriented/locally managed forms of heritage. The existing legal framework not only universalizes a Western paradigm of heritage thus marginalizing other worldviews and heritage conservation practices, as already illustrated above. But also, it is unable to address new challenges and realities created by the Anthropocene, where relationships between humans themselves and humans and the environment have changed fundamentally[61], overcoming a binary thinking system.

In simple terms, the term 'Anthropocene' was developed[62] to suggest a human-dominated epoch where human activities are shaping and reshaping the Earth system dynamics. Humans' profound impact on the Earth's systems imposes the need for a more holistic theorization of human-nature connections[63], according to which humans are not considered a separate entity from nature and the Earth system but are intrinsically part of it. The concept of the Anthropocene enables to understand that the separation between what is human and what is nature is overall artificial and shatter the classical dyads of nature/culture, body/mind, and materiality/immateriality[64]. This is also an opportunity to develop new paradigms, ideas, narratives and conceptual expressions to describe and respond to the complexity of challenges introduced by the Anthropocene.

In this scenario, alternative heritage onto-epistemologies and conservation practices provide new models for rethinking and

[61] W. Steffe, J. Rockstrom, K. Richardson, *Trajectories of the Earth System in the Anthropocene*, in *PNAS*, 115, 2018, 33, p. 8252 ss.

[62] P. Crutzen, E. Stoermer, *The Anthropocene*, in *IGBP Global Change Newsletter*, 41, 2000, p. 17 ss. Available at *www.igbp.net/download/18.316f183213234701775800014 01/1376383088452/NL41.pdf*.

[63] A. Muhar, C. Raymond, R. Van Der Born, N. Bauer, *A Model Integrating Socio-Cultural Concepts of Nature into Frameworks of Interaction between Social and Natural Systems*, in *Journal of Environmental Planning and Management*, 61, 2018, 3, p. 756 ss.

[64] Some would argue, however, that the Anthropocene reinforces the human/nature divide as it foregrounds Anthropos and anthropocentrism. See R.K. Mahaswa, A. Widhianto, *Questioning the Anthropos in the Anthropocene: is the Anthropocene Anthropocentric?*, in *SHS Web of Conferences*, 76, 2020, 4, pp. 1-10.

reconceptualizing heritage for the Anthropocene. In fact, as the Anthropocene demands, non-Western and marginalized conceptions of cultural heritage reinforce the need to overcome a binary thinking in the context of heritage protection, while also being compatible with the challenges of the Anthropocene. This means to embrace non-Western ways of knowing and thinking heritage that recognize the integration of culture with nature, the intertwined and inseparable nature of the tangible and intangible dimensions, the fluidity of heritage, and have a greater focus on community engagement.

3.1. *A shift towards a pluralist concept of heritage*

The Anthropocene metaphor enables us to dissolve the Cartesian worldview centred on a binary thinking system that hinders the development of a holistic concept of cultural heritage. Such tensions are foundational to Western thought and have been understood as not just radically separate from one another, but as situated in a hierarchical relationship. The culture/nature binary, for example, has been vastly facilitated and accelerated by humans' exploitation and despoliation of natural resources and the obsession of domination and mastery over other humans and nature which accompanied the Industrial Revolution, the development of capitalism and the European colonial-imperial project[65]. Their legacy is indeed reflected in the separation of cultural and natural heritage and tangible and intangible forms of heritage.

The anthropocentric vision, according to which heritage is a human product of the past, separated from nature and manifesting itself in material forms, to be preserved for present and future generations as a symbol of the cultural identity of humankind is the result of centuries-long Western influence over cultural heritage discours-

[65] S. Bockwell, S. O'Connor, D, Byrne, *Transcending the Nature-Culture Divide in Cultural Heritage: Views from the Asia-Pacific Region*, cit. p. 2.

es and deeply rooted power dynamics. Yet cultural heritage can also be envisaged as a living and interactive process able to encompass a plurality of ontologies[66]. Indeed, there are alternative forms of heritage practices that enact different realities and thus lead to different understandings of cultural heritage. Building on the Anthropocene metaphor and its implications on cultural heritage, it is possible to envisage a shift to a pluralist concept of cultural heritage which goes beyond dichotomies to reflect the inextricable interrelation between cultural and natural dimensions of heritage, between tangibility and intangibility, and the importance of involving local communities in heritage management. This is already visible in Indigenous and non-Western conceptions of cultural heritage, and also emerging from marginalized a groups and communities within the West whose critique challenges the authorized heritage discourse for a new and pluralist understanding of heritage which reflects different epistemologies.

As it has become increasingly difficult to distinguish the human from the natural, some scholars have started to refer to intertwined natural and human phenomena as 'post-nature'. This is to indicate the «the result of a highly complex interaction between humankind (culture, civilization, knowledge, technology) and nature»[67]. The impossibility of returning to nature is the result of human hyper agency, which can modify surroundings at a level never seen before[68] and which, in my view, demonstrates that humans are intrinsically part of the natural system. The geological plexus in Petra[69], Jordan, is an example of a post-natural construct where a

[66] R. Harrison, *Beyond Natural and Cultural Heritage: Toward an Ontological Politics of Heritage in the Age of Anthropocene*, cit.

[67] S. Raffnsoe, *Philosophy of the Anthropocene: The Human Turn*, Palgrave Macmillan, New York, 2016, p. 24.

[68] C.M. Hall, T. Baird, M. James, Y. Ram, *Climate Change and Cultural Heritage: Conservation and Heritage Tourism in the Anthropocene*, in *Journal of Heritage Tourism*, 11, 2016, 1, p. 10 ss.

[69] Petra is a geological plexus in Jordan comprising natural rocks and monuments carved in layers of sandstone. It is a site where geology and archeology beautifully coexist and make it a unique place in the world.

complex interaction between human and non-human factors, keeps transforming the site, bringing about a redefinition of the ontological foundation of cultural heritage[70]. Due to the generative and agentive transformations under the influence of external factors, Petra is constantly drifting away from its material reality and evolving into different shapes, as it is an ongoing process and an ever-transforming cultural heritage site. On the contrary, not recognizing the entanglement nature-culture would imply bringing the site back to its original state before its post-natural construct. The conservation of cultural heritage in these terms means keeping the past frozen for future generations, or 'sterilizing the past', thus depriving objects 'of their right to live'[71].

Moving beyond the separation between nature and culture implies not only envisaging a new conceptualization of cultural heritage which creates a new language and new institutional practices to address such dualism[72]. It also means challenging the authorized heritage discourse by smoothing tensions concerning how heritage is defined and controlled, and how it can be representative of a diversity of cultural identities, alternative practices and ways of understanding. The same can be said when referring to the dualism drawing boundaries between tangible and intangible forms of cultural heritage, a separation that «perpetuates a fundamentally Cartesian and colonial model», according to Michael Herzfeld[73]. Western cultures have placed enormous significance on possessing material things, either for showing evidence of domination and wealth

[70] M. Stobiecka, *Nature as a Curator: Cultural Heritage in the Anthropocene*, in *Theories and Practices of Visual Culture*, 2018, p. 9. Available at: *www.academia.edu/40391173/Nature_as_curator_Cultural_Heritage_in_the_Anthropocene_View_Theories_and_Practices_of_Visual_Culture_2018_22_http_www_pismowidok_org_en_archive_22_how_to_see_the_antropocene_nature_as_curator*.

[71] M. Shanks, *The Life of an Artifact in an Interpretive Archaeology*, in *Fennoscandia Archaeologica*, 15, 1998, 1, p. 17.

[72] P.B. Larsen, G. Wijesurya, *Nature-Culture Interlinkages in World Heritage: Bridging the Gap*, cit., p. 13.

[73] D. Byrne, *Archaeological Heritage, and Cultural Intimacy: An Interview with Michael Herzfeld*, in *Journal of Social Archaeology*, 11, 2011, 2, p. 148.

– as in the case of illegal dispossession of cultural goods during colonial times, still displayed in Western museums – or for the instrumental values of the goods themselves[74]. Such limitation in recognizing a comprehensive concept of cultural heritage fails to depict the non-tangible aspects of every tangible cultural or natural form of heritage. Every manifestation of heritage has an intangible element due to the fact that heritage itself has no intrinsic value[75] and it is not valued for its own sake, but rather because of the way people relate to it and create a unique relationship with it. The value of heritage mainly depends on the meanings placed upon the material artefacts and from the representations consequently created from them[76]. According to this view, the value of heritage is relational rather than intrinsic. Norris takes museums as an example, whose purpose it is to exhibit and explain to a culturally diverse audience the intangible aspects of our planet by presenting tangible works[77]. A lack of understanding of different cultures' belief and knowledge restricts the development of cultural collections and places barriers between differing cultures[78].

Acknowledging the profound interconnectedness of tangible and intangible heritage has cascade effects in facilitating the dissolution between the culture/nature divide while also stimulating the development of a pluralist concept of heritage. This is not only because the characteristics of intangible heritage provide a broader framework within which tangible heritage could take its shape and significance, but also because the traditional Western heritage

[74] S. Greenblatt, *Resonance and Wonder*, in *Exhibiting Cultures: The Poetics and Politics of Museum Display*, edited by I. Karp, S. Lavine, Smithsonian Institution Press, Washington, 1991, p. 51 ss.

[75] S. Harding, *Value, Obligation and Cultural Heritage*, in *Arizona State Law Journal*, 31, 1999, 1, p. 291 ss.

[76] G. Ashworth, B. Graham, J.E. Tunbridge, *Pluralizing Pasts: Heritage, Identity and Place in Multicultural Societies*, Pluto Press, London, 2007, p. 3.

[77] A. Norris, *The Intangible Roots of Our Tangible Heritage, in Intangible Natural Heritage: New Perspectives and Objects*, edited by E. Dorfam, Routledge, New York, 2012, p. 22.

[78] *Ibidem*.

discourse is based on the idea of preserving the past in the form of monuments, while non-Western experience often values intangible aspects of heritage. In contrast to a conservationist ideal of preserving the past as it was originally, practices from non-Western local communities show the profound interrelation between cultural and natural entanglements of heritage as more sensitive to the intangible dimension[79]. In this context, the cultural heritage discourse is informed by the nature conservation discourse, where natural and cultural qualities become blurry.

A symbiotic integration and interrelation between three dialoguing dimensions of heritage, namely cultural heritage, natural heritage and intangible or spiritual heritage, within which local and grassroots groups play a determining role in management, is at the core of the 'triple heritage of humanity', as envisaged by Dawson Munjeri[80]. The framework takes its shape in an equilateral triangle where a well-defined and balanced relationship between the three realms of heritage is fundamental. At the same time, the cultural heritage triangle needs a second system, an inner triangle, that underpins all three dimensions of heritage, preventing the monopoly of the human dimension over the others. Munjeri suggests that 'values, society, and norms' are the pillar of the inner equilateral triangle, an essential prerequisite for the outer triangle to work properly as it governs human relationships[81]. The balanced synchronization and convergence between the inner and the outer triangle would enable a two-level scenario, representative of a pluralist concept of cultural heritage. Munjeri's triangle framework lays the foundation

[79] I am referring to the example of nature and culture conservation in Laos. See A. Karlstrom, *Authenticity: Rhetorics of Preservation and the Experience of the Original*, in *Heritage Keywords: Rhetoric and Redescription in Cultural Heritage*, edited by K.L. Samuels, T. Rico, University Press of Colorado, Boulder, 2015, p. 29 ss.

[80] D. Munjeri, *Smart Partnerships: Cultural landscapes Issues in Africa*, in *Cultural Landscapes: The Challenges of Conservation*, World Heritage Papers, Shared Legacy, Common Responsibility, Associated Workshop, Ferrara, 2002, p. 135 ss. Available at *https://unesdoc.unesco.org/ark:/48223/pf0000132988*.

[81] *Ibidem*.

for a more holistic paradigm of cultural heritage that encompasses multiple dimensions and worldviews and goes beyond Western-imposed dichotomies while also bringing to light an all-inclusive process where not only states, but also local communities and multiple stakeholders are involved in heritage management. In fact, including local communities to define the components of heritage facilitates the process of recognizing values attached to the cultural, natural and (in)tangible dimension of cultural heritage.

Concluding Remarks

50 years after its adoption, the World Heritage Convention has brought significant changes to the concept of cultural heritage and its protection. Nevertheless, artificial dichotomies such as culture/nature, tangible/intangible and state-oriented/locally based management are still intrinsically attached to the WHC framework, centred on the authorized heritage discourse which universalizes the Western idea of heritage. As such, the concept of heritage is incapable of embracing alternative worldviews, understandings, and management of heritage, but it rather accommodates deeply rooted power dynamics and colonial legacies. Therefore, I propose to include Indigenous and non-Western perspectives on heritage and alternative heritage discourses. The non-Western approaches to cultural heritage can inspire and inform a way of rethinking cultural heritage, not only to give voices to the marginalized but also to address challenges and new realities in the Anthropocene. Starting from the dissolution of artificial Western boundaries, cultural heritage for the Anthropocene can be imagined as a process in which past and present interact with one another; this would reflect the indissoluble link between nature and culture and its tangible and intangible forms. In other words, a holistic heritage approach means not only moving beyond binary thinking, but also developing a legal framework that encompasses alternative meanings and

worldviews. Including local communities in heritage conservation is therefore crucial for developing culturally responsive approaches to heritage conservation that reflect the fact that heritage is a living entity. To do so, I believe it is critical to challenge dominant Western heritage narratives and discourses by strengthening a dissonant heritage discourse able to dismantle persistent colonial legacies in the UNESCO framework and embrace humanity's cultural difference and sensitivity. It is also vital to give voices to alternative and Indigenous understandings and conservation practices of cultural heritage to develop a bottom-up strategy inclusive of communities' wisdom and knowledge.

Candida Rolla, Francesca Sabatini

THE DEFINITION OF WORLD HERITAGE CULTURAL LANDSCAPES: A DIALOGUE WITH OCEANIA*

Abstract: This paper observes from a political and theoretical perspective the position of New Zealand within the World Heritage Convention framework, and specifically the mutual influence of Western conceptions and those coming from the Asia Pacific in redefining the notion and the regulation of World Heritage Cultural Landscapes.
The first section presents an overview of the historical developments of the cultural heritage preservation programs of the World Heritage Convention (WHC hereon) and the global challenges it is called to address in the light of the contemporary imbalanced geographies, issues of representations and shifting conceptualizations of the concept of heritage itself. The core of the paper focuses on the achievements of two major political bodies for heritage matters, ICOMOS New Zealand and Department of Conservation: the former, in bringing forward a progressively more original interpretation of the international ICOMOS Venice Charter; the latter, in promoting the role of New Zealand on a global scale, peaked in the first WHC General Assembly (GA) hosted in Christchurch, New Zealand, in 2007, when the 5th C of Community was added to the strategic objectives of the World Hertiage Committee. The third section presents the role (and related controversies) of New Zealand as a pivot for the agency and capacity building of the whole Pacific with the Pacific 2009 Action Plan.
The conclusion discusses the findings and identifies a twofold movement between the national and international level, and between Western political framework and local Māori values, further observing how these tensions have been incorporated in the contemporary developments of the World Heritage Convention.

1. *Guardianship and belonging: indigenous preservation of nature and culture*

«It is a terrible irony that as formal development reaches more deeply into rainforests, deserts, and other isolated environments, it tends to

* Double-blind peer reviewed content.

destroy the only cultures that have proved able to thrive in these environments»[1].

The action of marking the land with tangible and intangible signs and the will to preserve them for present and future generations is innate in human nature.

When culture marks a piece of land, this becomes a 'place' or a 'site'; *Aotearoa* (Māori name for New Zealand) «retains a unique assemblage of places of cultural heritage value»[2] and outstanding natural landscapes and has exercised an intense seduction on travellers' populations for centuries. The last-settled world's significant land mass is evidence of one central migratory influence strand, the Polynesian cultural tradition. Ancestral inhabitants have travelled by sea between these «land of islands»'[3] for thousands of years, formed new settlements and left new signs. Disembarking the *waka* (canoes) on *Aotearoa* (land of the long white cloud), they found substantial seashore expanses, plant life and wildlife which had freely developed for 80 million years and fertile and dynamic weather. They became the *tangata whenua* ('people of the land')[4].

Māori approach to ancestral spirituality determines the holistic relationship between humans and Earth, the knowledge of which is transferred from generation to generation through *Pakiwaitara* (myths and legends)[5], informing the traditional use of the land –

[1] G. Harlem Brundtland, *Report of the World Commission on Environment and Development: Our Common Future*, World Commission on Environment and Development, Oslo, 1987.

[2] ICOMOS, *New Zealand Charter for the Conservation of Places of Cultural Value*, ICOMOS New Zealand, 2010, p. 1.

[3] *Last, Loneliest, Loveliest, The New Zealand Pavillion, 14th International Architecture Exhibition La Biennale di Venezia*, edited by M. Austin, J. Walsh, New Zealand Institute of Architects Inc., Auckland, 2014, p. 13, *http://venice.nzia.co.nz/*.

[4] *Last, Loneliest, Loveliest, The New Zealand Pavillion, 14th International Architecture Exhibition La Biennale di Venezia*, edited by T. Van Raat, J. Walsh, New Zealand Institute of Architects Inc., Auckland, 2014, p. 13, *http://venice.nzia.co.nz/*.

[5] *Pakiwaitara*, *Te Aka Māori dictionary*, *https://maoridictionary.co.nz/word/5035*.

from housing to hunting, to agriculture, to the creation of intricately decorated objects. Within this knowledge, the relationship with *te Papa (*earth mother*)* is marked by stewardship, with tangata whenua being *kaitiaki* (guardians) of the ancestral *taonga* (treasured possessions, both tangible and intangible) and preservers of its *mauri* (life force). Through the all-encompassing concept of *whakapapa* (genealogy), at the core of belonging, predominant in the relationship between space and social environment and between people and ancestors, *whanau* (family) and *hapu* (extended family or subtribe, literally 'pregnant') are the original units of the social and cultural system. At the same time, *iwi (*tribe / etymologically 'bones') are groups living in a long-held location named after a founding ancestor[6]. The knowledge of individual *whakapapa* embraces the stories of the early ancestors arriving from distant lands and *atua* (supernatural beings) whose actions shaped the environment. Storytelling and the decorative arts are vital to preserving this intangible heritage.

During *Mihi* (introduction speeches), in a Māori traditional context, it is customary to share a *pepeha* (tribal aphorism which translates with 'baby breath') which helps the introducing person to express parts of their whakapapa, linking the person to a common ancestor, the land, represented by the mountains and the waterways of origin. Another essential term that highlights this relationship is *tūrangawaewae*: a place (*tūranga*) to stand (*waewae*). Tūrangawaewae tends to coincide with where the person reciting the pepeha was either born or brought up or to their ancestral land. It is a place where they feel they have a strong sense of belonging and a deep spiritual connection[7].

The modern nation of New Zealand can be seen as a connecting point between the Western grounded heritage conservation discipline and the Asia Pacific and Oceanic ethos, primarily through

[6] R. Taonui, *The significance of iwi and hapū*, in *Te Ara - the Encyclopedia of New Zealand*, *https://teara.govt.nz/en/tribal-organisation/page-1*.

[7] *Tūrangawaewae – a place to stand*, in *Te Ara - the Encyclopedia of New Zealand*, *https://teara.govt.nz/en/papatuanuku-the-land/page-5*.

the conception of outstanding cultural landscape on the World Heritage stage and the reach for a holistic perspective in cultural heritage conservation, one that supersedes a series of dichotomies rooted in the European core of the discipline: natural/cultural; tangible/intangible; Western/non-Western; physical/spiritual, curatorial/environmental etc. Māori worldviews and direct relationship to heritage have played a significant role in shaping new theoretical (if not philosophical) views of heritage which, in turn, have inspired new operational approaches and actions on a global scale. The present contribution will observe the role played by the Asia Pacific region and New Zealand precisely in reshaping the Convention, the principles it was based upon, and the categories it had set, bearing specific reference to the documents and legal tools which have been advanced by, or which have seen the relevant contribution of, New Zealand, starting from the role played in crafting the notion of cultural landscape as a complex and dynamic conception, embracing humankind's evolving relationship with its natural environment.

2. *The World Heritage Convention at 50: global challenges, imbalanced geographies and shifting conceptions*

The narrative of the World Heritage Convention (WHC hereon) policies and approaches towards preserving outstanding heritage places identifies the WHC as one of the tools for sustainable resource management, where culture is in every way part of the natural *holos* shared by humanity.

A uniquely rich document, the Convention established the first comprehensive taxonomy of cultural and natural heritage, identifying monuments, groups of monuments and sites for the former, and natural features, geological and physiographical formations and natural sites for the latter. Most importantly, the Convention set the legal rules for protecting cultural and natural heritage, accompanied by operational guidelines for implementing this regulation, and finally established the birth of a World Heritage Committee

(article 8). Great attention was placed on the role of States, as owners of the sites, in protecting, preserving, presenting and transmitting heritage for present and future generations (article 4), also indicating the legal framework by which this had to be done (article 5). Presently, the World Heritage Convention lists (and foresees the protection of) 1154 properties worldwide, of which 897 cultural properties and 218 natural properties. Fifty-two of these properties are considered in danger[8].

At the marking of its 50th anniversary, the Convention is facing some significant global challenges: first, political issues of representation and identity – for what concerns the geographical location of the World Heritage Sites and the understanding of heritage and the values it embeds[9]; second, political matters of cultural democratisation – with culture becoming more and more a stratified concept, embracing the intangible and everyday cultural practices as well as lifestyles[10]; third, redefining the role of communities in managing, preserving and developing heritage, and the impact of heritage policies implementation on the life of communities[11].

The re-balancing of power equilibria in the World Heritage Convention and its ramifications is relatively recent. The practice of conservation, the ethos and knowledge which inspired it, and the geographical locations of the majority of World Heritage sites were relegated to the Western World and the Global North, with Italy holding the primacy for the most significant number of sites

[8] UNESCO World Heritage List, *https://whc.unesco.org/pg.cfm?cid=31&l=en&&&&mode=table&order=region*.

[9] C. Brumann, A.É. Gfeller, *Cultural landscapes and the UNESCO World Heritage List: perpetuating European dominance*, in *International Journal of Heritage Studies*, 28, 2022, 2, pp. 147-162.

[10] K. Kuutma, *From folklore to intangible heritage*, in *A companion to heritage studies*, edited by W. Logan, M.N. Craith, U. Kockel, Wiley, Chichester, 2015, pp. 41-54.

[11] H. Jang, J. Mennis, *The Role of Local Communities and Well-Being in UNESCO World Heritage Site Conservation: An Analysis of the Operational Guidelines, 1994–2019*, in *Sustainability*, 13, 2021, 13, p. 7144.

inscribed in the World Heritage List, followed by China[12]. The inscription of a Country's sites in the World Heritage List shows patterned associations with economic determinants such as the relative size of the tourist sectors and historical GDP. In contrast, political factors such as federalism and being a member of the UN Security Council further corroborated the likelihood for a Nation's sites to be listed[13]. Even though recent times have seen the progressive expansion in the typology and number of places for less represented and less powerful Countries, imbalances are still noted today as political factors such as the presence of the Country in the World Heritage Committee, «the ecology of exchanging gifts and mutual benefits between political alliances» are enumerated as significant determinants for the listing[14] – despite, formally, early documents were already concerned with «civilisations, cultural areas and regions that are underrepresented»[15].

The Convention did not formally recognise the notion of intangible heritage until 2003[16]: up to that point, attention was mainly placed on sites (articulated into rigid taxonomies) and, consequently, on strict curatorial conservation rules – natural and cultural heritage were, in other words, understood as 'things', material and static, imbued with high symbolic meanings and functions, and characterized by ambiguous (if not controversial) notions like «authenticity»[17]

[12] UNESCO World Heritage List, *https://whc.unesco.org/en/list/*.

[13] B. S. Rey, P. Pamini, L. Steiner, *Explaining the World Heritage List: an empirical study*, in *International Review of Economics*, 60, 2013, 1, pp. 1-19.

[14] L. Yongqi *et al.*, *A quantitative description of the spatial-temporal distribution and evolution pattern of world cultural heritage*, in *Heritage Science*, 9, 2021, 1, pp. 1-14.

[15] UNESCO, Evaluation report on the implementation of the World Heritage Convention, 1992, p. 7, *https://whc.unesco.org/en/documents/643*.

[16] UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 2003, *http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html*.

[17] Our World heritage, Session 11: Integrity and Authenticity, *www.ourworldheritage.org/nha_s11/#:~:text=Authenticity%20and%2For%20integrity%20are,as%20a%20%E2%80%9Cheritage%E2%80%9D%20feature*.

and «wilderness»[18]: the former was epitomized in the Venice charter (the inspiration for the Operational Guidelines for the implementation of the WHC) as authenticity in materials, workmanship, design and setting; the latter was implemented to define areas exclusive of human significant biophysical disturbance[19].

Even considering the appropriate use of these terminologies in heritage conservation settings, two critical debates emerged. The first concerns the concept of authenticity, which implies the immutability of heritage sites and monuments, for which «defining a building as being of historical and cultural value meant placing it at a certain distance from everyday life»[20]; the second rotates around the notion of wilderness, remoteness from urban settlements and modern infrastructure[21], which can be found in the context of the cultural landscape protection and legislation for the protection of natural heritage.

The 1994 Nara Declaration, a milestone amongst the UNESCO cultural heritage conservation guidelines, involved the disagreement around the concept of authenticity, highlighting the need for diversity within the conservation procedures in light of the requirement for an evaluation of cultural values and resources which should not be fixed in any geographical orthodoxy, but rather specific for their context, stressing the appreciation of intangible values and the «full respect to the social and cultural values of all societies, in examining the outstanding universal value of cultural properties proposed for the World Heritage List»[22]. The catalyst for the renewal process of 'best practice' concept and challenge to the global epistemological debate, the Nara Declaration also represents one of

[18] C.F. Kormos *et al.*, *A Wilderness Approach under the World Heritage Convention*, 9 September 2015, *https://conbio.onlinelibrary.wiley.com/doi/full/10.1111/conl.12205*.

[19] C.F. Kormos, *op. cit.*

[20] UNESCO, Report of the World Commission on Culture and Development, 1996, *https://unesdoc.unesco.org/ark:/48223/pf0000104333*.

[21] Cyril F. Kormos, *op. cit.*

[22] UNESCO, ICOMOS, ICCROM, The Nara Document on Authenticity, UNESCO, Nara, 1994.

the first widely recognised contributions of the Asia-Pacific region to the UNESCO policy-making processes[23].

In New Zealand, the National Parks Act 1952 historically defined «wilderness areas» as those to «be kept and maintained in a state of nature», shaped in a resemblance to a 1921 proposal to the U.S. National Park System[24]. The paper *De-constructing New Zealand National Space: The Museum and National Park* by Jillian Wallis utilises the example of World Heritage site Tongariro National Park to convey that «the adoption of a wilderness classification thereby required the erasure of any prehistory», particularly the «erasure of Māori significance»[25].

3. *The conception of cultural landscapes: leveraging the List to advance the Convention*

During the 16th session of the World Heritage Committee (1992), the site-based, Western-centric approach to cultural-as-architectural heritage conservation was challenged significantly by introducing the cultural landscape category. Originating from the German scholarship of the 19th century, the concept began emerging as a field of priority in international scholarship already in the second half of the 20th century, when several international initiatives highlighted the widespread issues in the environmental and cultural heritage sectors: the UN Environment Programme, the UNESCO Man and the Biosphere Program, the UN General Conference which adopted the Convention for the Protection of Cul-

[23] K. Taylor, K. Altenburg, *Cultural Landscapes*, in *Asia-Pacific: Potential for Filling World Heritage Gaps*, in *International Journal of Heritage Studies*, 12, 2006, 3, pp. 267-282.

[24] J. Wallis, *De-constructing New Zealand National Space: The Museum and National Park*, in *Cultural Crossroads: Proceedings of the 26th International SAH-ANZ Conference*, The University of Auckland, 2-5 July 2009, p. 6.

[25] *Ibidem*.

tural and Natural Heritage – the World Heritage Convention[26]. All were bringing attention to the importance of preserving the world's natural and cultural heritage as a whole, even though the gap between nature and culture was still rooted in a western scientific mindset of compartmentalization.

Guidelines addressing the gap between the two spheres started to appear within the scholarship of cultural heritage conservation. The 1979 *Burra Charter* (published by Australia ICOMOS) and the 1981 *ICOMOS Florence Charter* brought attention to the dynamic and living aspects of heritage, the complementary roles of nature and culture and the multidisciplinary nature of heritage conservation[27]. They were not yet adopting the terminology cultural landscape, but foundations were laid in that regard.

The first acknowledgement of cultural landscapes as sites imbued with natural and cultural significance to the communities traces back to the region defined by UNESCO as «Asia Pacific»[28]. According to the 'State of World Heritage in the Asia-Pacific Region', «The Asia-Pacific region is at the origin of the development of the concept of cultural landscapes on the World Heritage List. The first three cultural landscapes inscribed on the List, Tongariro National Park in New Zealand, Uluru Kata Tjuta National Park in Australia, and the Banaue Rice Terraces in the Philippines, are all located in Asia and the Pacific»[29].

The 1992 WHC revision of the *Operational Guidelines for the Implementation of the World Heritage Convention* eventually identi-

[26] UNESCO World Heritage Committee, *Item 5 of the Provisional Agenda: Reports of the World Heritage Centre and the Advisory Bodies*, 43rd session of the World Heritage Committee *WHC/19/43.COM/5A*, Paris, 20 May 2019), p. 13, *https://whc.unesco.org/en/sessions/43com/documents*.

[27] G. Araoz, *New Considerations in Conservation Theory*, in T.L. Park, T. Artola-Guijarro, *1st IIWC Course on Wooden Heritage Conservation*, ICOMOS, 2019.

[28] M. Kawharu, *Ancestral landscapes and world heritage from a Maori viewpoint*, in *Journal of the Polynesian Society*, 118, 2009, 4, pp. 317-338.

[29] F. Jing *et al.*, *The State of World Heritage in the Asia-Pacific Region - 2003*. World Heritage Reports, 12, 2003. Available at: *https://whc.unesco.org/en/news/117*.

fied cultural landscapes as «combined works of nature and of man […] illustrative of the evolution of human society and settlement over time» and embracing «a diversity of manifestations of the interaction between humankind and its natural environment». Three main categories of cultural landscape were identified: i) designed, ii) organically evolved, and iii) associative. The latter is «justifiable by virtue of the powerful religious, artistic or cultural associations of the natural elements rather than material cultural evidence, which may be insignificant or even absent»[30].

This event significantly changed the operative processes of the WHC for what concerns the protection of cultural landscapes, incrementing the understanding of 'heritage of humanity' with the critical factor of local communities' interpretation. An emphasis was placed on interactions and evolution, thus adding dynamism to the concept of heritage while reconciling the human/cultural element with the natural one – both threatened by the same risk factors: human development, pollution, tourism and natural disasters[31]. For the first time, the acknowledgement of an evolving relationship with the environment allowed to «incorporate the belief systems and traditional knowledge of living cultures in a new dynamic approach to conservation, based on the active participation of a wider range of actors, from local populations […] to international consortiums»[32]. An influential role in the process was played by the pressures put on the Committee by non-Western institutions (and by representatives of the Asia-Pacific specifically) about the lack of representation of non-European cultures. The New Zealand representative of the International Union for the Conservation of Nature (IUCN) strongly supported the reform at the Octo-

[30] UNESCO Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, *Operational Guidelines for the Implementation of the World Heritage Convention*, 12 July 2017, §8.

[31] J.H. Stubbs, *Time honored: A global view of architectural conservation*, John Wiley & Sons, New Jersey, 2009, p. 28.

[32] S. Boukhari, *Beyond the monuments: a living heritage*, in *UNESCO sources*, 80, 1996, pp. 7-16.

ber 1992 meeting in the Vosges; three representatives from Oceania were present (although none were indigenous)[33].

In 1993, one year after the formal recognition of cultural landscapes as world heritage properties, the first site to be inscribed in the World Heritage List under the revised criteria of cultural landscapes was precisely New Zealand's Tongariro National Park[34]. The political vicissitudes on this land stretch back to the 1880s, when the *maunga* (sacred mountain tops) of Tongariro, Ngāuruhoe and Ruapehu were 'gifted' to the British Crown by Ngāti Tūwharetoa's (local iwi) chief in an attempt of protection: the agreement with the government ensured they could never be sold, becoming New Zealand's first, and the fourth National Park in the world[35]. It is interesting to note that Tongariro's nomination as Natural World Heritage was initially deferred in the late 1980s «until the New Zealand authorities have completed the new management plan which should give particular attention to placing limits on ski developments and to better reflecting the Māori cultural values as part of the management concept of the site»[36], to be soon approved in recognition of the improvement of «the management and protection of this site, particularly by limiting tourism developments and taking greater account of the cultural values»[37]. Finally, in 1993, the report for the candidacy to the newly formed notion of cultural landscape focused on Māori's connection to place and oral histories to support the cultural heritage values. Still, the Committee was largely unconvinced of the cultural heritage values until a tangible and material connection was provided: the *pou* (structural support)

[33] C. Brumann, A.É. Gfeller, *op. cit.*

[34] UNESCO World Heritage List, *https://whc.unesco.org/en/list/421/*.

[35] NZHistory, New Zealand history online, 'Tongariro mountains protected', Ministry for Culture and Heritage, *https://nzhistory.govt.nz/tongariro-mountains-gifted-to-crown*.

[36] UNESCO Decision CONF 005 VII.B.b) Deferred Examinations, *https://whc.unesco.org/en/decisions/3756*.

[37] UNESCO Decision CONF 004 VII. A Inscription: Tongariro National Park, New Zealand, *https://whc.unesco.org/en/decisions/3559*.

and the *whare* (ceremonial house)[38]. The same year «after careful consideration, the Committee decided to inscribe Tongariro National Park under cultural criterion»[39]. What surfaces from the UNESCO decisions' archive is that «this site was originally submitted as a mixed site». This would have happened before 1987 (the date of the first deferred examination) before the operational guidelines revision.

Another essential element that came to the fore with the Committee's decision was the disjunction between the cultural and natural criteria of evaluation: despite the newborn 'mixed site' status, evaluation remained anchored to the preexisting dichotomy (and essentially is today)[40]. In addition, it has been argued that the adjective 'ancestral' would be more appropriate than 'associative' to describe the Tongariro National Park World Heritage cultural landscape because it is better aligned with the concepts of identity, community, memory and historic connections with Māori culture. Merata Kawharu, Māori researcher on the Māori perspective on World Heritage, presented a proposal for a revision of the guidelines that considers the 2007 UN Declaration on the Rights of Indigenous Peoples and a suggestion for the Park's management of valuing the role of the Māori Heritage Council of the New Zealand Historic Places Trust (today Heritage New Zealand Pouhere Taonga, leading national historic heritage agency), and of Ngāti Tūwharetoa, the ancestral custodians of the area[41].

[38] M.F. Baird, *"The breath of the mountain is my heart": indigenous cultural landscapes and the politics of heritage*, in *International Journal of Heritage Studies*, 19, 2013, 4, pp. 327-340.

[39] *Ibidem*.

[40] I. Lilley, *Nature and culture in World Heritage management: A view from the Asia-Pacific (or, never waste a good crisis!)*, in *Terra australis*, 36, 2013, p. 20.

[41] M. Kawharu, *op. cit.*

4. *New Zealand World Heritage: internal political dynamics and first international achievements*

4.1. *Politics in policy: Tongariro as a contested space among several stakeholders*

The candidacy to the World Heritage List intertwines many political and heritage-related matters. For the first time, it acknowledged the active role of indigenous groups in shaping the intangible values attached to cultural landscapes, which came to the fore with the newborn definition and Tongariro specifically. Controversial political matters emerge, nonetheless, concerning both the role attributed to local communities and the rise of political bodies in non-Western regions, which were deemed 'recognizable' by a Western-based Committee. Concerning the part of communities, it has been argued that the political background of heritage nominations and landscape beautification help to bring power to a particular social group, representing a form of 'material exploitation' of the community's identity, often at the expense of the community itself.[42] In the specific case of Tongariro, the role of communities was acknowledged for what concerned *shaping* heritage, without any concern over their property and authority – it has critically been argued that «in some ways, the cultural landscape designation – as imagined by western experts – repositioned indigenous peoples outside of their systems of authority and positioned heritage experts as mediators of their heritage»[43].

Attempts to fill this controversial gap were made a few years later, in 2000, when New Zealand, alongside Australia and Canada, was the proponent of the World Heritage Indigenous Peoples Council of Experts (WHIPCOE) at the 24th UNESCO World Heritage Committee in Cairns, Australia. The proposal to establish

[42] P. Claval, *Changing conceptions of heritage and landscape*, in *Heritage, memory and the politics of Identity*, Routledge, London, 2016, pp. 97-106.

[43] M.F. Baird, *op. cit.*

WHIPCOE came within the World Indigenous People's Forum, which was called for by rising concerns over indigenous people's lack of involvement in the decision-making and implementation of heritage policies, strategies, and legal tools – especially when they are concerned with indigenous knowledge, values and traditions attached to their ancestral lands, now designated as Heritage Sites[44]. WHIPCOE was a failed attempt, which nonetheless represented an important milestone in New Zealand's history in the advocacy of indigenous rights and authority over heritage matters.

4.2. *ICOMOS New Zealand and the Charter*

The International Council on Monuments and Sites was created in parallel with the signature of the *International Charter for the Conservation and Restoration of Monuments and Sites*, also known as the 'Venice Charter' of 1964, the most world-acknowledged document for cultural-as architectural heritage conservation. ICOMOS New Zealand headquarters was conceived in 1987 as a «small group of heritage professionals who wanted to safeguard the integrity of New Zealand's unique cultural heritage – indigenous, colonial and beyond». To set some unified and nationally specific guidelines for conservation, in 1993, the members developed and published the first version of the *ICOMOS New Zealand Charter for the Conservation of Places of Cultural Heritage Value (1993, 2010)*, which while based on the principles the Venice Charter and its Australian descendant, the 1979 Burra Charter, meets the unique context of New Zealand's history aligning with the bi-cultural agreement between Māori culture and the Crown known as the Treaty of Waitangi of 1840. The acknowledgement was soon strengthened with the translation of the Charter in *te reo Māori* (Māori language)

[44] L. Meskell, *UNESCO and the fate of the World Heritage Indigenous Peoples Council of Experts (WHIPCOE)*, in *International Journal of Cultural Property*, 20, 2013, 2, pp. 155-174.

in 1995, including the bi-lingual credit of the organisation's name: Te Mana O Nga Pouwhenua O Te Ao[45].

The ICOMOS New Zealand Charter initially followed almost to the letter its Venetian ancestor, but mentioned the Treaty of Waitangi as the founding document of the nation and the basis for indigenous guardianship; in 2010, when a reviewed and expanded version of the Charter was published, the concepts underlying the Treaty were featured in *te reo*; a renewed emphasis was placed on the intangible cultural values attached to material heritage, and the role of communities in preserving and transmitting the necessary knowledge about such heritage, were formalized: «Particular *matauranga*, or knowledge of cultural heritage meaning, value, and practice, is associated with places. Matauranga is sustained and transmitted through oral, written, and physical forms determined by tangata whenua. The conservation of such places is therefore conditional on decisions made in associated tangata whenua communities, and should proceed only in this context»[46]. Similarly, the text proved particularly unique in that it weaves «the *tapu* (sacred) or spiritual connections of place and object as it is appreciated and guided by the indigenous culture of Aotearoa New Zealand, as well as the European notions of conservation»[47].

The 2010 Charter additionally stated that «Respect for all forms of knowledge and existing evidence, of both tangible and intangible values, is essential to the authenticity and integrity of the place», – which seems to bear apparent reference to the 2003 UNESCO convention, which formalized the notion and protection of intangible heritage; it is noteworthy, however, that New Zealand was not a party of the 2003 Convention[48], as «UNESCO has a very modest

[45] P. Dziwulska, in *Weaving. Entanglement*, edited by A. Melis *et al.*, Maretti Editore, Imola, 2022.

[46] ICOMOS New Zealand, *ICOMOS New Zealand Charter for the Conservation of Places of Cultural Heritage Value*, 2010.

[47] P. Dziwulska, *op. cit.*

[48] UNESCO, Intangible Cultural Heritage: New Zealand and the 2003 Convention, *https://ich.unesco.org/en/state/new-zealand-NZ*.

presence in New Zealand, which has limited the direct influence of the 2003 Convention. Heritage New Zealand, the central government entity responsible for the Heritage New Zealand Pouhere Taonga Act 2014, makes no reference to the UNESCO Convention on its website and documents, though there is recognition of intangible heritage»[49].

4.3. *The Department of Conservation's strategies and controversies*

DoC is a New Zealand Government Department which declares itself as the agency in charge of conserving New Zealand's natural and historic heritage and a corporate member of ICOMOS New Zealand[50]. The major achievement of DoC in the framework of the WHC was its role in preparing and publishing the study *Our World Heritage*, the World Heritage Tentative List exercise in 2007[51]; the same year, the first WHC General Assembly (GA) was hosted in Christchurch, an event to which DoC assigned great expectation of exposure amongst the international community[52].

The Tentative List came at the closing of Sir Tumu Te Heuheu Tukino VIII's mandate as chairman of the World Heritage Committee – the first-ever indigenous chair of the WHC, who brought Māori values in the ethos of World Heritage both nationally and globally. During this year, the Pacific 2009 Action Plan developed during the Tongariro workshops (events detailed in the following

[49] H. Viriaere, C. Miller, *Living indigenous heritage: Planning for Māori food gardens in Aotearoa/New Zealand*, in *Planning Practice & Research*, 33, 2018, 4, pp. 409-425.

[50] Department of Conservation Te Papa Atawhai, *About Us*, *https://www.doc.govt.nz/about-us/*.

[51] World Heritage Centre, *New Zealand Tentative List* (Last revision 30.07.2007), *https://whc.unesco.org/en/tentativelists/state=nz*.

[52] New Zealand Department of Conservation, *World Heritage*, *www.doc.govt.nz/about-us/international-agreements/world-heritage/*.

paragraph) was also brought forward[53]. Most importantly, under his leadership, a 5th 'C' was added to the existing Cs of UNESCO's strategic objectives (Credibility, Conservation, Communication, Capacity Building) – standing for 'Community'. The role recognized and assigned to communities was intended to be the establishment of the World Heritage List and its daily management, promotion and development[54].

This addition might have been influenced by other global developments concerning the Convention a few years earlier, weaving the sustainability and heritage discourses in the WHC. In 2002, the Committee adopted the Budapest Declaration, which committed to «ensure an appropriate and equitable balance between conservation, sustainability and development, so that World Heritage properties can be protected through appropriate activities contributing to the social and economic development and the quality of life of our communities», while in 2005 the Sustainable Development Goals were introduced in the Operational Guidelines for the Implementation of the WHC[55].

Most NZ DoC projects in its 35 years of activity have shown fewer efforts towards cultural heritage preservation than a commitment to preserving the *tout-court* natural environments and biodiversity of New Zealand, exacerbating the absence of solely cultural World Heritage sites in the country and highlighting the unbalance toward perceiving New Zealand as a 'green paradise', often merely a tourist-friendly catch-phrase, disconnected by human history[56].

The pressure on New Zealand ecosystems and specifically on Tongariro experienced a dramatic surge with the nomination of Tongariro as a World Heritage cultural landscape, which re-

[53] H. MacDonald, in *Journal of the Polynesian Society*, 125, 2016, 1, pp. 1-84.

[54] S. Telcz, *The Strategic Objectives of the World Heritage Convention: the "five C's"*, *www.scola-telcz.net/kopie-von-5-c-s-1*.

[55] UNESCO, World Heritage and Sustainable Development, *https://whc.unesco.org/en/sustainabledevelopment/*.

[56] M. O'Keeffe, K.L. Jones, *Prospects for World Heritage in New Zealand and Polynesia*, in *Historic Environment*, 14, 2000, 5, pp. 37-43.

mained constant over the years. As the Visitor Trends Report reported[57], tourism experienced in those years «a long period of rapid growth that finished in 2004». Still, in 2012, however, there were 2,564,618 international visitor arrivals in New Zealand. In 2021, In Tongariro National Park, the number of hikers on the Tongariro Alpine Crossing reached 122,200 – even without international visitor flows[58].

Because New Zealand strongly relies on tourism, DoC has made fewer efforts towards the de-saturation of the tourism industry and the respect for the carrying capacity of the sites and instead adopted mitigating strategies relying on tourists' responsibility, such as the Tiaki Promise, «a pledge encouraging all visitors in New Zealand to behave in a way that protects the environment, respects culture and keeps everyone safe»[59].

Local communities and researchers are acting bottom-up to find practical solutions and rewrite narratives of touristic imagery (such as the one which was massively over-imposed on the Tongariro with the movie adaptation of Tolkien's Lord of the Rings)[60]. Tourism-related damage can be itself a threat to a site's World Heritage status, and Tongariro National Park works again as an example: in 2020, news of breaches of customary practices strongly advocated by the local community suggested the WH listing of Tongariro National Park World Heritage cultural landscape jeopardy in the upcoming 2021 review.

A *rāhui* (a three days temporary restriction to the trails) was put in place by representatives of the local iwi after the death of a

[57] M. Harbrow, *Visitor Trends Report: Tongariro, Whanganui, Taranaki Conservancy*, New Zealand Department of Conservation, 2013, *www.doc.govt.nz/Documents/about-doc/role/visitor-research/twt-visitor-trends-report.pdf*.

[58] A. Mcrae, *The number of visitors to popular national parks could be capped during peak times*, Radio New Zealand, 2021, *www.stuff.co.nz/travel/experiences/national-parks/300199704/the-number-of-visitors-to-popular-national-parks-could-be-capped-during-peak-times*.

[59] A. Insch, *The challenges of over-tourism facing New Zealand: Risks and responses*, in *Journal of Destination Marketing & Management*, 15, 2020, 100378.

[60] J. Wallis, *op. cit.*

tramper, in acknowledgement of the tragedy that occurred on the land, «to allow time for healing, for not only the environment but the grieving whānau and those who were involved in the recovery of the body»; «information centers were notified, signs were put up at, the entrances of the track and DOC staff were onsite to inform trampers to take alternative routes» nonetheless, some casual visitors have been ignoring it. «We do get challenged on it mostly by New Zealanders – they struggle to understand the concept of it and are often quite willing to come and give their two cents on it» the words of the spokesperson on the incident[61].

5. *The turn of the century: the Asia-Pacific region in the WHC*

At the end of the century, UNESCO World Heritage became a tool in the Asia-Pacific region. Building awareness about the connections between the indigenous cultural practices and landmarks like Tongariro and Uluru Kata-Tjuta National Parks (respectively, first and second cultural landscapes inscribed), about their significant and ongoing contribution to the maintenance and care of places and the continuity and development of cultural heritage in the Pacific, became a shared goal of the actors involved. Building capacity in the greatly un-represented region to include more World Heritage sites became a task force: the UNESCO Pacific World Heritage Program, which formulated three 4-years regional Action Plans driven by ICOMOS in the region (2004-2009, 2010-2015, 2016-2020)[62]. The outcomes still showed a lagging situation for the Pacific Island Countries: only two properties were listed in 2008 and

[61] Radio New Zealand, News that New Zealanders are ignoring Tongariro rāhui upsets iwi, March 11th, 2020, *www.rnz.co.nz/news/te-manu-korihi/411477/news-that-new-zealanders-are-ignoring-tongariro-rahui-upsets-iwi*.

[62] U.S. Department of Interior, UNESCO Pacific World Heritage program, *https://www.doi.gov/sites/doi.gov/files/uploads/oia-12032019-world-heritage-in-pacific.pdf*.

2010, and 2012 marked the end of the 2nd cycle of the periodic reporting for Asia and Pacific (the last available report).

Since New Zealand marked the first cultural landscape milestone for the Asia Pacific with Tongariro entering the list, the majority of Asia Pacific properties listed in the WHL, especially for the Southern Hemisphere, have been of the 'mixed sort'. While this is an indicator of the fact that the new definition is more responsive to more complex and non-Western interpretations of heritage, what is also notable is that many Countries in the region still opt for candidating their resources to the Natural Heritage list: «The nations we are encouraging to nominate cultural landscapes and mixed sites so that local perspectives on World Heritage are recognized and valued often really can't afford to nominate and then manage such properties, even with external assistance. This means that when offered a choice by a process divided between nature and culture, they quite pragmatically tend to put most of their eggs in the better-built basket, namely natural heritage management, to help ensure access to the supposed benefits of World Heritage recognition»[63].

New Zealand's DoC and Australia's Department of Environment and Heritage (DEH) worked together to organize the Pacific Island World Heritage Workshop (also called the Tongariro Workshop), an event to be held in 2006 in Tongariro National Park to encourage capacity building in the region, through the identification of individual properties of potential Outstanding Universal Value[64]. With other gatherings in Tongariro, namely a UNESCO workshop in 2000 and the South Pacific World Heritage Site Managers Workshop, the workshop was instrumental in developing the Pacific 2009 Action Plan[65]. Furthermore, the program 'World Heritage Pacific 2009' was created to guide Pacific Island states and

[63] I. Lilley, *Nature and culture in World Heritage management: A view from the Asia-Pacific (or, never waste a good crisis!)*, cit.

[64] ICOMOS International, *The World Heritage List: Filling the Gaps; an Action Plan for the Future Analysis*, ICOMOS, 2004, p. 14.

[65] UNESCO, *Pacific Island World Heritage Workshop*, *https://whc.unesco.org/en/events/345/*.

territories in implementing the World Heritage Convention over five years.

As part of the broad program, the Australasian ICOMOS committees conducted a series of analyses of the cultural landscapes inscribed on the World Heritage List and Tentative Lists, based on three complementary scientific approaches: Typological, Chronological-Regional and Thematic Framework Analysis[66]. A weakness highlighted by the study was, first of all, the Asia-Pacific geographical determination – as cultural assimilation of the Pacific Islands within the Asian continent was limiting and disproportional of the unique cultures of the Pacific Islands diluted within the much larger territories and demographics of Asia, reinforcing the under-representation on the World Heritage List. Under the Typological framework, the main under-represented Pacific cultural landscapes identified were traditional agricultural landscapes and sacred and symbolic significance of natural features (which, however, had the potential to be virtually inscribed into the manufactured landscapes and associative cultural landscapes). The Chronological study demonstrated how significant under-represented cultures and civilizations have emerged and developed from Oceania; indigenous cultures substantially changed through time in their social formations and use of the landscape and its resources. These points of relevance were represented in the Thematic Framework analyses as well, in the sub-themes of i) expressions of society; ii) creative responses and continuity (monuments, groups of buildings and sites); iii) spiritual responses (religions); iv) use of natural resources; v) movement of peoples; vi) development of technologies[67].

Thanks to this study and its dissemination, by 2007, the implementation of the Convention in the region led to nine of the Pacific Island States Parties (including Aotearoa/New Zealand) submitting their Tentative Lists of potential World Heritage properties.

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[66] A. Smith, K.L. Jones, *Cultural landscapes of the Pacific Islands*, 2007, pp. 17-62.

[67] A. Smith, K.L. Jones, *op. cit.*

Scholars and professionals from Australia and New Zealand continue to join forces advocating for the region's less represented smaller Island Countries. However, disparities between the two macro-areas (of New Zealand and Australia on the one hand and the Pacific Islands on the other) concern legal enforcement, financial status and human resources in the heritage sectors[68].

6. *A most silent achievement: the unanswered challenges and future developments of the WHC in New Zealand*

From the birth of ICOMOS New Zealand to the mandate of Sir Tukino VIII as chairman of the World Heritage Commission, 20 years have passed in which New Zealand has built its cultural policy framework internally, drawing in a curiously mechanical way from different sources: the Venice Charter, British systems of historic buildings protection, American examples in the National Park management and other UNESCO tools and attached conceptions that pertained to the Western mindset on cultural heritage. In an additional unique way, over time, the sensitiveness towards issues of representation and authority of indigenous and local cultures has reshaped these tools and adapted them to the local context; this happened in the light of both a national reckoning and a global surge for the role of communities in managing, protecting, restoring, transmitting and developing heritage in its multi-faceted and layered dimensions – despite an initial lack of commitment to the 2003 Convention on Intangible Heritage.

At the same time, and conversely, New Zealand has had direct influences on the WHC: some of them did not translate into actual policy, such as the 2000 proposal for the establishment of the World Heritage Indigenous Peoples Council of Experts; some others did enter the international framework, such as the 1992/1993

[68] *UNESCO Periodic Reporting 2nd Cycle: Asia & Pacific*, 2012, *https://whc.unesco.org/en/activities/682/*.

definition of associative cultural landscape and the 2007 introduction of the 5 C for 'community' in the Convention's strategic objectives, representing a fruitful season for New Zealand on the WHC stage. It is most definitively not a coincidence that the whakapapa of Paramount Chief Tumu Te Heuheu Tukino VIII is linked with the iwi of Ngāti Tuwharetoa, customary protectors of the Tongariro lands, who are actively defending the cultural association of such land from the detrimental effects of colonialism and development since at least the 1880s.

And yet, after decades of international developments, the last 15 years (from 2007 up to the present day) are marked by a silent detachment: the most active involvement of DoC with the World Heritage Centre somehow interrupts within the first decade of the new millennium, and the Tentative List has not since been reviewed (the World Heritage Centre suggests this should be done at least every ten years). The disconnection is most likely caused by a lack of resources and focuses allocated to the Government departments. ICOMOS New Zealand, conscious of this missed opportunity, has been vocal with the national authorities multiple times and created a working group explicitly addressing the issue. However, the voluntary-based non-profit organization has a limited agency under its role of body advisor and the non-executive nature of its recommendations; therefore, no significant developments have occurred until the present day.

7. *Conclusions*

The paper has analyzed the mutual influences of the global and national scenarios between the World Heritage Convention and New Zealand through the lens of the significant milestones that have characterized the legal path of the convention and its implementation in New Zealand heritage policies. In particular, it has presented an introductory overview of the original Western-centric Weltanschauung, which has inspired the Convention's principles

and the operational guidelines for its implementation. Firstly, it has focused on a crucial evolution of the Convention's original concepts with the creation of a cultural landscape label for mixed sites of natural and cultural outstanding universal value, and the role the Asia Pacific (and New Zealand in particular) has played in the 1992 Convention establishing cultural landscapes, using political transformations and of progressive incorporation of indigenous values and sensemaking into the notion of local heritage, as is demonstrated by the ICOMOS New Zealand Charter and its reference to the Treaty of Waitangi.

Secondly, it has presented the achievements of two major political bodies for heritage matters, ICOMOS New Zealand and the Department of Conservation: the former, in bringing forward a progressively more original interpretation of the international ICOMOS Venice Charter, with a policy that fully incorporated Māori worldviews and ethos towards heritage properties and the symbolic, intangible values attached to it; the latter, in promoting the role of New Zealand on a global scale, peaked in the first WHC GA hosted in Christchurch, in 2007, at the end of Sir Tukino VIII's mandate as chairman of the World Heritage Committee, when the 5th C of Community was added to the strategic objectives of global heritage protection.

Thirdly, it has presented the role of New Zealand as a pivot for the agency and capacity building of the whole Pacific with the Pacific 2009 Action Plan, eventually leading to new Tentative Lists being produced; however, the Plan showed controversies, especially as the capacity to implement WHC policies from the part of Pacific Countries seemed to be related to Western standards. Conclusively, a quiet retirement can be noted from 2009 onwards with regards to New Zealand's position within the WHC discourse, characterized by a general lack of funding, a disquieting disregard for matters concerning the sustainability of heritage (such as the overtouristization of Tongariro) and poor implementation of the WHC reporting exercises and tools' updates, such as the Tentative List.

Several turning points can be noted: first, the formation of New Zealand's legal and operational framework for cultural heritage policy, with a strong influence from Western tradition; and subsequently, the strengthening of its position within the scenario of global players concerning heritage, on which the Nation could leverage to propose the expanded notion of cultural landscape. Second, the increasing relevance acquired by indigenous culture initially instrumentalized to 'characterize' Tongariro as a mixed site (with the 1992 WHC resolution), and which later received a more significant meaning with the advocacy for the role of indigenous experts in decision making and implementation of heritage policies: in the 2000 WHIPCOE proposal and the 5th C of the strategic objectives, for what concerns the international level, and in the ICOMOS New Zealand Charter, as an example of the national ones. New Zealand has oscillated between a lack of agency (evident in its absence as a party member of the 2003 Convention on Intangible Heritage) and a strong position in the Asia Pacific and international discourse.

A twofold movement emerges between the Western political framework and local Māori values at national and international levels. The legacy of New Zealand as a British colony is likely to have accelerated the process of assimilation to the Western legal framework. In contrast, the Polynesian cultural root has played a significant role in determining some shifts in the WHC in conceptualizing cultural landscapes and the consequent geographical location of heritage sites inscribed on the List. The factual preservation of sites and the practical accounting for Māori ethos in managing heritage, however, is all but assured, in the light of the distance of the national bodies in charge of heritage executive policymaking and implementation from it and an imbalance in commercial/touristic goals rather than on communities.

Overall, the dialogue with Oceania can be read as a critical development of the 50 years old Convention. Without assuming having mentioned the totality of initiatives and connections, this paper has demonstrated that a shift of focus and definition of heritage

preservation from the universal cradle of civilization – Europe – to the most significant water body on Earth – the Pacific Ocean – has been and still functions as a catalyst for change. The mighty human knowledge basin represented by indigenous living cultures has been and can be used by the Convention in supporting initiatives paramount for this century: climate change counter-actions and reconnection of culture with a natural environment now clearly lived unsustainably. It shed light on perspectives abandoned on a large scale by most major state parties, but that can be found in any small community: responsibility towards the posterity on the base of heritage guardianship.

Costanza Rizzetto

WHICH PROTECTION AGAINST THE DESTRUCTION OF THE CULTURAL HERITAGE OF «NON OUTSTANDING UNIVERSAL VALUE»? A CRITICAL ANALYSIS OF THE WORLD HERITAGE CONVENTION FRAMEWORK IN THE LIGHT OF THE RECENT EPISODES OF 'ICONOCLASTIC PROPAGANDA'*

Abstract: The cultural cleansing campaign accomplished in Afghanistan by the Taliban in August 2021, as well as the attacks against the Confederate memorials coming along with the Black Lives Matter protests since May 2020, have shown how the intentional destruction of the cultural heritage of States in times of peace still represents, at 20 years since the episode of the Buddhas of Bamiyan, an unsolved issue within the framework of the World Heritage Convention.

Saluted as legitimate episodes of 'cultural renovation' by domestic authorities, such acts have been mainly overlooked by the international community, which appears as having perceived them as legitimate actions of internal affairs carried out in the context of wider cultural policies or political programs. As for the only concern raised at the international level in the aftermath of such events, the risk of deterioration and loss of those targeted cultural goods included in the World Heritage List the inscription in which, conceived the list as the UNESCO referential inventory of worldwide cultural heritage, seem to represent the condition for activating the international cultural heritage protection mechanism established by the World Heritage Convention.

On the contrary, no reference has ever been done to all those cultural elements which, although being also acknowledged as part of the cultural heritage of States, were not inscribed in the World Heritage List at the moments of the attacks. Falling outside from the scope of the international protection framework established by article 4 and following of the World Heritage Convention, the competence on such cultural property seems as having in toto been deferred to the domestic jurisdiction of States Parties, left free to determine the fate of such goods upon their own discretion.

As for the reasons of such discrepancy, the fact that the World Heritage Convention seem not to entail, at the current time, any general obligation towards the

* Double-blind peer reviewed content.

conservation of all the elements of cultural heritage of humanity. Rather, such safeguard seems to be reserved, exclusively, to those cultural elements inscribed in the World Heritage because of their «outstanding universal value» by the World Heritage Committee, in which hands relies, de facto, the conferral of the international protection accorded by the World Heritage Convention.
All this, it appears, to the detriment of all those non inscribed cultural goods which, although representing part of the «cultural heritage of nations» by the means of the preamble of the Convention, appear as mainly overlooked by the World Heritage Convention, in spite of the treaty's declared aim of protecting all the cultural expressions coexisting at the global level.
In the light of all the above, the question remains if it is possible to identify, within the UN framework, and, notably, in the international framework for sustainable development, any rule such as to allow a more inclusive interpretation of the World Heritage Convention, ensuring a universal protection to all the artistic and historic heritage of nations – being such property inscribed or not in the World Heritage List.

1. *Introduction. The recent attacks against cultural heritage carried out in the territories of Afghanistan and United States and the increasing worldwide phenomenon of 'iconoclastic propaganda'*

At twenty years since the destruction of the Buddhas of Bamiyan, Afghanistan nowadays seems to face a new risk of looting and destruction of its cultural heritage and diversity. Since the Taliban takeover in August 2021, several episodes of 'iconoclastic propaganda' have been occurring in various areas of the country, jeopardizing an integral part of its monuments and sites. As for the reason of such destruction, the perceived contrast of such cultural property with the official message of the Taliban's regime. As it has been reported by the international press, several religious and cultural sites considered as a vital element of the social cohesion for the people of Afghanistan have been put at risk by Taliban's cultural cleansing campaigns, as well as many exhibition areas and local museums including the National Museum in Kabul[1].

[1] See UNESCO Director-General Audrey Azoulay statement, 19th August 2021, available at *https://en.unesco.org/news/afghanistan-unesco-calls-protection-cultural-heritage-its-diversity*.

On the other side of the globe, at almost two years since the outbreak of the *Black Lives Matter* demonstrations following George Floyd's murder in May 2020, a number of monuments and memorials has been vandalized, destroyed or removed by demonstrators in several cities of the United States. Just to mention a few, have been toppled down over the course of the protests the General Lee Memorial in Portsmouth, the Confederate Monument of Alexandria, and the statues of Roosevelt and Colombo, respectively, in New York City and Boston[2]. In such circumstances, the demolition of the targeted monuments has been accompanied, in most of the occasions, by the authorization or approval of the local authorities. Perceived as 'dark heritage' symbols, such elements have been appointed as a potential catalyst of social tensions, to be eradicated from civil society together with all the traces of the contested 'white supremacy' regime[3].

Although carried out in utterly different scenarios, such acts may not represent isolated episodes. On the contrary, they appear as representing two expressions of the same phenomenology which, recognizing in statues and monuments potential 'enemies' for determined societies, is worldwide jeopardizing the cultural heritage of peoples even in absence of armed conflicts. As it has been highlighted by the former Special Rapporteur in the field of cultural rights, in fact, since the early 21st century the international community is witnessing the growth of a new wave of 'cultural engineering' which, conceived as part of wider political programs carried out

[2] C. Selvin, T. Solomon, *Toppled and Removed Monuments: A Continually Updated Guide to Statues and the Black Lives Matter Protests*, June 11, 2020, in *Artnews.com* (*www.artnews.com/art-news/news/monuments-black-lives-matter-guide-1202690845/*).

[3] «[the statue's] continued presence could lead to injury or violence and therefore must be immediately removed». See the declarations of the Major of Norfolk (Virginia), Kenneth Cooper Alexander. See also the declarations released by the Major of Raleigh (North Carolina) concerning the removal of the Confederate monuments placed in front of the City Hall.

by entitled authorities, is progressively endangering the diversity of cultural property within the territories of States[4].

Seeking the homogenization of cultural and historical views, these cultural cleansing campaigns have the objective of creating an historical narrative in line with the official or majoritarian discourse. To this end, they seek to eradicate any cultural expression not in accord with such visions. This, notably, by the means of the removal of such symbols from public space or, even, of their complete destruction.

As it happened in the case of the toppling down of the Confederate memorials, such acts of *in situ* cultural heritage deliberate destruction are, when not carried out directly by them, openly justified by the competent authorities, proclaiming them as valuable expressions of Erasing public history[5].

Although often at the center of the public debate, all these episodes of iconoclastic propaganda seem to have provoked a rather fuzzy reaction within at the international scope[6]. Apart from few declarations released on such issue by isolated politicians, the global arena appears as having mostly given up on taking a clear and uniform stand on such events, rather mainly relegating the issue to a question of purely domestic law.

As a matter of fact, the only concern which has been raised by the international community the aftermath of such events refers to the risk of loss of those elements of cultural property recognized as relevant parts of the cultural heritage of mankind which, due to

[4] Special Rapporteur in the field of Cultural Rights, Report on the intentional destruction of cultural heritage as a violation of human rights, A/71/317, para. 35 and ss., 9th August 2016.

[5] See D. Abrahams, *Connecting Past and Present: How to Understand the Idea of Erasing History*, 2020.

[6] In particular, see the declarations of the Prime Minister of England Boris Johnson and of the French President Emmanuel Macron in the aftermath of the Black Lives Matter mass demonstrations occurring in the United Kingdom and in France in June 2020 (*https://jacobinitalia.it/buttare-giu-le-statue-serve-a-elaborare-la-storia/*).

their inclusion in the UNESCO 1972 World Heritage List, are acknowledged as deserving international protection[7].

Such approach comes clear in the case of Afghanistan. In that context, the UNESCO Director-General declared the organization's commitment in preserving the cultural heritage of mankind situated in the territories of Afghanistan and endangered by the Taliban's cultural cleansing. In her Declaration, the Director-General makes specific reference to the Minaret and Archaeological Remains of Jam and the Cultural Landscape and Archaeological Remains of the Bamiyan Valley, which are inscribed, since respectively 2002 and 2003, in the World Heritage List[8].

On the contrary, nor a similar declaration, nor any kind of reaction, was registered from the international community in the aftermath of the demolitions and destructions carried out against those monuments not included in the World Heritage List while targeted by the deliberate attacks *in situ*.

Such episodes – occurring, notably, in the context of the Black Lives Matter protests –, appear as having been mainly omitted by the international community, which has chosen to focus, rather, on the political and social issues linked to such events not directly entailing the cultural heritage destruction.

Hence, dozens of cultural goods have been dismantled, within the territories of a number of States, because perceived as deviating from the official discourses or, as in the case of the Confederate memorials, no longer acceptable for civil society. This, in the silence of the international community and, in particular, of the World Heritage Convention. Although applicable within the territories of the States theatres of such iconoclastic propaganda, in fact, the Convention seems not to provide, at its actual state of interpretation, any kind of protection to all those monuments targeted by

[7] Convention concerning the Protection of the World Cultural and Natural Heritage (adopted in Paris, 16th November 1972. Entered to force in 1975, «World Heritage Convention» or «the Convention»), UNESCO.

[8] See the World Heritage Convention Report on Afghanistan, available at *https://whc.unesco.org/en/statesparties/af*.

the intentional attacks not included in the scope of its World Heritage List.

In the light of this premise, the aim of the present contribution aims at shedding some light on the exhaustiveness of the mechanism put in place by the World Heritage Convention for the protection of the cultural heritage of States. In particular, the idea is to assess if it is possible to identify, within the framework of the Convention, a norm such as to provide international protection to all those cultural goods not considered as of 'exceptional value' by the means of the Convention, in virtue of the intergenerational value attributed to them by the international norm set for Sustainable Development and, in particular, by UN Agenda 2030.

2. *The conservation of cultural heritage non «outstanding universal value» in the framework of the World Heritage Convention: which protection in case of 'peaceful' destruction of national cultural goods?*

Conceived in the context of the safeguarding campaign launched by UNESCO to preserve the Abu Simbel temple from the construction of the Aswan High Dam in Egypt, the World Heritage Convention is the international core treaty for cultural heritage preservation in times of peace. Ratified by 94 States as of March 2022, the Convention seeks to protect the cultural heritage of mankind from the consequences of the «evolving social and economic conditions», which seem to put it at risk even more than the «traditional causes of decay» occurring, notably, in the event of armed conflict.

In particular, the focus of the Convention is protecting cultural heritage from the consequences of human interferences. As it has been recalled by UNESCO Former General-Director in occasion of the 40th anniversary of the Convention, the treaty arises from the necessity to strengthen the international cooperation towards the protection of cultural property in face of worldwide phenomena like globalization, cultural homologation and, notably, the in-

tentional destruction of cultural heritage in the context of 'cultural cleansing' campaigns[9].

In comparison to the 1954 the Hague Convention for the Protection of Cultural Property in the event of Armed Conflict[10], the World Heritage Convention seems not to foresee, within the scope of its provisions, any general obligation of cultural heritage protection pending on its Member States[11].

On the contrary, although considering that the disappearance of *any* item of worldwide cultural heritage constitutes a harmful impoverishment and an irreplaceable loss[12], the World Heritage Convention appears as focusing exclusively on the international preservation of a determined category of cultural heritage, defined of «outstanding universal value» by its article 1.

Distinguishing themselves for their «exceptional interest» these 'outstanding elements' are saluted by the Convention as representing a source of value and identity, rather than for a determined people or a geographic area, for humanity as a whole[13].

To this end, the Convention calls up on States Parties and relevant stakeholders to strengthen their commitment towards the safeguard of such heritage, establishing the mechanism of internation-

[9] See the Report Celebrating the 40 years of the World Heritage Convention, Proceedings, Closing event of the celebration of the 40th anniversary, Japan, November 2012.

[10] Convention for the Protection of Cultural Property in the event of Armed Conflict, UNESCO (adopted in The Hague, 14th May 1954. Entered to force 7th August 1956, «The Hague Convention»).

[11] «The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property», article 4 paragraph 1, The Hague Convention.

[12] Preamble, emphasis added, World Heritage Convention.

[13] Preamble, World Heritage Convention.

al protection and collective assistance referred to in section II of the Convention[14].

Acknowledged for their «outstanding universal value» («OUV») from the historical, artistic or scientific point of view, as well as «from the aesthetic, ethnological or anthropological perspective»[15], these exceptional cultural elements are acknowledged as such pursuant to the assessments of the appointed World Heritage Committee[16].

According with arts. 8 and 11 of the Convention, it is entrusted to such organ[17] the inscription of such property in the «World Heritage List»[18], which represents the official UNESCO inventory of worldwide cultural property, as well as the referential list of the 'outstanding cultural heritage' to be provided with international protection by the means outlined in arts. 4, 5 and 6 of the Convention[19].

On the other side, nothing seems to be foreseen within the framework of the World Heritage Convention about the international conservation of those elements of cultural heritage which, situated within the territories of States, have not been recognized as of «outstanding universal value» by the WHC Committee.

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[14] National and International Protection of the Cultural and Natural Heritage.

[15] Art. 1, World Heritage Convention.

[16] «Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value», art. 8, World Heritage Convention. (Also «the WHC Committee» or «the Committee»). See *infra*.

[17] And to the evaluations of its Advisory Bodies, see *infra*.

[18] Also «the WHC List» or «the List». See *infra*.

[19] In detail, the Convention foresees that the duty of taking charge of such goods pends primarily on States Parties, which are called upon to engage for the conservation of the OUV's heritage *in situ* «in so far as possible and as appropriate for each country» and pursuant to arts. 4 and 5. In addition, art. 6 of the Convention establishes a collective assistance mechanism to support States as per their cultural heritage conservation, pursuant to which all the States Members of the Convention have the duty to collaborate for the international protection of the cultural heritage *in situ*, «whilst respecting the sovereignty of the [competent] States» and «without prejudice to property right provided by national legislation».

As a matter of fact, none of the obligations pending on States Parties pursuant to article 4 and followings seems to apply to these cultural goods. Nor, such property appears as included within the scope of the cultural heritage monitoring mechanism set up by the Operational Guidelines for the implementation of the World Heritage Convention, nor in their periodically revisions carried out by the Committee since their establishment in 1977[20].

On the contrary, it appears, these cultural goods seem to be considered by the World Heritage Convention only in its preamble. In rather general terms, it is in this context that it is specified the necessity for the international community to safeguard the «unique and irreplaceable» cultural heritage «to whatever people it may belong», being the deterioration or disappearance of *any* item of worldwide cultural heritage «a harmful impoverishment of the heritage of all the nations of the world»[21].

For the rest, such property seems to remain entirely overlooked by World Heritage Convention framework, being entirely consigned, therefore, to the domestic jurisdiction of State Parties.

As for the reasons of such framework, the fact that UNESCO recognizes the sovereignty of States Parties on the *in situ* cultural

[20] Operational Guidelines for the Implementation of the World Heritage Convention, UNESCO Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage («Operational Guidelines») V. *Periodic reporting on the implementation of the World Heritage Convention*, para 199 and following, p. 163.

[21] Preamble, World Heritage Convention. As it has been outlined by exponents of the doctrine, the progressive emergence of a customary norm such as to allow international protection to all the elements of the cultural heritage of mankind, independently from the «outstanding universal value» eventually attributed them pursuant to the World Heritage Convention, might be deduced, *inter alia*, from the provision of article 12 of the Convention, according to which «The fact that a property belonging to the cultural or natural heritage has not been included in either of the two lists mentioned in paragraphs 2 and 4 of Article 11 shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusion in these list[s]». On this point, see F. Francioni, F. Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, in *European Journal of International Law*, XIV, 2003, 4, pp. 619-651.

goods which, eventually left aside from the international community's interest towards the preservation of those parts of the cultural heritage acknowledged as of 'exceptional value', are left to the discretion of national authorities[22].

Hence, it is in view of such framework that might be interpreted the 'peaceful' demolition of cultural heritage part of the worldwide wave of 'iconoclastic propaganda'[23] occurring at the global level since the two-year period 2020-2022, notably, in Afghanistan and in the United States.

Carried out without entailing the presence of an armed conflict in the concerned States, these episodes of intentional destruction of national cultural heritage do not incur in the general obligation pending on States Parties towards the protection of endangered cultural heritage established by the 1954 Hague Convention. Rather, they fall within the scope of the 1972 World Heritage Convention framework which, as it has been highlighted in the above paragraphs, appears as limiting the scope of its international protection to those elements of «OUV»[24].

[22] Operational Guidelines, paragraph 15, p. 13.

[23] The term 'iconoclastic propaganda' is used to define the cultural cleansing campaigns carried out by political forces and regimes since the aftermath of the French Revolution, when the Abbé Grégoire condemns the systematic destruction of artwork and monuments connected the Ancien Régime carried out by revolutionaries. In addition, it has been used in 1917, when the Bolsheviks took control of Russia, they ordered the demolition of all pre-revolutionary monuments present in the area. Some decades later, during the Cultural Revolution carried out by the Chairman Mao Tse Dong, the Chinese Communist Party tried to eliminate the «Four Olds»: Old Culture, Old Thinking, Old Habits, and Old Ideas. See D. Gamboni, *The Destruction of Art: Iconoclasm and Vandalism since the French Revolution*, Reaktion Books, London, 1997. For an in-depth analysis of the French envoi system of art distribution, see D.J. Sherman, *Worthy Monuments: Art Museums and the Politics of Culture in Nineteenth Century France*, Harvard University Press, Cambridge, 1989. See also K. Jote, *International Legal Protection of Cultural Heritage*, Juristforlaget, Stockholm, 1994.

[24] Such framework has recently in the context of the most recent attacks against cultural heritage occurred in Ukraine in the aftermath of the Russian invasion on 24th February 2022. Among the atrocities perpetrated by the Russian army, UNESCO has reported, as of March 2022, the destruction of 53 Ukrainian cultural elements carried out, notably, in the context of the attacks against the cit-

In the light of the above, and being none of the targeted monuments and sites inscribed, at the moment of the attacks, in the

ies of Kiev, Kharkov and Mariupol. Among them, the sites of the Drobitsky Yar Holocaust memorial, the historic city center of L'viv and the ancient monasteries in the historic center of Chernihiv. For this reason, the UNESCO Committee for the Protection of Cultural Property in the Event of Armed Conflict has adopted on 18th March 2022 the Declaration on the protection of cultural heritage in Ukraine. In this document, the Committee emphasizes the necessity of preserving the cultural heritage in Ukraine jeopardized by the armed conflict and it recalls the provisions States Parties to comply with their obligations pursuant to arts. 4 and 5 of the UNESCO 1954 Hague Convention – as well as to its two Protocols (see the Declaration on the Protection of Cultural Heritage in Ukraine adopted by the UNESCO Committee for the Protection of Cultural Property in the Event of Armed Conflict, 2nd Extraordinary Meeting of the Committee for the Protection of Cultural Property in the Event of Armed Conflict, C54/22/2.EXT.COM/3, 18th March 2022). On the contrary, no reference to the importance of avoiding the damage and destruction of the Ukrainian cultural heritage *as a whole*, in the name of its value for mankind, has ever raised by the international community in the context of the 'cultural renovation' campaign carried out by Ukrainian authorities since the fall of URSS. As it has been highlighted by some scholars (see L. Lixinski, *Legalized Identities. Cultural Heritage Law and the Shaping of Transitional Justice*, Cambridge University Press, Cambridge, 2021, p. 121 ss.), Ukraine represents a relevant example in terms of 'lawful' iconoclastic propaganda carried out in a State's territory by order of competent authorities. Having the largest concentration of Lenin statue monuments in the entire USSR, Ukraine has always adopted a 'pro-removal' attitude towards the monuments 'symbol' of the Soviet Union era. Such feeling has conveyed in the adoption of law «On condemning the Communist and National-Socialist totalitarian regimes and prohibiting the use of their symbols», passed by the Ukrainian former government in April 2015. In the aim of eradicating any reference to USSR from the Ukrainian territory, such law orders the complete removal and destruction of monuments that «glorify functionaries of [the] Soviet totalitarian regime» (see the translation of the European Commission for Democracy through Law, *Law on the condemnation of the communist and national socialist (nazi) regimes, and prohibition of propaganda of their symbols of Ukraine*, 9th April 2015, Opinion no. 823/2015, Council of Europe, Strasbourg, 28th October 2015). In compliance with such law, the almost totality monuments dedicated to Lenin and other Soviet leaders has been destroyed or removed, since April 2015, by the Ukrainian territory, without any raise of concern from international community. As for the reasons of such approach, the fact that none of those Soviet monuments was included in the World Heritage List at the moment of the attacks, nor their inscription in such inventory had ever been proposed, as it is obvious, by the Ukrainian government – the only one entitled to submit proposals for inclusion in the WHC List pursuant to art. 11 of the World Heritage Convention.

World Heritage List, such deliberate destruction of cultural heritage appears as ultimately falling within the scope of States' Parties jurisdiction. In this sense, notably, paragraph 53 of the WHC Operational Guidelines, according to which the Convention shall not be «intended to ensure the protection of all properties of great interest, importance or value», but only of those elements recognized as «the most outstanding from an international viewpoint», inscribed for this reason in the World Heritage List[25].

In view of the above framework, such attacks carried out against 'non outstanding cultural heritage' within the territories of States have been justified by some authors as possible examples of lawful destruction of the cultural heritage placed under the jurisdiction of States[26]. Even more – notably, in the U. S. context –, they have been acknowledged as possible expressions of an emerging so-called «right to destroy», such as legitimize, in some circumstances, the 'peaceful' destruction of the cultural heritage of States, when it is carried out by order or on behalf of the competent authorities and with the support of the majority of the concerned population[27].

3. *«Outstanding universal value» for who? The decisions of the World Heritage Committee through the lens of the debate between universalism and cultural relativism*

As for the reasons of such UNESCO framework, relegating the international protection of cultural elements in peacetime to their eventual attribution of an «outstanding universal value», the nature itself of the World Heritage Convention. Coming as the result of the initiatives for saving the cultural heritage of global impor-

[25] Operational Guidelines, para. 52.

[26] K. Wangkeo, *Monumental Challenges: the Lawfulness of Destroying Cultural Heritage during Peacetime*, in *The Yale Journal of International Law*, XXVIII, 2003, p. 243 ss.

[27] E. Perot Bissell V, *Monuments to the Confederacy and the Right to Destroy in Cultural-Property Law*, in *The Yale Law Journal*, 128, 2019, 4, p. 1130.

tance carried out, since the 1960s, in the context of the ICUN[28] and of the US proposal for a World Heritage Trust, the Convention seeks to institutionalize a global responsibility for the preservation of those cultural elements of universal significance for humanity.

As outlined in the above paragraphs, is to this end that it sets up the mechanism of the World Heritage List which consists, in the anthropocentric perspective at the core of the UNESCO mission, in an inventory in which the international community inscribes those cultural elements acknowledges as deserving a global protection because of their significance.

To cite some scholars in the field of anthropology studies, the idea underpinning the WHC List is, precisely, the necessity of ensuring universal safeguard to those perceived as main cultural expressions at the global level, or to those «famous and iconic sites that many people would expect» as deserving an effective protection from the international community[29]. This, notably, regarding those monuments, sites and masterpieces which, reflecting a «monumental» and aesthetic-led approach to cultural tradition, are referred to the Eurocentric and neoliberal background. As a matter of fact, counting 1154 items of which 897 cultural sites as in April 2022[30], the WHC List is indeed composed at 71% by cultural expressions referred to the Western-oriented and post-colonial tradition; of those elements, almost 50% come from the European and North American regions[31].

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[28] Established in 1948 under the aegis of UNESCO, the International Union for Conservation of Nature («IUCN») is an international non-governmental organization providing technical evaluations of natural heritage properties. It is headquartered in Gland, Switzerland. Together with ICCROM and ICOMOS, it represents one of the Advisory Bodies to the World Heritage Committee. See Operational Guidelines, para. 36, p. 19.

[29] C. Brumann, *The Best of the Best: Positing, Measuring and Sensing Value in the UNESCO World Heritage Arena*, in *Palaces of Hope. The Anthropology of Global Organization*, edited by R. Niezen, M. Sapignoli, Cambridge University Press, Cambridge, 2017.

[30] See World Heritage List, available at *https://whc.unesco.org/en/list/*.

[31] See World Heritage List Statistics – Number of World Heritage Properties per Region. Updated statistics available at *https://whc.unesco.org/en/list/stat*.

As for the reasons of such arrangement, arguably, the composition itself of the collective body charged by the World Heritage Convention with the evaluation of the 'exceptional nature' of such cultural goods.

Assigned by article 8 of the Convention to the final decision of the World Heritage Committee, the assessment on the «OUV» of cultural heritage is in fact left to the evaluations of the Committee's Advisory Bodies, appointed to support the Committee with their «technical and scientific considerations»[32]. As for the reason of such mechanism, the fact that the WHC Committee is composed by 21 representatives of the Member States, appointed to represent their national governments in the WHC decisional processes and without necessarily entailing scientific skills in the cultural field. To this end, the Operational Guidelines establish that the Committee has to ground its decision on the advices of its Advisory Bodies – and, notably, of IUCN and ICOMOS –, which evaluate the possible inscription of cultural heritage in the WHC List, in the light of their competence and field of expertise[33].

In the absence of any «outstanding universal value» definition in the text of the Convention nor in the Operational Guidelines, these Advisory Bodies seem as having, *de facto*, a rather wide marge of appreciation when evaluating the «OUV» eventually attributable to cultural goods. As it is established in the Operational Guidelines, in fact, they are appointed to provide advice to the WHC Committee in the light of, notably, the – rather general – criteria outlined at paragraphs 77-78 of the Guidelines' II-D section dedicated to the assessment of the «OUV» regarding cultural elements[34], as well as

[32] Operational Guidelines, para. 23, p. 14.

[33] Operational Guidelines, para. 31, p. 17.

[34] «The Committee considers a property as having Outstanding Universal Value (see paragraphs 49-53) if the property meets one or more of the following criteria. […] (i) represent a masterpiece of human creative genius; (ii) exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design; (iii) bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has

of the – equally vague – requirements of «authenticity» and «integrity»[35]. For the rest, and in the silence of the World Heritage Convention framework, these organs are left free to make the assessment on the «outstanding» value of cultural goods relying on their own expertise. This, notably, according to the backgrounds in arts history, architecture, and cultural heritage disciplines of their own components.

Components which have always hailed, as it has been pointed up by several scholars, from mostly European and North Americans countries, therefore unavoidably relying, therefore, on a rather 'Eurocentric' conception of cultural heritage[36]. As it has been raised on several occasions, notably, in the political arena, the World Heritage Convention framework is hence appearing, since its establishment in 1972, as reflecting that rather neo-liberal and post-colonial narrative which, characterizing the western area of the globe since the aftermath of World War II, emerges, notably, with regard to the cultural goods inscribed in the World Heritage List.

This, notwithstanding with the Global Strategy for the creation of a 'Representative, Balanced and Credible World Heritage List' adopted by UNESCO in 1994, as well as with the package of reforms devised by the organization since the 1990s seeking at reconceptualize the notion of «outstanding universal value» applied to cultural heritage in a less Eurocentric way[37].

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disappeared; (iv) be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history; (v) be an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change; (vi) be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance». In addition, such cultural property has to meet the requirements of «authenticity» and «integrity». See Operational Guidelines, II-D, paragraphs 77-78, pp. 29-30.

[35] Operational Guidelines, I-E, pp. 79-95.

[36] See *supra*, n. 45.

[37] The Global Strategy is available at the following link: *https://whc.unesco.org/en/globalstrategy/*.

As a matter of fact, the composition of the two last sessions of the ICOMOS World Heritage Panel[38] has shown how the World Heritage Convention might still be perceived as an expression of the 'cultural universalism' which has been highlighted by some scholars with regard to the evolution of the relation between culture and international human rights[39].

This because, as it has been explained, its protection seems to be reserved, exclusively, to those «most iconic churches, cathedrals, historic town centers» representing a symbol for western societies, thereby leaving aside all those cultural expressions which, not fitting in «outstanding cultural value» western-led standards of the World Heritage Committee, appear as overlooked by the whole World Heritage Convention framework.

4. *Interpreting the World Heritage Convention in the light of the 2030 Agenda for Sustainable Development: towards a general obligation of preserving the cultural heritage of non-«outstanding universal value»?*

In the light of all the above considerations, question remains whether the World Heritage Convention can still be considered, at 50 years since its adoption, as the referential international treaty for the enhancement and safeguard of the cultural heritage of mankind. This, notably, in reason of its 'monumental' approach which, as it has been explained in the above paragraphs, risks to ward off the text of the Convention from a real effective and inclusive protection of all the expressions of all the cultural expressions and tra-

[38] The composition of ICOMOS World Heritage Panels is available at the following link: *www.icomos.org/en/home-wh/93286-icomos-world-heritage-panel-2019-2022*.

[39] F. Lenzerini, *The Debate on Universalism and Cultural Relativism in International Human Rights Law*, and F. Lenzerini, *Rethinking the Debate on Universalism and Cultural Relativism*, in F. Lenrezini, *The Culturalization of Human Rights Law*, Oxford University Press, Oxford, 2014.

ditions coexisting around the globe. One may wonder if a possible solution to such *aporia* might be obtained from an interpretation of the Convention in the light of the current international framework for the protection of the needs and interests of future generations and, notably, for the enhancement of sustainable development. This, notably, in the light of the provisions of article 31, paragraph 3, lett. c) of the Vienna Convention, which establishes the necessity of considering, while interpreting a treaty, also «any relevant rules of international law applicable in the relations between the parties»[40].

Underpinning the UN framework since its establishment in 1945[41], the necessity of transmitting to future generations the cultural diversity and expressions of mankind has been highlighted, notably, by the UN General Assembly in occasion of the adoption of the 2030 Agenda for Sustainable Development[42]. Although not having a dedicated Sustainable Development Goal (SDG) in the 2030 Agenda, culture has in fact been saluted as one of the fourth pillars of sustainability. Being at the core of the SDG framework dedicated to sustainable cities, it has been identified as underpinning several other SDG targets including, *inter alia*, those about reduced inequalities (SDG 10), climate action (SDG 13), innovation (SDG 9) and peaceful and inclusive societies (SDG 16)[43].

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[40] See among others A. Cannone, *La Convenzione UNESCO del 1972 sulla tutela del patrimonio mondiale culturale e naturale*, in *La tutela dei beni culturali nell'ordinamento internazionale e nell'Unione europea*, edited by E. Catani, G. Contaldi, F. Marongiu Bonaiuti, EUM, Macerata, 2020, p. 86.

[41] «UNESCO's mission is to contribute to the building of a culture of peace, the eradication of poverty, sustainable development and intercultural dialogue through education, the sciences, culture, communication and information». See International Conference on World Heritage Interpretation held in Republic of Korea, 2nd November 2016, Seoul, *infra*.

[42] UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1 («2030 Agenda» or «Agenda»).

[43] See the UNESCO Report «Culture in 2030 Agenda», 2nd October 2020, available at *https://en.unesco.org/news/culture-2030-agenda*.

With specific reference to cultural heritage, the importance of strengthening the efforts to protect and safeguard the world's cultural and natural property is recalled in Goal 11.4, which focuses on the key role in «make cities and human settlements inclusive, safe, resilient and sustainable»[44]. As it has been highlighted by ICOMOS, this in virtue of the key role of cultural heritage in fostering social cohesion and socio-economic regeneration, by enhancing the appeal and creativity of regions[45].

In the aftermath of the adoption of the 2030 Agenda, the strict interconnection between the importance of preserving worldwide cultural heritage and the needs and interests of future generations has been highlighted by UNESCO, among others, with reference to the World Heritage Convention.

Recalling the intrinsic value of cultural heritage for present and future generations, States Parties of the Convention have acknowledged the great potential of world's cultural heritage to enhance to the social, economic and environmental sustainability targets, as an important contributor to sustainable development across its various dimensions. In this sense, in the aftermath of the establishment of the Agenda 2030, they have adopted the Report World Heritage and Sustainable Development, in which it is highlighted the crucial role played by world heritage in the enhancement of the «capability of individuals to live and to be what they choose» – representing the ultimate purpose of human development according to the Nobel prize Amartya Sen[46].

In the same way, it is to foster such strong interconnection between the World Heritage Convention and the 2030 Agenda that, on 19 November 2015, the 20th General Assembly of the States

[44] Goal 11.4, «Strengthen efforts to protect and safeguard the world's cultural and natural heritage», in Goal 11, Make cities and human settlements inclusive, safe, resilient and sustainable, 2030 Agenda.

[45] See ICOMOS Report *Heritage and the sustainable development goals: policy guidance for heritage and development actors*, ICOMOS, March 2021, available at *https://openarchive.icomos.org/id/eprint/2453/1/ICOMOS_SDGs_Policy_Guidance_2021.pdf*.

[46] See the UNESCO Report World Heritage and Sustainable Development, available at *https://whc.unesco.org/en/sustainabledevelopment/*.

Parties have adopted the «World Heritage Convention Policy for Sustainable Development», a document which seeks at integrating the sustainable development perspective within the processes of the Convention[47]. This, in the light of the provisions of the Vienna Convention on the Law of Treaties which establishes, at its article 31 paragraph 2 lett. a) and b) that the interpretation of a treaty shall comprise «(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty» as well as «(b) any instrument […] in connection with the conclusion of the treaty» and accepted by such by States Parties[48].

Saluted as a «significant shift in the implementation of the Convention and an important step in its history», such policy seeks, notably, to assist States Parties in the reinterpretation of the World Heritage Convention, in the light of the principles of sustainable development, as well as in its consequent implementation. Quoting on World's Heritage Committee 2002 Budapest Declaration, the Policy calls on States Parties, precisely, to «ensure an appropriate and equitable balance between conservation, sustainability and development, so that World Heritage properties can be protected through appropriate activities contributing to the social and economic development and the quality of life of our communities»[49]. To this end, States Parties need to integrate the principles of sustainable development within the framework of the World Heritage Convention. This, notably, through a mid-term and long-term perspective. In particular, they are called to consider cultural heritage matters in the light of the three dimensions of sustainable development – namely environmental sustainability, social development and economic development –, and to shape their policies and pro-

[47] World Heritage Convention and Sustainable Development («the WHC Policy» or «the Policy»), Decision 36 COM 5C, World Heritage Committee, 36th session, 2012, St. Petersburg, available at *https://whc.unesco.org/en/decisions/4610/*.

[48] Art. 31, paragraph 2, lett. a) and b), Vienna Convention on the Laws of Treaties, 1969.

[49] Budapest Declaration on World Heritage, Decision CONF 202 9, World Heritage Committee, 29th session, 2002, 28th June 2002, Budapest, available at *https://whc.unesco.org/en/decisions/1217/*.

grams with a specific view to «celebrate social cohesion» and cultural diversity as to foster intergenerational equity in the most inclusive way[50].

In this sense, paragraph 6 of the Policy establishes that States Parties should identify, by appropriate means, the most suitable strategies for worldwide conservation and protection of all the elements of the World Cultural Heritage, «embracing *not only* the protection of the OUV, *but also* the wellbeing of present and future generations»[51]. In other words, the international protection which has to be conferred to the cultural property of mankind has *no more* to be related to its eventual exceptional significance, from an artistic, historic or anthropologic point of view, in the light of the evaluation of the WHC Committee.

On the contrary, such conservation duty derives from the irreplaceable value conferred by the international community to *all* the elements of cultural and natural heritage of the world, in the name of their central contribution to sustainable development and the wellbeing of people[52].

Striving to achieve an effective implementation of the World Heritage Convention in the light of the sustainable development international framework, the WHC Committee has integrated such principles also in the provisions of the Operational Guidelines. From such effort comes indeed the latest version of such document, which establishes at its paragraph 14-bis (I-C) that «States Parties are encouraged to mainstream into their programmes and activities related to the *World Heritage Convention* the principles of

[50] WHC Policy, paragraphs 7 – 13.

[51] «States Parties should recognize, by appropriate means, that World Heritage conservation and management strategies that incorporate a sustainable development perspective embrace not only the protection of the OUV, but also the wellbeing of present and future generations». WCH Policy, para. 6 (emphasis added).

[52] «The 2030 UN Agenda for Sustainable Development recognizes this and includes the protection and safeguarding of the world cultural and natural heritage as a specific target of one of its 17 'Sustainable Development Goals, notably N. 11 on inclusive, safe, resilient and sustainable cities and human settlements». WHC Policy, paragraph 3 n. 5.

the relevant policies adopted by the World Heritage Committee, […], such as the Policy Document for the Integration of a Sustainable Development Perspective into the Processes of the *World Heritage Convention*»[53].

This, apparently, also with reference to the provision of the Policy's paragraph 6, which calls up on States Parties, as it has been highlighted above, for the reassessment of their actions towards cultural heritage preservation, by including within the scope of their protection also those elements of cultural heritage which, although not included in the WHC List, have to be transmitted to future generations.

In other words, and notwithstanding with the notion of «OUV» which is still at the core of the Convention, the safeguard of worldwide cultural property should no more be limited to the conservation of those identified elements deserving a special protection. Rather, in view of the WHC Policy, and of its value in the interpretation of the World Heritage Convention pursuant to above mentioned dispositions, it has to be considered as part of a wider global action for presenting and transmitting worldwide cultural expressions to future generations, in a wider perspective of inter-generational justice and sustainable development[54].

In the same way, the World Heritage Committee has commissioned, in the aftermath of the UNESCO International Conference on the World Heritage Interpretation held in Republic of Korea on 2nd November 2016, the International Coalition of Sites of Conscience (ICSC) to elaborate a new interpretation framework applicable to the World Heritage Convention striving at the conservation and transmission to future generations, notably, of Sites of Memory[55].

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[53] Operational Guidelines, I-C, para. 14*bis*.

[54] Operational Guidelines, paragraphs 6-7.

[55] Interpretation of Sites of Memory. Study commissioned by the World Heritage Centre of UNESCO and funded by the Permanent Delegation of the Republic of Korea, International Coalition of Sites of Conscience (ICSC), 31st January 2018.

In detail, the WHC Committee appoints the coalition to assist States Parties and the World Heritage Committee in «Review[ing] existing theories and models of heritage interpretation and develop[ing] effective methods of heritage interpretation for future generations».

This, notably, through an interpretation of the World Heritage Convention seeking at «Promot[ing] social cohesion by fostering pluralism, intercultural dialogue, and a culture of peace, as well as securing the central role of culture in sustainable development», in the light of the inclusion of cultural heritage in the UN Sustainable Development Goals and of the integration of the WHC Policy in the World Heritage Convention framework.

Saluted by some authors as underpinning its scope since its adoption in 1972[56], such interpretation of the Convention as an «integrated treaty for the cultural stewardship essential to successful long-term sustainable development», has often been recalled, within the global cultural diplomacy arena, by several UNESCO fonctionnaires[57]. In such context, it has been recalled, notably, how such principle seems to be expressively referred to within the provision of article 12 of the Convention.

Establishing that the fact of not being included in the World Heritage List *does not imply*, for cultural property, «that it does not have an outstanding universal value for purposes *other* than those resulting from inclusion in [the list]», such article appears as indeed recalling, within its formulation, the same «non-exclusive» ap-

[56] «the scope of action of the Convention seems to go beyond the sites included in its List of World Heritage properties, to encompass national heritage policies and wider development strategies». See the Report on Sustainable Development within the UNESCO framework, available at *https://whc.unesco.org/en/sustainabledevelopment/*.

[57] «the World Heritage Convention carries in itself the spirit and promise of sustainability […], in its insistence that culture and nature form a single, closed continuum of the planet's resources, the integrated stewardship of which is essential to successful long-term sustainable development – and indeed to the future of life on the Earth as we know it», see the declarations of Richard Engelhardt, Former (1991-1994) Director of the UNESCO Office in Cambodia.

proach to cultural heritage as the one entailed in the sustainable development's framework[58].

In the same way, there are several instances of how such interpretation of the WHC in the light of article 31 of the Vienna Convention has been received by its States Parties, which appear as progressively recognizing the importance of implementing the provisions of the treaty in a 'sustainable' perspective. Recalling their duty of exploiting national resources pursuant to the principles of the Rio Declaration[59], States appear as having indeed oriented their cultural policies towards a more sustainable conservation of their monuments and sites, to be handed down to future generations. Relevant examples of such practice have been reported, notably, in the Annex 3 of the above mentioned «Interpretation of Sites of Memory» report, which shows the effort, both of western and non-western countries, of conserving their national cultural heritage in a sustainable development-oriented perspective – irrespective of its eventual OUV[60].

Finally, although often overlooked in the context of the World Heritage Convention's implementation, such provision has also been recalled, as well as in the framework of sustainable development, by several scholars in the field of international human rights law[61]. In detail, it has been referred to with reference to the destruction of the Buddhas of Bamiyan, in the aftermath of which, in the context of the debate concerning the difficult balance between the 'lawful' demolition of 'contested' cultural heritage within the territories of States and the right to have access to culture, several authors have recalled the emergence of a customary norm according to which the whole UNESCO framework should be interpreted as entailing a general obligation of protecting the cultural heritage sit-

[58] Article 12, World Heritage Convention, emphasis added.

[59] Principle 2, Rio Declaration. Adopted in Rio de Janeiro, 14 July 1992.

[60] Annex 3, «Examples of good practice», Interpretation of Sites of Memory, p. 39 and ff.

[61] See *supra*, n. 25.

uated within the territories of States[62]. This, notably, in virtue of its acknowledged central role for the universal enhancement of the human right to culture, as it is defined, notably, by article 27 ICCPR and article 15.1 (a) ICESCR, and regardless of their possible inclusion in the World Heritage List[63].

Hence, it seems, it is in the light of such considerations that the traditional 'monumental' approach subordinating the conservation cultural heritage of mankind to those elements of «OUV» might be overcome[64].

Focusing on the importance of transmitting to future generations all the elements of worldwide cultural heritage as part of an 'intergenerational common good', the UN framework for sustainable development – and, notably, the 2030 Agenda seems in fact to offer a rather more effective interpretation of the World Heritage Convention, such as to include within the scope of its protection not only a selected list of 'exceptional' properties, but *all* the expressions of the cultural heritage of mankind.

5. *Conclusions*

At 50 years since the adoption of the World Heritage Convention in 1972, and notwithstanding with the important results obtained by such UNESCO framework, it appears how its implementation has come with a series of limits. Although conceived for se-

[62] On the emergence of a customary norm allowing international protection to all the elements of the cultural heritage of humankind regardless of their inclusion in the World Heritage List, see note n. 21.

[63] Art. 27, International Covenant on Civil and Political Rights, UN General Assembly, 16th December 1966; art. 15.1 lett. a), International Covenant on Economic, Social and Cultural Rights, UN General Assembly, 16th December 1966. See also Guidelines on treaty specific documents to be submitted by State Parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, Committee on Economic, Social and Cultural Rights, E/C.12/2008/2, 24th March 2009, para. 67. See also Recommendation on Participation by the People at Large in Cultural Life and their Contribution to it, UNESCO, 1976.

[64] See *supra*, n. 58.

curing «any item of the cultural or natural heritage […] of all the nations of the world» against the phenomena of damage or destruction occurring at the global level[65], the World Heritage Convention seems in fact to apply, in the light of its current interpretation and implementation by the international community, to selected elements of the cultural heritage of nations. Recalling the importance of conserving those cultural elements of exceptional interest for the international community, it seems in fact as subordinating its global action *only* to those cultural elements appointed as of «outstanding universal value» by the World Heritage Committee and its Advisory Bodies, by no means «intend[ing] to ensure the protection of *all* properties of great interest, importance or value» situated in the territories of States Parties[66].

All this, it appears, to the detriment of all those 'non outstanding' elements of cultural heritage which, endangered by several reasons, notably, in times of peace, find themselves falling outside the scope of the Convention, rather being entirely left to the discretionary power of States Parties. This also in the case in which, as it has been highlighted by the Special Rapporteur in the field of Cultural Rights in its 2016 Report, these elements are targeted with cultural cleansing campaigns carried out by local authorities, thereby encountering their irreversible destruction or degradation.

Against such background, and in the aim of assessing whether it would be possible to derive from the World Heritage Convention any provision such as to ensure an effective, *universal* protection to *all* the «cultural heritage of nations», it appears how a solution might emerge from the interpretation of the World Heritage Convention – notably, pursuant to article 31.3 lett. c) of the Vienna Convention – in the light of the UN framework for sustainable development. Recognizing in the UN Agenda 2030 its guiding light, such framework salutes culture as the 'fourth pillar of sustain-

[65] «Considering that deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world», Preamble, World Heritage Convention.

[66] Operational Guidelines, paragraph 52.

able development', and it recalls the necessity of transmitting *all* its components to future generations. This, not in view of the «OUV» eventually attributed to such elements of cultural heritage, rather, in virtue of the key role attributed to cultural heritage and diversity in the processes of collective and individual development by the sustainable development global framework and, notably, by Amartya Sen[67].

[67] A. Sen, *Culture and Human Rights*, in *Development as Freedom*, Chapter 10, Knopf, New York, 2000, pp. 227-248.

Nikolia-Sotiria Kartalou

TRACING INTANGIBLE CULTURAL HERITAGE*

Abstract: This paper presents an overview of the institutionalised discourse on 'cultural heritage' with emphasis on the recognition of intangible cultural heritage. The presentation has two parts: (i) The first part presents a timeline on shifts of definitions and of actions suggested towards safeguarding world heritage. With a view to trace the aggregation of what we could nowadays call 'established heritage', this part examines precise moments from the mid-twentieth century onwards which expanded the notion of monument to urban areas and towards – what is now known as – intangible cultural heritage; (ii) The second part examines the two typologies of heritage – tangible and intangible – through the prism of their definitions given by UNESCO in 1972 and 2003 respectively and identifies the aspects that differentiate process and outcome in heritage discourse.

Introduction[1]

This paper examines how the institutionalised notion of cultural heritage has gradually matured since twentieth century onwards: from architectural to urban, from local to global and from tangible to intangible. First, the paper traces the aggregation of the 'established heritage' through a review of the institutional charters that shaped its universal meaning, with the intention to examine how the understanding of cultural heritage has gradually changed from the appreciation of 'monument' towards the recognition of 'living traditions'. The narrative follows a chronological sequence of selected institutional charters and declarations, by seeking how heritage has been appreciated in relation to its etymological meaning – that

* Double-blind peer reviewed content.

[1] This paper is a revised version of 'Chapter I: The problem of spectacle-heritage' of my PhD thesis. N.S. Kartalou, *Dissolving [in]tangible cultural heritage: Exploring material performative endurance in a* locus *of temporal transition*, PhD diss., University of Edinburgh, Edinburgh, 2019.

of transmission. This historical overview is used to prove that stewardship still considers the performative dimension of heritage at a theoretical level. Yet, the focus on form and matter overshadows the flux of cultural manifestations in practice. The intentionality of this order lies in the fact that we have not only gradually inherited the material and immaterial creative outcomes of the past, but we have also inherited an understanding of cultural heritage as a legacy accompanied with the responsibility of preservation – a 'social-heritage'[2]. The second part of this paper examines the official definitions provided by UNESCO for both tangible and intangible heritage from a critical heritage lens, with a view to identify the aspects that differentiate 'process' and 'outcome' in heritage discourse. The key issue that this paper aims to highlight is that, although both categories are examined separately (tangible and intangible), their *in-between* state is yet to be discussed and acknowledged.

The problem of 'spectacle-heritage'

The admiration of cultural heritage is related to living traditions that survived from one generation to another; to expressions of creative practices that continue to live in the present through tangible or intangible attributes; and to accomplishments that became paradigms for the present and the future development of cultural manifestations. Although conservation practices demonstrate an engrossed attention in the preservation of tangible fabric, there has been recently an accelerating interest towards the inclusion of the safeguarding of living traditions. Its roots can be traced back to the French and Industrial Revolutions, which have played a pivotal role

[2] I use the term 'social-heritage' to describe David C. Harvey's notion of 'heritageisation'. Harvey used the term to denote that the inherited duty of preserving does not derive from the commercialisation of heritage, but to an intrinsic attitude towards the admiration of the past; a long-lasting responsibility of preserving. D.C. Harvey, *Heritage Pasts and Heritage Presents: Temporality, Meaning and the Scope of Heritage Studies*, in *International Journal of Heritage Studies*, 7, 2001, 4, p. 320.

in the foundation of a gradually accelerating propagation towards the safeguarding of the tangible remnants of the past. While the former has brought a nationalistic attitude strongly related to the acceleration of history (France), the latter contributed to an intentional decline of modernity (Britain)[3]. These positions were instrumental in the genesis of the conservation movement by «exploiting monuments as agents of stabilisation»[4]. The crescendo of the movement can be detected during the Second World War with Italy's and Germany's imposing grandeur for cultural supremacy, reaching its peak in the post-war period when the consequences of adversaries' bombardments have provoked the need for nations to construe their homogeneous identities. Architectural heritage thus became monumental and essential for remembering, either through the restoration of damaged tissue, or through the replacement of perished fabric.

Following the traces that nationalism engraved, the post-war era facilitated a commercialised greed of architectural and urban capitalism. The institutionalisation of cultural heritage has augmented the assumed obligation of nations to preserve their past, with an exclusive focus on the material: what is officially known nowadays as tangible cultural heritage. Until the turn of the twenty-first century, the so-called 'Western' discourse had equated cultural heritage with only the visible and tangible past, failing to include other dimensions of cultural manifestations. With the recognition of intangible heritage in 2003, the monolithic conception of heritage has been partially dissolved, although the separation of categories has generated a distinction between a living practice and a final outcome.

The establishment of the tangible as a dominant attribute of cultural heritage, which conquered past centuries, instigated several issues. Among the problems arising was that of 'spectacle-heritage': a commercialised architectural heritage of display[5]. Within this or-

[3] M. Glendinning, *The Conservation Movement a History of Architectural Preservation: Antiquity to Modernity*, Routledge, Abingdon, 2013, pp. 66-67.

[4] *Ivi*, p. 67.

[5] This phenomenon is also known as 'heritagisation'; a term coined by Kevin Walsh to denote the degradation of real places with functional attributes to objects

bit, the favoured tangible has become more sacred, providing a false impression that its constant preservation is sufficient for safeguarding heritage[6]. As a result tangible cultural heritage has been overestimated, since it acquired more years of officially acknowledged presence, whereas intangible cultural heritage is yet to receive similar attention. Crucially, the effects of stewardship are evident in both recognised typologies of heritage, leading to a fixity of understandings and to an inherited belief of a preserving-duty. The escalation of policy making, at both local and global level, has contributed to a conformity of ideologies that framed what Laurajane Smith has named 'authorized heritage discourse'[7]; a paradigm of notions, actions and (generalised) understandings of what is heritage. But what exactly does heritage mean?

The lacuna in heritage conformity

Heritage derives from the verb inherit, which is defined according to the *Oxford English Dictionary* as «to make heir, put in possession»[8]. The definition of the term does not assign a value to the inherited attribute, as the words 'legacy' or 'patrimony' do, but it is rather closer to the notion of transmission.

> «1. a. That which has been or may be inherited; any property, and esp. land, which devolves by right of inheritance.
> b. Land and similar property which devolves by law upon the heir and not on executors or administrators; heritable estate, realty.
> c. The 'portion' allotted to or reserved for any one; e.g. that of the righteous or the wicked in the world to come.
> 2. The fact of inheriting; inheritance, hereditary succession.

of display. K. Walsh, *The Representation of the past: Museums and Heritage in the Post-modern World*, Routledge, London, 1992, p. 4.

[6] D. Lowenthal, *The past is a Foreign Country*, Cambridge University Press, Cambridge, 1985, p. 384.

[7] L. Smith, *Uses of Heritage*, Routledge, London-New York, 2006, p. 29.

[8] Inherit 1.a., *OED, Online.*

3. a. Anything given or received to be a proper and legally held possession.
b. The people chosen by God as his peculiar possession; the ancient Israelites; the Church of God.
4. That which comes from the circumstances of birth; an inherited lot or portion; *the condition or state transmitted from ancestors* (emphasis added).
5. Heirs collectively; lineage»[9].

The first remark that we can make from the definition is that the word 'heritage' refers to something that is legally transmitted from someone to another. The transmitted attribute is not necessarily material neither valuable. In addition, the word is neutral[10], in the sense that it does not imply an authentic or integral inherited attribute, and it clearly does not insinuate an obligation for the latter's preservation. When the term culture is conjoined with heritage, it is understood that the transmitted attribute is related to «distinctive ideas, customs, social behaviour, products, or way of life of a particular nation, society, people, or period»[11]. These are the cultural manifestations of societies, which are creative expressions with either (i) visible and material movable or immovable outcomes – such as buildings, paintings, statues, or other artefacts – or (ii) immaterial sensory attributes – such as language, music and dance or other performing rituals. In this form, heritage moves from individual to collective, addressing not only a person or a small group of people – such as a family – but also a community and by extension society. Therefore, the term cultural heritage encompasses both human practices and their associated products by generating a temporal continuum from one generation to another. In the case of architectural heritage – which lies within the category of immovable tangible outcomes of creative expressions – the buildings are the main representatives of

[9] Heritage, *OED, Online.*

[10] It does not have a gender sign, in opposition to patrimony (*patri* – father). «Forming words with the sense "of or relating to social organisation defined by male dominance or relationship through the male line"», patri-, *OED, Online.*

[11] Culture, 6.a., *OED, Online.*

the transmitted attributes. They *may* be transmitted from one generation to another and they *may* also be preserved in time.

In order to scrutinise the meaning beyond the visible and the recognised material character of architectural heritage, the first part of this paper will attempt to read the shift from tangible to intangible heritage beyond the normative and, perhaps, obvious explanation. Borrowing a semiotic method from the field of linguistics, tangible cultural heritage is examined as a sign with its material character understood as the 'signifier' (sound-image), whereas its immaterial dimension in relation to the notion of transmission is perceived as the 'signified' (concept)[12]. By considering tangible heritage as a sign, we can recognise mentally its sensory effect through the visible and material, commonly described as tangible. This tangible cognitive experience of heritage plays the role of the 'signifier'. On the other hand, the 'signified' – that is, the concept, or the 'association' in Ferdinard de Saussure's words – can be related to the concealed understanding of the notion of tangible heritage that is associated with the latter's meaning as well as its significance and creative practice, or else, the process of transmission of cultural manifestations.

Interlude

Seventeen years ago, David C. Harvey examined 'social-heritage'[13] as an intrinsic condition transmitted from ancient times, and

[12] Ferdinard de Saussure (1857-1913), a French linguist and the co-founder of semiotics alongside Charles Sanders Peirce (1839-1914), explained the concept of linguistic signs as an entity which has both a sound-image and also a concept. The sound-image for Saussure, that is described by the name of each word, is the «psychological imprint of the sound, the impression that it makes on our senses». The concept is the «association … which is generally more abstract» related to the sound-image. F. De Saussure, *Course in General Linguistics*, edited by C. Bally, A. Sechehaye, translated by W. Baskin, Philosophical Library, New York, 1959, p. 66.

[13] David C. Harvey used the term *heritageisation* to describe the temporality of heritage as a social process rather as a result of the contemporary heritage industry. D.C. Harvey, *Heritage Pasts and Heritage Presents…*, cit., p. 320.

was critical about scholars who selectively analyse and define heritage as an intensified phenomenon manifested during the nineteenth century. This section does not intend to provide any opposition to D.C. Harvey's argument, since the inherited obligation for preservation is indeed present from antiquity and is well documented in several books that enquire into the history of architectural conservation[14].

Nevertheless, the period after the French and Industrial Revolutions furnished the genesis of the conservation movement (especially in Europe) with the former becoming instrumental in a more systematic and material-centric approach towards the preservation and management of cultural heritage. That is to say, although 'social-heritage' can be detected prior to the industrial boom in Europe, as D.C. Harvey argues, the theories developed from nineteenth century onwards became (perhaps unintentionally) the cornerstones of the current solidified definitions and understandings of cultural heritage. The theoretical considerations of practitioners and scholars of the nineteenth and twentieth centuries[15] contributed significantly to the discourse between restoration and conservation within the European continent. Their definitions, theories and practices led to a better appreciation, evaluation and management of the evidence of the tangible past[16]. They provided solid foundations to an extended discourse of architectural conservation during the twentieth century, influencing also international instruments

[14] See for example F. Choay, *L'Allégorie du Patrimoine*, Seuil, Paris, 2007²; M. Glendinning, *The Conservation Movement…*, cit.; J. Jokiletho, *A History of Architectural Conservation*, Routledge, Oxon, New York, 2018².

[15] Among them are several figures, such as Eugène Emmanuel Viollet-le-Duc (1814-1879), John Ruskin (1819-1900), William Morris (1834-1896), Camillo Boito (1836-1914), Camillo Sitte (1843-1903), Alois Riegl (1857-1905), Patrick Geddes (1854-1932), Gustavo Giovannoni (1873-1947) and Cesare Brandi (1906-1988).

[16] For example, Camilo Boito's insistence on the preservation of original forms was pivotal for the international discourse on conservation, and his intellectual influence is evident in both the Athens Charter (1931) and the Venice Charter (1964).

for the management and preservation of cultural heritage. Their ideas were followed by the writings of contemporary academics[17] whose theoretical critiques and intellectual involvement shaped the institutionalisation of cultural heritage[18]. The latter has been defined by UNESCO as «the legacy of physical artefacts and intangible attributes of a group or society that are inherited from past generations, maintained in the present and bestowed for the benefit of future generations»[19].

The following section traces the aggregation of what we could nowadays call established heritage[20], by examining precise moments from the twentieth century onwards which expanded the notion of monument to urban areas towards, what is now known as, intangible cultural heritage. Particular emphasis is given to international charters since the beginning of twentieth century[21]. International charters serve as tools for a unified understanding of cultural heritage – such as urban environments and communities – and they provide professional recommendations towards conservation, sustainability and management of heritage – such as techniques, tools, methods, materials, et cetera. The discourse on architectural conservation is by no means limited to them. However, they cannot be

[17] Among them Jukka Jokilehto, Knut Einar Larsen, Raymond Lemaire (1921-1997), David Lowenthal (1923-2018), Paul Philippot (1925-2016), and Herb Stovel (1948-2012).

[18] See for example the discussion on 'authenticity' before the release of the Nara Document in 1994: *Conference on Authenticity in Relation to the World Heritage Convention: Preparatory Workshop*, edited by K.E. Larsen, N. Marstein, Tapir Publishers, Bergen, 1994; *Nara Conference on Authenticity in Relation to the World Heritage Convention*, edited by K.E. Larsen, J. Jokilehto, UNESCO World Heritage Centre, Paris, 1995.

[19] *Tangible Cultural Heritage*, UNESCO, accessed September 14, 2018, *www.unesco.org/new/en/cairo/culture/tangible-cultural-heritage/*.

[20] Rodney Harrison calls it 'official heritage'. See R. Harrison, *Heritage: Critical Approaches*, Routledge, Milton Park, Abingdon, New York, 2013, pp. 14-15.

[21] The term *charter* is used in this paper to encapsulate within its meaning the outcomes of various international instruments, such as charters, declarations, conventions and reports on cultural heritage from resolution meetings of intergovernmental scientific organisations and congresses – such as UNESCO, CE, ICOMOS, ICCROM and UN.

excluded from the discussion since they reflect shifts of definitions and of actions suggested towards the safeguarding of the world's heritage, and they are, if not the main, significant players responsible for contemporary 'social-heritage'. The aim here is to provide a chronological overview of the evolution of heritage-understanding beyond its tangible manifestation.

Heritage consensus

Although the cornerstone of the international conservation movement was undeniably the Venice Charter in 1964 (investigated later in this paper), the roots of the intercontinental stewardship of cultural heritage can be traced back to the interwar period with the foundation of the International Committee on Intellectual Cooperation (ICIC, 1922-1946), the predecessor of UNESCO (founded in 1946)[22]. Since then, the concept of conservation has been addressed in various international charters, by incorporating individual artefacts, urban and natural sites, traditions and rituals with the main aim being the systematic safeguarding of the world's heritage.

During the interwar period, and in particular in the 1930s, two documents that were produced concurrently unveiled the antithesis in the perception of the historic environment. Firstly, the Athens Charter (Charte d'Athènes) published in 1943 by Le Corbusier, was a doctrine based on the meeting of Congrès International d'Architecture Moderne (CIAM) in 1933 en route from Marseille to Athens. The charter followed the modernist ideas on urban planning, and had a special section on the 'Historic Heritage of the Cities'[23]. Six main points were raised in relation to historic fabric:

[22] The ICIC and the IMO, were both founded by the League of Nations as a step forward to promote peace and international dialogue between scientific, artistic and scholar communities.

[23] Le Corbusier, International Congresses for Modern Architecture, *The Athens Charter*, Grossman Publishers, New York, 1973, p. 86.

> «Architectural assets must be protected, whether found in isolated buildings or in urban aggregations…
> They will be protected if they are the expression of a former culture and if they respond to a universal interest…
> and if their preservation does not entail the sacrifice of keeping people in unhealthy conditions…
> and if it is possible to remedy their detrimental presence by means of radical measures, such as detouring vital elements of the traffic system or even displacing centers hitherto regarded as immutable…
> The destruction of the slums around historic monuments will provide an opportunity to create verdant areas…
> The practice of using styles of the past on aesthetic pretexts for new structures erected in historic areas has harmful consequences. Neither the continuation of such practices nor the introduction of such initiatives will be tolerated in any form»[24].

The issues raised in the Athens Charter (1933), addressed an architectural and urban continuity to historic cities with respect to progress (architectural production for serving human needs), originality (as opposed to the production of facsimiles) and appreciation of cultural manifestations (recognition and respect for the past). The charter, although radical in relation to a consistent and systematic form-centred preservation of the urban tissue, introduced a reality of coexistence of the past with the future. It addressed heritage as an innate process of creation without focusing exclusively on the visual, but rather on the functional aspects of architecture.

Secondly, two years prior to the CIAM's resolutions, another meeting took place in Athens. It was the First International Congress of Architects and Technicians of Historic Monuments in 1931, organised by the International Museums Office (IMO). The meeting gave birth to the Athens Charter, also known as *Carta del Restauro,* which can be considered as the manifesto of the international conservation movement. The congress's resolutions were described under seven main categories, with the aim to raise na-

[24] *Ivi*, pp. 86-88.

tional and international awareness for the protection of works of art, monuments, historic and archaeological sites, through modern techniques and materials for the restoration of built fabric. Although very general in terms of definitions, practices and methods, the charter served as a catalyst for the articulation of a cosmopolitan urge to preserve tangible cultural expressions.

Focusing on the historical and aesthetic character of monuments and works of art, lacking definitions and specifications on the categories of artefacts, the Athens Charter (1931) introduced general principles for the restoration of monuments, concerning exclusively the tangible and visible heritage. An interesting section of the charter was the recommendation apropos the occupation of buildings which can be understood as a first indication towards the intangible character of heritage[25]. This suggestion asserted a continuity to the functional aspect of tangible heritage, signifying the transmission of form and matter alongside the purpose of creation. Nevertheless, it was proposed that the occupation of the structures should respect the original function. The risk of a profane usage in respect to the artistic character had to be eliminated so as not to disturb the artistic character and the visual appearance of the structure; an issue that limits the variability of material endurance, and, in a way, eradicates the dimension of intangible carried within this recommendation.

Institutionalisation of cultural heritage

During the post-war period, the Venice Charter of 1964, was the result of the second International Congress of Architects and Technicians of Historic Monuments, adopted also as the first document of ICOMOS at its foundation in 1965. The Venice Charter is, according to many scholars, the basis of all succeeding inter-

[25] «The conference recommends that the occupation of buildings, which ensures the continuity of their life, should be maintained but that they should be used for a purpose which respects their historic or artistic character». *The Athens Charter for the Restoration of Historic Monuments*, 1931.

national doctrines, since it can be considered as a more comprehensive and detailed *Carta del Restauro.* The document provided a more comprehensive definition of the monument, relating it for the first time to the urban or rural setting in which it is found[26]. Although the intangible was neither included in the definitions nor in the conservation practice suggestions, it can be found as a non-articulated idea under the notions of 'authenticity', 'human values', and 'cultural significance'[27]; concepts that played a pivotal role in the articulation of intangible cultural heritage in the turn of the twenty-first century.

The Charter of Venice initiated the focus on the transmission of material evidence, and provided an interpretation for the significance of the general context that a monument carries within it – positing that it is not only the latter's locality or adjacent built environment, but also the ethnological perspective in relation to urban areas that should be evaluated. Alongside the obvious duty of safeguarding the tangible, four notions that were brought forward from the Venice Charter – although not articulated in this way – were the most important aspects that have been addressed from all international instruments prior to the recognition of tangible and intangible cultural heritage: (i) the material evidence of the past; (ii) the notion of place; (iii) the social function of architectural heritage; and (iv) the urban or rural environments where cultural manifestations take place in relation to nature.

[26] «The concept of a historic monument embraces not only the single architectural work but also the urban or rural setting in which is found the evidence of a particular civilization, a significant development or a historic event. This applies not only to great works of art but also to more modest works of the past which have acquired *cultural significance* with the passing of time (emphasis added)». The Venice Charter, *International Charter for the Conservation and Restoration of Monuments and Sites*, Venice, 1964.

[27] «People are becoming more and more conscious of the unity of *human values* and regard ancient monuments as a common heritage. The common responsibility to safeguard them for future generations is recognized. It is our duty to hand them on in the full richness of their *authenticity* (emphasis added)» (*ibidem*).

The radical shift on the understanding of tangible cultural heritage, in terms of both definitions and measures, emerged from UNESCO's World Heritage Convention in 1972. The convention acted as a response to the world's threatened heritage, thus making a clear distinction between cultural and natural heritage. Henceforth cultural heritage was considered as the material outcome of creative manifestations, whereas natural heritage was understood as the habitat of animals and plants and the natural environment of unparalleled beauty[28]. Apart from the recommendations that the convention brought forward for the safeguarding of the world's heritage, the chief characteristics worth mentioning, were the disintegration of the notion of monument[29] and the introduction of criteria for valuing heritage.

> «For the purpose of this Convention, the following shall be considered as 'cultural heritage:'
> monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
> groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
> sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view»[30].

[28] This category of heritage which is of undeniable importance for natural habitats, is not included in the discourse of this paper. It is perhaps needless to say that there is no intention to underrate its significance. Rather, cultural heritage is intentionally brought forward by being the subject of examination of this paper.

[29] Until 1972, all valued immobile material attributes were encompassed under the term monuments.

[30] UNESCO, *Convention concerning the Protection of the World Cultural and Natural Heritage*, Paris, 1972, p. 2.

Although the terminology used for describing tangible heritage has become more explicit with the introduced categories of 'monuments', 'sites' and 'groups of buildings', the focus on form and matter has turned out to be more solid. Surprisingly, even nowadays when cultural heritage is officially acknowledged in both its tangible and intangible dimensions, the definition of cultural heritage remains the same. Cultural manifestations are officially appreciated through the tangible, and valued 'from the point of view of history, science and art'. Only for the category of sites are the values determined from an 'aesthetic', 'ethnological' and 'anthropological' point of view, a fact that as Françoise Choay has also noted is quite unclear and peculiar[31]. Since then, the transmission of cultural manifestations has become quantifiable; valued through the visual characteristics – form and matter – of an individual artefact or a territory.

The convention «established a sense of shared belonging, a global solidarity»[32]. Yet, the influence of Western values was not only evident, but has also become officially universal. Soon enough, the World Heritage (WH) designation became a prestigious status symbol for countries, with an increased number of properties inscribed on the UNESCO WH list every year (approximately twenty attributes annually). Pivotal as it was for the unified understanding of the notion of heritage, the Convention of 1972 was also the epitome of the beginning of international stewardship and heritage of display[33]. A phenomenon that contributes to a large extent to 'spectacle-heritage', since the relationship between the visual and the functional is already at risk.

Figure 1 illustrates the inscribed world heritage properties from all over the globe, as recorded by UNESCO in September 2014[34].

[31] F. Choay, *The Invention of the Historic Monument*, Cambridge University Press, Cambridge, 2001, p. 221.

[32] *Ivi*, p. 140.

[33] Consider for example, heritage tourism. Nowadays, a very important part of global tourism is directed through heritage, and in particular associated with the inscribed properties included in the UNESCO WH list.

[34] This illustration is entitled 'What would you discover if you linked the dots? You can discover everything except the obvious'. It has been prepared for the

Figure 1: Map illustrating the 1,007 inscribed properties in UNESCO WH list (2014), including cultural, natural and mixed properties around the globe. © N. S. KARTALOU

The recommendations provided by these international instruments were not only restricted to properties that were in danger of natural dilapidation or of demolition due to urban developments that threatened their physical existence. Measures and suggestions have been also issued for the protection of monuments in the event of intentional destruction due to war. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (UNESCO) was the first charter to address this issue, immediately after the end of the Second World War. In a similar logic, the Declaration of Dresden on the "Reconstruction of Monuments Destroyed by War" in 1982 by ICOMOS, stressed the necessity of bringing back the material evidence of the past that violently ceased to exist and thus was not able to be transmitted – at least visually and in a state of actuality. During a period of more

design competition 'Authenticity: Global VS Local' in relation to the XVIII General Assembly and ICOMOS Symposium November 2014 in Florence. In this image the dots are counted to 1,007; equivalent to the number of properties inscribed in UNESCO's WH list as per September 2014 (when this illustration was created). The number of intangible cultural heritage attributes is eschewed from this drawing, since it is presumed that a living practice cannot be captured within geographical boundaries.

than sixty years, several issues concerning the management of tangible heritage have been stressed in various charters; among them are: the protection of archaeological remains and sites (1956, 1989, 1990, 1992, 2010); the safeguarding of the underwater cultural heritage (1996, 2001); the preventing of illicit export of movable cultural properties (1964, 1970); and the preservation of industrial heritage (1987, 1990, 2003, 2011).

This social element of architectural heritage has also appeared more prominently during the development of the established heritage movement. With the extrapolation of conservation approaches from architectural to urban areas, the ethnological perspective was evident in many charters addressing the contemporary role of historic areas[35]. *The Resolutions of Bruges* in 1975 was among the first charters to stress the need for integrated conservation approaches for safeguarding the character of historic towns while respecting the social context, followed by the *Declaration of Amsterdam* the same year. *The Norms of Quito* of 1967, was another stone in the pyramid of stewardship, considering the 'social function' of buildings and sites. The useful contribution of the charter was the recognition of the 'historic and artistic human imprint' that makes a building worth to be considered as heritage, echoing, in this sense, Cesare Brandi's theoretical examinations on the appreciation of the 'work of art' according to its historical significance representing testimony to human activity[36].

[35] See for example the Records of the General Conference, 19th session, Nairobi: UNESCO, Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas, 1976.

[36] Cesare Brandi distinguished the products of human activity into two categories: (i) industrial products, which are those that serve as tools or instruments with a particular function – such as a craft item – and (ii) works of art, those artefacts that have a particular form and structure, as well as functional properties – such as architecture. According to Brandi, architecture should be considered as a work of art, since the appearance of a structure becomes the medium from which the image is manifested and transmitted to the future. See C. Brandi, *Theory of Restoration I*, in *Historical and Philosophical Issues in the Conservation of Cultural Heritage*, edited by N. Stanley-Price *et al.*, Getty Conservation Institute, Los Angeles, 1996, pp. 230-233.

The distinction of the different typologies of architectural heritage from UNESCO in 1972 has brought to light a new wave of management policies addressing urban areas. Intangible heritage, although not officially recognised during the 1980s, was evident in several charters which addressed architectural heritage from the perspective of the inhabitant; detected in phrases such as: «identify our cultural personality»[37], «values of traditional urban culture»[38], and the participation of community to the everyday living experience[39].

With the Istanbul Declaration on Human Settlements, published by UN in 1996, the social aspect of heritage moved higher up in the conservation agenda. The prime concern of the Habitat Agenda was the sustainability of human settlements, the universal solidarity, social equality, and cultural diversity. Although the agenda did not involve any heritage-safeguarding concerns, the declaration influenced consequent conservation charters towards a more user-friendly perspective on the management of architectural heritage and to a better quality of the living conditions in urban areas and historic settings.

One of the most influential contributions provided by ICOMOS in 1979 (revised in 2013) was the *Burra Charter.* The charter issued a more comprehensive understanding of the notion of place by encapsulating material and immaterial elements that contribute to the cultural significance of a territory. Instead of providing direct ways of dealing with the safeguarding of heritage (architectural or urban), the charter's scope was to suggest guidance for the conservation and management of heritage in places of cultural significance. The Burra Charter process included the following steps: (i) 'Understand Significance'; (ii) 'Develop Policy'; and (iii) 'Manage in Accordance with Policy'[40]. The important thing that the charter introduced was a method for understanding a place's value according to its unique

[37] ICOMOS, *Charter for the Preservation of Quebec's Heritage (Deschambault Declaration),* 1982.

[38] ICOMOS, *Charter for the Conservation of Historic Towns and Urban Areas* (*Washington Charter*), 1987.

[39] ICOMOS, *Petropolis Charter,* 1987.

[40] *Ibidem*.

characteristics – i.e. history, use, associations and fabric[41] – rather than a recipe for policies that should be applied to every place.

But while the Burra Charter seemed to encompass the social context of a historic settlement, by acknowledging human creativity in relation to the transformation of the environment (i.e. 'adaptation'), the definition given for the term 'place' contradicted this logic: *«Place* means a geographically defined area. It may include elements, objects, spaces and views. Place *may* have tangible and intangible dimensions (emphasis added)»[42]. But a 'place' always has tangible and intangible dimensions if we consider that the intangible is entangled with tradition, which is in a constant negotiation with the making of cultural heritage.

The immaterial character of heritage thus became prominent in several charters, which stressed the need to understand the historic sites and cities as 'urban ecosystems'[43]. But more importantly, the international instruments started taking into consideration the «[*s*] *pirit of place* [which] is defined as the *tangible* (buildings, sites, landscapes, routes, objects) and the *intangible* elements (memories, narratives, written documents, rituals, festivals, traditional knowledge, values, textures, colors, odors, et cetera), that is to say the *physical* and the *spiritual* elements that give *meaning*, *value*, *emotion* and mystery to the *place* (emphasis added)»[44]. The *Québec Declaration* of 2008, suggested that the value of tangible heritage should not only be measured according to historic or aesthetic criteria. Rather, a place, where matter is manifested, is assigned with cultural significance because it contains an amalgamation of meanings that give value to its overall existence beyond its fixed form.

[41] Definitions were provided for each notion in Article 1 of the charter. *See* ICOMOS, *The Burra Charter*, *The Australia ICOMOS Charter for Places of Cultural Significance*, 2013.

[42] Paradoxically in the explanatory notes, the intangible is present under the phrase «a site with spiritual or religious connections»: Article 1, Definitions: 1.1, *The Burra Charter*, 2013, 2.

[43] ICOMOS, *The Valletta Principles for the Safeguarding and Management of Historic Cities, Towns and Urban Areas,* 2010.

[44] ICOMOS, *Québec Declaration on the Preservation of the Spirit of Place*, 2008.

Figure 2: Timeline of charters produced by UNESCO, ICOMOS and the council of EUROPE. © N. S. KARTALOU

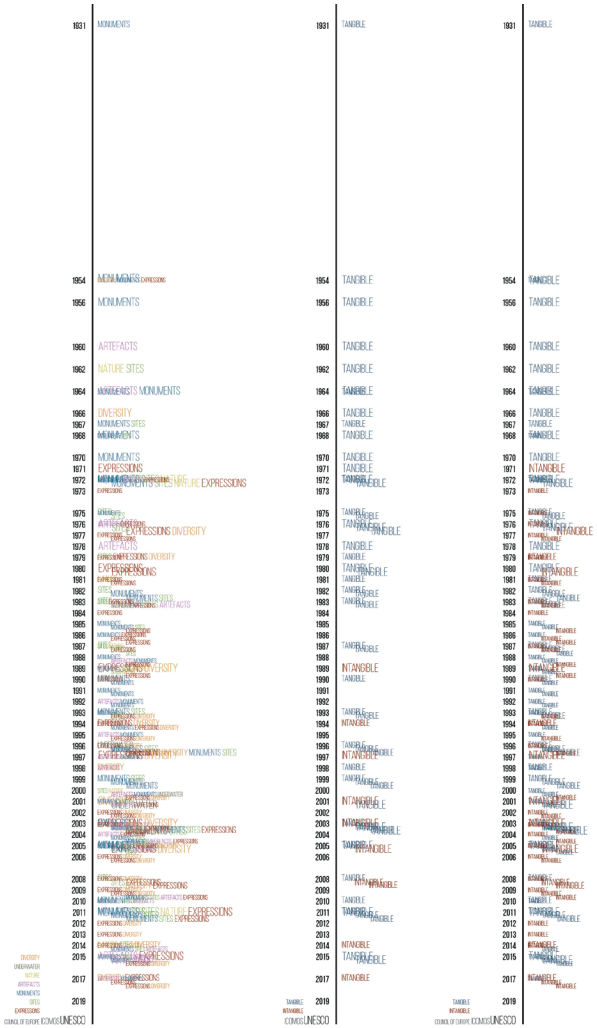

Figure 3: Timeline illustrating from left to right: (i) - categories of heritage considered in each charter; (ii) - outcome of each charter in relation to tangible and intangible heritage; and (iii) - interpretation of the concealed notion of intangible when only tangible heritage was considered in the recommendations. © N. S. KARTALOU

At the turn of the twenty-first century, the intensification of international policy-making has reached a point where every scale of tangible heritage with assigned value may be under consideration for protection. Due to the dominant Western influence on material evidence of the past, cultural diversity was overshadowed by the significance of the solid tangible. As a response to the fixity established by the provision of unified criteria for valuing the world's physical heritage, the *Nara Document on Authenticity* in 1994, instituted the notion of 'authenticity' as a measure for valuing the tangible according to the cultural context of each society. The *Nara Document* provided a revisionist approach to the monolithic notion of tangible heritage by illustrating that cultural significance is not fixed within an eternal presence of physical artefacts as 'Western convention' dictates, but it can also be found in the traditional ways that each culture controls the existence of matter[45].

The notion of tradition was further explored during the preparations for the official recognition of intangible heritage. The *Folklore Recommendations* issued by UNESCO in 1989 was the first step towards understanding the immaterial character of heritage which is associated with a living tradition related to identity, rituals and oral values, liberated from matter and form. Yet, as the next section of this paper will show, the distinction between the tangible and intangible did not contribute to the dissolution of the material character of heritage. Rather, it served as another recommendation for the safeguarding of cultural transmissions, this time even more dangerous since it aimed to manage an *a priori* characteristic of heritage that indicates process and creativity.

The interesting development within the internationalisation of cultural heritage, as an extended part of the conservation movement, is that it is not limited to physical entities – i.e. monuments. The acknowledgment of heritage through other means of expressions, or

[45] An example is the famous case of Japan's shrines. Every twenty years, the temples are demolished and facsimiles are rebuilt from scratch, in order to provide shelter for the new spirit that comes to occupy the temple - i.e. re-creation of matter.

through other factors that contribute to the transformation of the historic fabric that expand to territories, significantly shaped the understanding of what can be equally valued. The problem, however, is that the radical escalation of heritage attributes – especially of the tangible – has been multiplied and it will soon become the majority, in contrast to the non-acknowledged fabric, that is, if designation tendencies carry on in the same way. As a result, cultural heritage, seen only through the lens of stewardship, jeopardises the meaning of value since almost everything is valuable within this persistent conservation scheme. Moreover, and most importantly, it exposes the notion of transmission by delineating the intrinsic variability or transformability of cultural manifestations which are expressed through tangible or intangible means. The gradual establishment of the notion of preservation has become a systematic international movement that nourishes 'social-heritage' (inherited obligation to preserve) and has contributed significantly to the phenomenon of 'spectacle-heritage' (ossified heritage of display). Or, as Rem Koolhaas has remarked sarcastically, «the scale of preservation escalates relentlessly to include entire landscapes, and there is now even a campaign to preserve part of the moon as our most important site»[46-47].

Figure 2 illustrates a timeline of charters produced by UNESCO (red colour letters in bigger scale), ICOMOS (green colour in medium scale) and the Council of Europe (blue colour in small scale). This illustration shows the density of actions taken forward for managing cultural heritage. The superimposition of each charter's title is intentional, in order to show the compactness of stewardship since 1931, considering Athens Charter as the starting point of this intensified conservation movement. It is followed by Figure 3, which decodes in three different timelines the content of the

[46] R. Koolhaas, *Preservation is Overtaking Us*, in *Future Anterior: Journal of Historic Preservation, History, Theory, and Criticism*, 1, 2004, 2, pp. 1-2.

[47] Surprisingly Koolhaas might be a prophet for his ironic statement, since a start has been made with China's Moon mission and the sprout of the first seeds planted. *China's Moon mission sees first seeds sprout*, in *BBC*, January 15, 2019, *www.bbc.co.uk/news/world-asia-china-46873526*.

charters illustrated in Figure 2. The image illustrates from left to right the same timeline depicting: (i) The characteristics of heritage that were considered in each charter, classified under the categories of 'diversity' (orange colour), 'underwater' (grey), 'nature' (yellow), 'artefacts' (purple), 'monuments' (blue), 'sites' (green), and 'expressions' (red); (ii) The charters that considered tangible (blue) or intangible (red) heritage in their recommendations; and (iii) An interpretation of those charters that considered the intangible character of heritage, even if not addressed it in their recommendations.

Intangible and tangible: Process and Outcome

This section examines the two typologies of heritage – tangible and intangible – under the prism of their definitions. The first part compares the two typologies by bringing forward the discrepancies between their definitions in relation to the dipole, 'process' and 'outcome'. The intention of this comparison is to illustrate that tangible heritage is solidified not only through its preservation, but also through the ways that is processed. Compared with intangible heritage, which is appreciated through the process of making, tangible heritage is defined and valued through its fixed condition. What this section seeks to unveil is the *lacuna* of the intangible dimension of tangible heritage. The analysis of the given definitions of both typologies sets the ground to identify the problem of 'social-heritage' through the prism of stewardship, with the intergovernmental institutions being the main instruments that inform, control and guide they ways in which cultural heritage is acknowledged, preserved and managed.

The official document that recognises the existence and also the need for safeguarding the recent articulated character of cultural heritage is the one provided by UNESCO under the "Convention for the Safeguarding of the Intangible Cultural Heritage" in Paris in 2003. Until now, it is the only official document defining intangible cultural heritage as follows:

«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.
2. 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»[48].

If we pause for a moment and reflect on the definition of cultural heritage by UNESCO in 1972, we might be surprised by the contradictions that can be found within a period of thirty years between the two conventions. Surprisingly, the official definition of cultural heritage provided both by ICOMOS[49] and UNESCO[50], remains the same. It fails to include the intangible typology and de-

[48] UNESCO, *Convention for the safeguarding of the Intangible Cultural Heritage*, Paris, 2003, 2.

[49] See both ICOMOS definitions *Glossary*, ICOMOS, updated November 10, 2016, *www.icomos.org/en/2016-11-10-13-53-13/icomos-and-the-world-heritage-convention-4#cultural_heritage*; and J. Jokilehto, *Definition of Cultural Heritage: References to Documents in History*, ICOMOS, 1990, revised for CIF, 2005.

[50] See the most updated version the Operational Guidelines: UNESCO, *Operational Guidelines for the Implementation of the World Heritage Convention*, Word Heritage Centre, Paris, 2021, 21, *http://whc.unesco.org/en/guidelines*.

fines heritage exclusively through the lens of material outcomes of cultural manifestations. The first aspect worth noticing from both definitions is the relationship between the 'process of creation' and the 'outcome of creation'. Tangible heritage is considered an attribute with assigned values. Its definition implies a static state of the categories of artefacts, without reference to the process of making. On the other hand, intangible heritage is conceptualised both as product and as traditional practice that generates various outcomes, either material or immaterial. In this sense, it does not provide an enriched conceptual ground more than the 'Recommendation on the Safeguarding of Traditional Culture and Folklore' already issued in 1989:

> «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 cultural and social 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»[51].

Although the definitions issued by the WH Convention of 2003 can be traced back to the Folklore Recommendations of 1989, the meaning of intangible cultural heritage in a global context within twenty years has not (significantly) changed[52]. After nineteen years of its recognition, intangible cultural heritage is not yet separated from the outcome and the traditional making of the outcome. However, the latter conjecture does not imply any suggestion for their differentiation, since tradition is *a priori* intangible and is en-

[51] UNESCO, *Recommendation on the safeguarding of traditional culture and folklore*, in *Resolution 7.1 adopted by the General Conference at its twenty-fifth session*, Paris, 1989, 239.

[52] Emphasis is added here on the meaning and not on the ways of safeguarding it. For the differences between the two conventions/recommendations along see: B. Kirshenblatt-Gimblett, *Intangible Heritage as Metacultural Production 1*, in *Museum International*, 56, 2004, 1-2, pp. 52-65.

tirely interrelated with creative expressions. Rather, it appears to be paradoxically confusing when it comes to considering intangible cultural heritage with tangible outcomes. Conversely, it is inconceivable to think of tangible cultural heritage without its accompanying process of making. -

This quasi-differentiation throws the actual difference between the tangible and intangible dimension of cultural heritage into confusion. If we are to think of tangible as a category of heritage responding to material outcomes, we would have to consider their accompanied (creative) cultural expressions. That is, not only the process of making as understood from the intangible typology, but the process of altering as well as the process of regenerating material heritage. It is understandable that the endurance of tangible attributes is a result of a continuous transformation of their fabric as a necessary process of the transmission of cultural expressions in time, which, as this paper argues, is not necessarily reflected through a static outcome – for example a monument.

The most concrete example of this lack of consideration of the process of tangible cultural heritage (in urban scale) is the controversial case of the Dresden Elbe Valley in Germany, inscribed on the WH list in 2004 as a cultural site (the third category of the definition of cultural heritage)[53]. The site was de-listed in 2009 due to the construction of a new bridge (*Waldschlößchenbrürcke*), which, according to UNESCO, was posing a threat to its cultural setting[54]. Although the debate on the de-listing stressed the threat of the ecosystem, it was more focused on the visual impact that the bridge brought to the cityscape, accompanied in the end by a failure of communications among the participatory authorities that led the de-listing of the site[55]. As stated by UNESCO, «the term 'cultural

[53] Cultural side in contrast to natural side, with the latter encompassing the rural environment.

[54] *Dresden is deleted from UNESCO's World Heritage List*, UNESCO, June 25, 2009. *https://whc.unesco.org/en/news/522/*.

[55] B. Gaillard, D. Rodwell, *A Failure of Process? Comprehending the Issues Fostering Heritage Conflict in Dresden Elbe Valley and Liverpool - Maritime Mercan-*

landscape' embraces a diversity of manifestations of the interaction between humankind and its natural environment»[56]. Therefore, the de-listing of the site because of the construction of a bridge, an interrelationship of humans and environments combining materials and techniques of the present time, is contrary to the given definition. This is perhaps a notable proof of lack of consideration of the relationship of 'process-and-outcome' for tangible cultural heritage in a world heritage context, influenced by the visual[57].

Yet, if we are to think of intangible cultural heritage as *a priori* non-tangible outcome – without matter but related to the senses – we would support that it is accompanied by (creative) cultural expressions. This association of process and outcome is already included and understood as intangible cultural heritage and there are numerous examples inscribed in the WH list: among them are folk music, traditional dance, language, narratives such as poems, oral stories, rituals and social practices manifest in immaterial form. All of them are practices survived and transmitted to following generations. However, the intangible cultural heritage also includes traditional expressions that compose tangible outcomes, such as craftsmanship, which on the one hand is recognised for its intangible character by indicating the way of 'making', but on the other hand, is manifested through material outcomes.

What is preserved corresponds to the traditional process of making, but the outcome can unquestionably be considered as tangible cultural heritage – which paradoxically is not appreciated as such. From the 631 elements inscribed to the intangible cultural heritage list, 101 traditional safeguarded practices concern the production of tangible outcomes. Among the latter, twelve of them are re-

tile City World Heritage Sites, in *Historic Environment: Policy and Practice*, 6, 2015, 6, 1, pp. 26-30.

[56] P.J. Fowler, *Cultural Landscape*, in *World Heritage Cultural Landscapes 1992-2002,* UNESCO World Heritage Centre, Paris, 2003, p. 22.

[57] At the present time there are fifty-two properties included on UNESCO's list of WH in danger. List of World Heritage in Danger, *https://whc.unesco.org/en/danger/*.

lated to immovable artefacts – such as arch bridges or timber structures – while the remaining eighty-nine concern movable artefacts of smaller scale and in quantities of production – see for example the case of *Ala-kiyiz and Shyrdak, art of Kyrgyz traditional felt carpets*, inscribed in the WH list in 2012[58]. That is to say, for the intangible typology of heritage, even when the outcome is material, the important aspect for safeguarding the transmission of cultural manifestations is related to the process of making; whereas for the tangible typology the interest lies with a finished form of the outcome, in a form as fixed and solid as possible (see definition of cultural heritage as proof). Nevertheless, tangible cultural heritage is measured under the criteria of authenticity and integrity, where these notions suggest – even sometimes in a contradictory manner – an intangible aspect of the process of valuing and appreciating material outcomes.

This paper does not aim to highlight discrepancies within UNESCO's definitions. However, there is a certain amount of weight on the UNESCO's proclamations for the protection of cultural heritage which, in various ways, affects local decisions for management plans and leads to conformity of ideologies. On top of everything they provide definitions which in turn develop policies and unified understandings (e.g. tangible-intangible typologies). We should not forget that among other things, the WH convention of 1972 and its subsequent declarations determine the ways in which wider cultural heritage is articulated nowadays. ICOMOS and UNESCO contributed to the unification of the cultural heritage discourse at a global level by providing definitions and frameworks in different languages. This is an issue that is still problematic with many important theories of the conservation movement remaining untranslated from their original languages, or limited to only a few. Among the declarations, the 2003 convention was undoubtedly a step towards an appreciation of the process of creation in relation to its outcome. Nonetheless, the meanings and differences (or even similarities) between the tangible and intangible are yet to be examined further.

[58] See full list here: *Lists*, in *Intangible Cultural Heritage*, UNESCO, *https://ich.unesco.org/en/lists*.

While the aim of the international instruments is to promote the safeguarding of the word's heritage, their resulting effects are closer to an incomprehensible race for a privileged status among countries which propose their valued properties for listing. As it can be seen in Figure 4, the tangible properties inscribed in the WH list reached the number 1,154 within a period of forty-three years, while the intangible list counted six hundred and one attributes within a period of fourteen years! An issue that raises further questions is whether these attributes will remain in the same state forever, in compliance with the established heritage conformity, or they will lose their listed status, by not responding to a fixity of pre-given and pre-determined forms supported by international organisations. For example, a tangible that is always required to respond to a fixed form and matter and an intangible that is performed in an endless repetition of past practices without accumulating characteristics of the present.

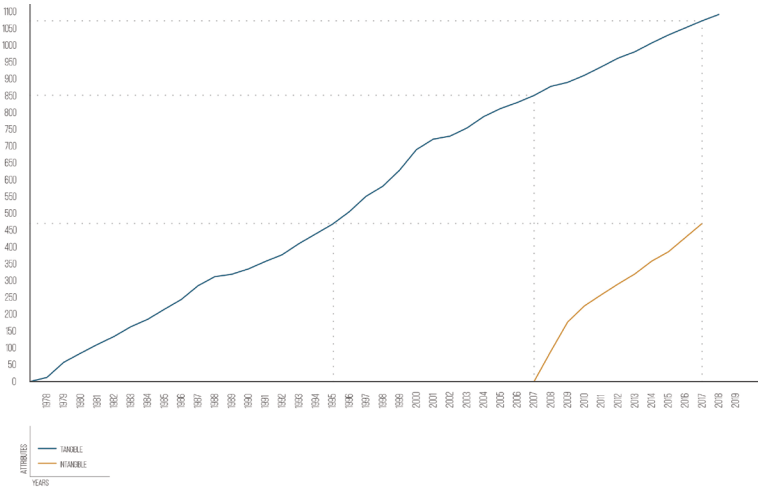

Figure 4: Diagram illustrating the number of inscribed attributes (tangible and intangible) in the Unesco world heritage list, within a period of forty years. © N. S. KARTALOU

Conclusion

This paper has briefly put forward some contradictions regarding the recognised relationship of the process of making with the final outcome – material or immaterial, based on the official definitions of both (in)tangible typologies given by UNESCO in 1972 and 2003 respectively. The reference to the selected charters is an attempt to offer a snapshot of the gradual development of cultural heritage into a (political) conundrum and to illustrate how a heritage of social process ('social-heritage') has turned into a heritage of display or of spectacle ('spectacle-heritage'), providing an ossified understanding of the past in relation to what is transmitted. The problem that this overview aimed to highlight, is that cultural heritage has reached its zenith and thus a new quandary has risen: the cultural manifestations transmitted from the past are menaced by either being tarnished or amplified.

The persistence on definitions and meanings aims to illustrate an *in-between* state of heritage – neither concrete nor abstract – which is partially dismissed from the institutionalised discourse. This *lacuna* in heritage discourse underrates the qualities that contribute to the shaping of cultural heritage as a continuous anticipation of creative expressions. Rather, it foregrounds a fixed and framed image of a past; a closed circle of authorised expressions and forms. This lack of addressing the *in-between* state is reflected into the current definitions and policies of heritage which consider tangible as an outcome and intangible as a process. Two, otherwise, inseparable notions for understanding heritage as a cumulative progression of both past and present creative actions.

Section II

The World Heritage Convention: its Relevance for Strengthening the Values of the International Community

Joshua Davis

THE POLITICISATION OF THE PROCESS OF INSCRIPTION INTO THE UNESCO WORLD HERITAGE LIST*

Abstract: The purpose for this study is to examine the extent to which the process of inscription into the UNESCO World Heritage List is subject to politicisation. The study outlines and examines the process and criteria of selection into the UNESCO World Heritage List, as well as the competences of the governing organs of UNESCO. specifically, the UNESCO General Assembly and the UNESCO World Heritage Committees. Moreover, this chapter analyses the role of UNESCO in the inscription process into the World Heritage List. The chapter reviews the literature and findings of previous studies on politicisation of the inscription process into the World Heritage List, which permits a synthesis of cases in which politicisation was evaluated as perceived as having occurred. The study examines these cases in the context of the theoretical framework of the politicisation of cultural property, and determines that the processes surrounding inscription were politicized, and that the inscription process into the World Heritage List. Regarding the milestone of the 50th anniversary of the 1972 World Heritage Convention, the chapter offers strategies that may potentially mitigate the politicisation of the inscription process into the World Heritage List, all of which are potentially avenues for future research in order to determine their potential for action.

Introduction

The United Nations Educational, Scientific and Cultural Organisation (UNESCO) was established in London on 16 November 1945, by forty-four gathered nations, with the explicit goal of «promoting collaboration among nations through education, science, culture and communication in order to further universal respect for justice, the rule of law, human rights and fundamental

* Double-blind peer reviewed content.

freedoms set out in the Charter of the United Nations»[1]. World leaders including UK Prime Minister Clement Atlee, made the distinction between educational and cultural cooperation by stating that «wars begin in the minds of men», with US President calling for cultural and educational cooperation by drawing on his predecessor Franklin D. Roosevelt's belief that «civilisation is not national, it is international»[2]. As the 1972 World Heritage Convention enters into its fiftieth anniversary year, it is timely to reflect upon and evaluate its capacity to fulfil its mission of protecting, preserving and conserving the cultural property of the world for all of humanity in perpetuity.

The criteria for the inscription of cultural property into the mechanism which permits UNESCO to fulfil this mission, that of the World Heritage List, is that the cultural property conforms to the criteria of having outstanding universal value and also has authenticity[3]. The Operational Guidelines for the Implementation of the World Heritage Convention outline the criteria for determining the outstanding universal value of cultural property, and the 1994 Nara Document of International Council of Monuments and Sites (ICOMOS) sets out the criteria for determining the authenticity of cultural property for inscription into the UNESCO World Heritage List. The Operational Guidelines for the Implementation of the World Heritage Convention Convention refer to the intrinsic value of cultural property as criteria for inscription, with the 1994 Nara Document of International Council of Monuments and Sites (ICOMOS) – the organisation responsible for assessing cultural properties on behalf of UNESCO – , referring to authenticity of cultural properties and providing a blueprint for valorisation

[1] L. Meskell, C. Liuzza, E. Bertacchini, D. Saccone, *Multilateralism and UNESCO World Heritage: Decision-making, States Parties and Political Processes*, in *International Journal of Heritage Studies*, 21, 2015, 5, pp. XV.

[2] *Ibidem*.

[3] UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 16 November 1972, *https://whc.unesco.org/archive/convention-en.pdf*.

of non-Western cultural properties[4]. The aspects of intrinsic value and authenticity of cultural property, and the extent to which these are relevant criteria for what constitutes as being of outstanding universal value according to the 1972 UNESCO World Heritage Convention are matters which are subject to consistent debate and division in the continual UNESCO General Assemblies and World Heritage Committees, as well as during meetings and conferences held by ICOMOS[5].

Yet, as the State Parties to the Convention have the exclusive competence for nominating for the inscription of cultural property located on their territory, an incentive is placed on the State Parties to nominate cultural properties for inscription to the World Heritage List for reasons pertaining to political and nationalistic agendas. As a result, a perception may be formed that the process of the inscription into the UNESCO World Heritage List is affected by politicisation. Politicisation is theoretically defined by Wiesner as «relates to the fact that an issue or actor is public, collective, and contested. It means to mark something as collectively and publicly relevant and debatable and as an object of politics»[6]. Politicisation in the context of the inscription process under the auspices of the 1972 World Heritage Convention may be defined as the contestation for the justification of the inscription of cultural property into the UNESCO World Heritage List. It is therefore necessary to understand why and how this is the case, as well as to determine measures that could potentially remedy the situation.

Bertacchini, Liuzza, Meskell, and Saccone assess that even though the purpose of the World Heritage List is to protect and conserve the world's cultural properties that are of outstanding universal value, and it is therefore a document of cultural internationalism; moreover in practice the inscription of a site into the World

[4] S. Labadi, *UNESCO, Cultural Heritage, and Outstanding Universal Value*, Rowman & Littlefield Publishing Group, Lanham, MD, 2013, pp. 56-57.

[5] *Ibidem*.

[6] C. Wiesner, *Rethinking Politicisation in Politics, Sociology and International Relations*, Palgrave Macmillan, Cham, 2021, p. 22.

Heritage List grants international recognition to a site, along with economic benefits[7]. Through the use of systemic data analysis of decisions of the World Heritage Committee and Summary Records over the period of 2003-2012, the authors found that decisions taken by the World Heritage Committee on the inscription of cultural property into the World Heritage List have been influenced by both political and economic interventions[8]. The empirical data for this conclusion is that in the verbal interventions of the speakers during plenary sessions, the speakers made arguments based in political and economic terms rather than justifying their decisions based on outstanding universal value and/or authenticity[9]. An example of this is cited in the vocal support given by Qatar and South Africa in 2013 in favour of Panama, due to the close commercial ties between Panama and the respective nations[10]. Specifically, the study found that whilst the final decision on inscription is based on technical criteria, in instances in which a cultural property had initially been rejected for inscription, the final decision on inscription was instead based on political and economic assessments, as for example in the case of Qatar and South Africa's interventions in Panama's favour during the meetings of the World Heritage Committee in 2013[11]. Moreover, the authors found that State parties that can exercise informal influence on the World Heritage Committee through their national delegations, and which have close international and political ties with other State parties involved in the decision-making process have an augmented capacity to gain supportive statements for their nominations of cultural property being inscribed in the World Heritage List if their initial nomination has

[7] K. Wangkeo, *Monumental Challenges – The Lawfulness of Destroying Cultural Heritage during Peacetime*, in *The Yale Journal of International Law*, 28, 2003, 1, pp. 183-209.

[8] *Ibidem*.

[9] E. Bertacchini, C. Liuzza, L. Meskell, D. Saccone, *The Politicisation of UNESCO World Heritage Decision Making*, in *Public Choice*, 167, 2016, 1-2, pp. 95-129.

[10] *Ibidem*.

[11] *Ibidem*.

been rejected[12]. However, the authors also note that in their study, they found neither correlation nor causation for the suggestion that a nation serving on the World Heritage Committee, or a nation having a higher level of GDP per capita influenced the success of failure of the inscription of cultural property into the World Heritage List[13]. They conclude that «deliberations over the inscription of sites on the UNESCO World Heritage List has reached a level of politicisation similar to that of other UN fora» and that in the case of UNESCO, political and economic interests play a key role in decision-making event when the mission and purpose of UNESCO is irrelevant to these concerns, as for example in the case of Panama's favourable treatment from Qatar and South Africa in the World Heritage Committee considering both respective nations' economic ties with Panama[14].

The motivation behind the 1972 World Heritage Convention

It is first necessary to outline and examine the vision and objectives, as well as the motivation behind the 1972 World Heritage Convention. As stated in the preamble of the 1972 World Heritage Convention, its goal is to mobilise the international community to collectively act for the protection and conservation of the world's natural and cultural heritage[15]. The 1972 World Heritage Convention recognises that the challenges to the protection and conservation of cultural heritage are evolving and increasing[16]. In order to remedy this situation, the 1972 World Heritage Convention introduces the concept of «outstanding universal value» into international law, and in the preamble of the Convention it considers

[12] *Ibidem*.
[13] *Ibidem*.
[14] *Ibidem*.
[15] UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, cit.
[16] *Ibidem*.

that certain parts of 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[17]. Within this conceptualisation, the 1972 UNESCO World Heritage Convention represents a normative shift in which cultural property moves into being of world community interest as cultural heritage rather than of being localised interest[18]. Meskell describes the 1972 UNESCO World Heritage Convention as «utopian » in its ideology and in its objectives[19].

Meskell posits that the philosophical understanding underpinning the 1972 UNESCO World Heritage Convention is one which was heavily influenced by an expression of the ideology of scientific humanism that was advocated by H.G. Wells and Julian Huxley, in which human history, culture and achievement is emphasised as being a collective effort of human civilisation, rather than separate civilisations[20]. Within this vision, which was particularly expressed by Julian Huxley, civilisations are not measured by their individual progress, but rather by their collective contributions to global human civilisation[21]. There is no valorisation of one civilisation over another. Instead, there is a view of the equivalence of collective natural histories, and scientific as well as cultural outputs being vectors for overcoming intolerance between peoples[22]. Thus, within the conceptualisation of «outstanding universal value», a rise in a humanistic and anti-nationalist vision emerges which seeks to actively counter the chauvinistic nationalism of the pre-1945 era[23].

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[17] *Ibidem*.

[18] F. Francioni, *A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage*, in *Standard-Setting In UNESCO*, I, *Normative Action In Education, Science And Culture - Essays in Commemoration of the Sixtieth Anniversary of UNESCO,* edited by A.A. Yusuf, UNESCO Publishing and Koninklijke Brill Publish, Paris, France and Leiden, The Netherlands, 2007, pp. 221-237.

[19] L., Meskell, *A Future in Ruins – UNESCO, World Heritage and the Dream of Peace*, Oxford University Press, Oxford, 2018, pp. 11-15.

[20] *Ibidem*.

[21] *Ibidem*.

[22] *Ibidem*.

[23] *Ibidem*.

The early directorship of UNESCO by Julian Huxley, whose ideas were articulated in his book «History of Mankind », resulted in the ideas of Julian Huxley directly influencing the 1972 UNESCO World Heritage Convention[24]. Therefore, the ideological perception underpinning the 1972 UNESCO World Heritage Convention is one of universal humanistic approaches to civilisation, which seeks to collectively value all cultures and cultural heritage in a pluralistic manner within the prism of shared humanity[25].

Labadi examines the process of what counts as intrinsic value within cultural property, and the contribution of this intrinsic value to the determination of what constitutes «outstanding universal value» as it is codified within the 1972 World Heritage Convention[26]. Labadi explains UNESCO's attitude towards cultural heritage of outstanding universal value as being an idea that certain cultural properties are so exceptional that all humans would consider them as worthy of protection, regardless of their personal and community cultural and social contextual frames of reference[27]. Moreover, it is considered that cultural property is outstanding universal value to humans regardless of the time in which they live, with Labadi noting that the Great Pyramids of Giza were also considered of value in ancient times by figures such as Herodotus[28]. Labadi also notes that the ideas expressed by Immanuel Kant in the book *Critique of Judgement* (1790), in which humans have an inate common sense of «good taste» allows for the developing of a consensus regarding art[29]. Extending this to cultural heritage, the 1972 UNESCO World Heritage Convention seeks to form a consensus based on common sense of what is of outstanding universal value. In discussing an «inate common sense», it is relevant to note that philos-

[24] *Ibidem*.
[25] *Ibidem*.
[26] S. Labadi, *UNESCO, Cultural Heritage, and Outstanding Universal Value*, cit., pp. 28-29.
[27] *Ibidem*.
[28] *Ibidem*.
[29] *Ibidem*.

ophers such as Derrida and Bordieu deconstructed Kant's conceptualisation and instead noted that human valuing of art and by extension cultural heritage was relative and heavily influenced by contextual factors[30]. Within this deconstructionist vision of aesthetics, there is no universal sense of appreciation of taste in cultural heritage, and that what is considered as being of value is heavily influenced by the personal, academic and socioeconomic background of an individual[31]. In finding a point of equilibrium between the notions of aesthetics being a universal predisposition, compared to the view that aesthetics are relativized depending on the contextual factors of an individual, Labadi notes the intrinsic value of what are considered as canonical examples of cultural heritage. These canonical examples, such as the Pyramids of Egypt and Greek and Roman cultural heritage, have been valued for their heritage for long periods of time, and are therefore not subject to debate on the merits of their intrinsic value. Within the debate of the divide between intrinsic and relativist value is the salient point that there is a preponderance of cultural properties inscribed into the World Heritage List which are considered as being of value to European heritage. Indeed, of the 897 (as of 2022) cultural properties inscribed into the World Heritage List according to the 1972 World Heritage Convention, 468 (47.23%) of these are located within Europe and North America[32]. In contrast, there are 54 (8.49%) cultural properties located in Africa on the World Heritage List, which includes cultural properties that date to the European colonial period[33]. This

[30] J. Loesberg, *Bourdieu's Derrida's Kant: The Aesthetics of Refusing Aesthetics*, in *Modern Language Quarterly, Seattle*, 58, 1997, 4, pp. 417-436; J.S. Libretti, *Aesthetics in Deconstruction: Derrida's Reception Of Kant's Critique Of Judgment*, in *The Philosophical Forum*, 43, 2012, 3, pp. 327-344.

[31] J. Loesberg, *Bourdieu's Derrida's Kant: The Aesthetics of Refusing Aesthetics*, cit., pp. 417–436; J.S. Libretti, *Aesthetics in Deconstruction: Derrida's Reception Of Kant's Critique Of Judgment*, cit., pp. 327-344; S. Labadi, *UNESCO, Cultural Heritage, and Outstanding Universal Value*, cit., pp. 28-29.

[32] UNESCO, *World Heritage List Statistics*, *https://whc.unesco.org/en/list/stat/*.

[33] *Ibidem*.

state of affairs gives rise to criticism of what is considered as being of intrinsic value as being Euro-centric[34].

The 1972 UNESCO World Heritage Convention may be considered as a legal document which aims to universally valorise cultural heritage based on its intrinsic value to humanity in perpetuity. It seeks to advance a humanistic agenda of pluralism and equality of value of cultural heritage between all peoples on Earth. In its collectivist visions of value for cultural heritage, it also seeks to achieve collaborative solutions for the protection, preservation, conservation and safeguarding of cultural heritage.

The legal framework of the 1972 UNESCO World Heritage Convention

Regarding the legal framework of the 1972 World Heritage Convention, the 1972 UNESCO World Heritage Convention is a United Nations convention, which according to international law, is legally binding on all State Parties that have ratified the Convention[35]. As of 23 October 2020, there are 194 State Parties to the 1972 UNESCO World Heritage Convention[36]. The 1972 UNESCO World Heritage Convention adapts the concept of the common heritage of humanity to the field of cultural heritage, in which cultural heritage is associated with state sovereignty and national ownership of cultural properties[37]. The notion of the common heritage of humanity draws on the models of associating territorial

[34] S. Labadi, *UNESCO, Cultural Heritage, and Outstanding Universal Value*, cit., pp. 28-29.

[35] M. Lostal, *The World Heritage Convention as the Field's Common Legal Denominator*, in *International Cultural Heritage in Armed Conflict - Case Studies of Syria, Libya, Mali, the Invasion of Iraq and the Buddhas of Bamiyan*, Cambridge University Press, Cambridge 2017, pp. 69-91.

[36] UNESCO, *List of State Parties to the World Heritage Convention*, *https://whc.unesco.org/en/statesparties/*.

[37] P-M. Dupuy, *The Impact of Legal Instruments Adopted by UNESCO on General International*, in *Standard-Setting In UNESCO*, I, *Normative Action In Educa-*

sovereignty with the common heritage of humanity as codified in the 1959 Antarctica Treaty and the 1967 Outer Space Treaty[38]. The fundamental principles of the 1972 UNESCO World Heritage Convention are based in customary international law[39]. The ratification of the 1972 UNESCO World Heritage Convention by a large majority of States legitimises the principles of UNESCO and place a universal obligation on all parties to safeguard cultural heritage on their sovereign territory not only for the wellbeing of their national populations, but for humanity as a whole and in perpetuity. This universal obligation to safeguard cultural heritage for the common wellbeing of humanity correlates strongly with the utopian ideals within the original vision of UNESCO, and the 1972 UNESCO Convention codifies this vision for all State Parties to follow.

The process and system for inscribing cultural property into the World Heritage List

The process for inscription into the UNESCO World Heritage List is outlined in the UNESCO Operational Guidelines for the Implementation of the World Heritage Convention[40]. The Operational Guidelines for the Implementation of the World Heritage Convention were first adopted by the World Heritage Committee in 1978[41]. The Operational Guidelines are periodically revised in

tion, Science And Culture - Essays in Commemoration of the Sixtieth Anniversary of UNESCO, cit., pp. 351-365.

[38] *Ibidem*.

[39] *Ibidem*.

[40] UNESCO Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, *Operational Guidelines for the Implementation of the World Heritage Convention - WHC.21/01*, 31 July 2021, *https://whc.unesco.org/document/190976*.

[41] UNESCO, *The Operational Guidelines for the Implementation of the World Heritage Convention*, *https://whc.unesco.org/en/guidelines/*.

order to reflect the decisions of the World Heritage Committee[42]. The most recent Operational Guidelines for the implementation of the World Heritage Convention date to 31 July 2021[43]. The Operational Guidelines for the implementation of the World Heritage Convention refer to the intrinsic value of cultural properties as being the criteria for inscription in the World Heritage List[44]. Article 8(1) sets out the composition, diversity representation, meeting frequency and duties of the General Assembly and the World Heritage Committee[45]. The General Assembly of the State Parties to the 1972 UNESCO World Heritage Convention meet during the ordinary sessions of the UNESCO General Conference[46]. The UNESCO General Conference consists of 195 Member States (and ten associate Members)[47]. As of 23 October 2020, there are 194 State Parties to the 1972 UNESCO World Heritage Convention[48]. The World Heritage Convention Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value, called «the World Heritage Committee», is composed of 21 State Parties to the Convention, who are elected by the General Assembly[49]. The World Heritage Committee is composed of an «an equitable representation of the different regions and cultures of the world»[50]. The World Heritage Committee and

[42] *Ibidem*.

[43] UNESCO Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, *Operational Guidelines for the Implementation of the World Heritage Convention - WHC.21/01*, cit.

[44] S. Labadi, *UNESCO, Cultural Heritage, and Outstanding Universal Value*, cit., pp. 56-57.

[45] J. Wouters, C. Ryngaert, T. Ruys, G. De Baere, *International Law: A European Perspective,* Hart Publishing, Oxford, 2019, pp. 297-298.

[46] UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, cit.

[47] J. Wouters, C. Ryngaert, T. Ruys, G. De Baere, *International Law: A European Perspective*, cit., pp. 297-298.

[48] UNESCO, *List of State Parties to the World Heritage Convention*, cit.

[49] UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, cit.

[50] *Ibidem*.

the General Assembly includes representatives of the International Centre for the Study of the Preservation and Restoration of Cultural Property (Rome Centre) and a representative of the International Council of Monuments and Sites (ICOMOS)[51]. These representatives have an advisory capacity to provide technical information on decisions pertaining to the inscription into and maintenance of the World Heritage List[52].

The criteria for inscription in the UNESCO World Heritage List have their source in the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (hereafter the 1972 UNESCO World Heritage Convention), which is dedicated to the protection of tangible cultural heritage[53]. This differs from the UNESCO Lists of Intangible Cultural Heritage, which have their source in the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage[54]. For the purposes of this paper, the focus will be on tangible cultural heritage according to the UNESCO World Heritage List, as it is defined in the 1972 UNESCO World Heritage Convention. Article 1 of the 1972 UNESCO World Heritage Convention sets out the criteria for the inscription of cultural property into the World Heritage List. In order to be inscribed in the World Heritage List, «cultural heritage», may include monuments or groups of buildings which are of outstanding universal value from the point of view of history, art or science, groups of building, or sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view[55]. According to Article 49 of the UNESCO Operational Guidelines for the Implementation of the World Heritage

[51] *Ibidem*.

[52] *Ibidem*.

[53] UNESCO Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, *Operational Guidelines for the Implementation of the World Heritage Convention - WHC.21/01*, cit.

[54] UNESCO, *Basic texts of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage UNESCO(091)/C96*, *https://ich.unesco.org/en/basic-texts-00503*.

[55] UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, cit.

Convention, in order to be inscribed in the World Heritage List, the cultural property in question must be of «outstanding universal value», defined as «cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity», for which «the permanent protection of this heritage is of the highest importance to the international community as a whole»[56]. In accordance with Article 77 of the UNESCO Operational Guidelines for the Implementation of the World Heritage Convention, in order to be considered as having «outstanding universal value», and to therefore be inscribed in the World Heritage List, the cultural property in question must meet at least one of six criteria*:

> «(i) represent a masterpiece of human creative genius (e.g.: the Sistine Chapel in the Vatican);
> (ii) exhibit an important interchange of human values (e.g.: the Cappella Palatina in Palermo, Sicily);
> (iii) bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared (e.g.: the Alhambra Palace, Granada);
> (iv) be an outstanding example of construction which illustrates significant stage(s) in human history or which has become vulnerable due to irreversible change (e.g.: the Lascaux Caves in France);
> (vi) be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance (e.g.: the Hagia Sophia in Istanbul, Turkey) »[57].

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[56] UNESCO Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, *Operational Guidelines for the Implementation of the World Heritage Convention - WHC.21/01*, cit.

* Pursuant to Decision 6 EXT.COM 5., the World Heritage Committee at its 6th extraordinary meeting (2003) amalgamated the two separate lists of criteria for cultural heritage (six points), with the list of criteria for natural heritage (four points), *https://whc.unesco.org/en/decisions/6165/*.

[57] UNESCO Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, *Operational Guidelines for the Implementation of the World Heritage Convention - WHC.21/01*, cit.

Outstanding Universal Value and Authenticity

A key point which is taken into account in the UNESCO nomination process is that of UNESCO maintaining a World Heritage List that is balanced, credible and representative[58]. Countries that are over-represented on the list are asked to limit their nominations (Article 59 of the UNESCO Operational Guidelines), whereas those countries which are under-represented are encouraged to prepare Tentative Lists and nominations (Article 55)[59].

Additionally, all cultural heritage properties must meet authenticity conditions – in particular that the information about the cultural properties justifying their outstanding universal value is truthful and credible (Article 79)[60]. As set out in Article 83, «attributes such as spirit and feeling do not lend themselves easily to practical applications of the conditions of authenticity»[61] The document which the World Heritage Committee uses in order to determine authenticity in the inscription list of the World Heritage List is the 1994 Nara Document on Authenticity[62]. The 1994 Nara Document on Authenticity is a document drafted by the International Council of Monuments and Sites (ICOMOS)[63]. It introduced the concept of cultural relativism into the assessment processes of cultural properties[64]. It acts as a guideline for International Council of Monuments and Sites (ICOMOS)[65]. in their assessment of what

[58] *Ibidem*.
[59] *Ibidem*.
[60] *Ibidem*.
[61] *Ibidem*.
[62] *Ibidem*.
[63] UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, cit.; ICOMOS, *The Nara Document on Authenticity*, 1994, *www.icomos.org/charters/nara-e.pdf*. See A. Gfeller, *The Authenticity of Heritage: Global Norm-Making at the Crossroads of Cultures*, in *The American Historical Review*, 122, 2017, 3, pp. 758-791.
[64] ICOMOS, *The Nara Document on Authenticity*, cit. See A. GFELLER, *The Authenticity of Heritage: Global Norm-Making at the Crossroads of Cultures*, ct., pp. 758-791.
[65] UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, cit.

constitutes outstanding universal value[66]. The Nara Document heavily influences the reports submitted to the World Heritage Committee and the UNESCO General Assembly and provides a blueprint for valorising non-Western and non-traditionally canonical cultural properties, addressing the imbalance between Western and non-Western cultural properties inscribed in the World Heritage List. The 1994 Nara Document on Authenticity condemns «aggressive nationalism» (Article 4)[67]. Moreover, pursuant to Article 6, «In cases where cultural values appear to be in conflict, respect for cultural diversity demands acknowledgment of the legitimacy of the cultural values of all parties». According to the Nara Document, authenticity in cultural heritage preservation «clarifies and illuminates the collective memory of humanity», acting against «aggressive nationalism » and the «suppression of the cultures of minorities»[68]. An example of a case in which cultural values appear to be in conflict and respect for diversity is relevant is evident in the situation of educational intervention into the lives of the Roma minority within Europe, in which different cultural values on education for children create conflict[69]. In such a situation, the Nara document provides for legitimacy for the minority rights of the Roma community in conflict with the mainstream values of the European nations in question.

To sum up, the current nomination criteria and processes of assessment by the World Heritage Committee contains measures which ensure that any cultural property inscribed into the World Heritage List is of outstanding universal value to all humanityand

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[66] ICOMOS, *The Nara Document on Authenticity*, cit. See A. GFELLER, *The Authenticity of Heritage: Global Norm-Making at the Crossroads of Cultures*, cit., pp. 758-791.

[67] UNESCO Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, *Operational Guidelines for the Implementation of the World Heritage Convention - WHC.21/01*, cit.

[68] *Ibidem*.

[69] N. Salgado-Orellana, E. Berrocal De Luca, C. Sánchez-Núñez, *Intercultural Education for Sustainability*, in *The Educational Interventions Targeting the Roma Student: A Systematic Review*, 12, 2019, 3238.

meeting the standards of authenticity. These standards should prevent the inscription of cultural properties with nationalistic and politicised agendas into the World Heritage List. Yet, politicisation and the nomination of cultural properties with nationalistic agendas to the World Heritage List continues to occur, for example in the case of Thailand contesting Cambodia's bid to inscribe the contested Preah Vihear Hindu temple on a disputed section of Thai-Cambodian border as being Cambodian cultural property, providing for international recognition of Cambodian sovereignty over the disputed border area[70].

The 1972 World Heritage Convention – Internationalist, yet with Exclusive Competence for State Parties

The 1972 UNESCO World Heritage Convention is legally binding on all State Parties, which, pursuant to Article 4 of the Convention, have the responsibility to ensure that all cultural heritage on their territory is protected and preserved in order for it to be transmitted to future generations. Before nominating any cultural property for the World Heritage List, pursuant to Article 63 UNESCO Operational Guidelines for the Implementation of the World Heritage Convention, the State Parties should prepare their own Tentative Lists of all those properties which they consider to be of Outstanding Universal Value, and then nominate these for inscription in the World Heritage List[71]. Since the State Parties have exclusive competence to identify and nominate any cultural property on

[70] H. Silverman, *Border Wars: The Ongoing Temple Dispute between Thailand and Cambodia and UNESCO's World Heritage List*, in *International Journal of Heritage Studies*, 17, 2011, 1, pp. 1-21; L. Meskell, C. Liuzza, E. Bertacchini, D. Saccone, *Multilateralism and UNESCO World Heritage: Decision-making, States Parties and Political Processes*, cit., pp. 423-440.

[71] UNESCO Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, *Operational Guidelines for the Implementation of the World Heritage Convention - WHC.21/01*, cit.

their territory to the World Heritage List, it follows that the State Parties are able to contest the inscription process of cultural properties based on criteria which potentially suits their political agendas.

In its structure, the 1972 UNESCO World Heritage Convention embodies a duality in which, on the one hand the State Parties cede elements of their sovereignty over their cultural property to the international community by granting international oversight and recognition of their cultural heritage (Article 15), yet also remain exclusively competent for nomination of their cultural property to the World Heritage List, and for the preservation, conservation and maintenance of the cultural property on their territory (Article 15)[72].

This duality in the 1972 UNESCO World Heritage Convention may be described as being a conflict between cultural property internationalism and cultural property nationalism[73]. Within this duality is the tension between market nations and source nations of cultural heritage, with the market nations representing cultural property internationalism in valorising cultural heritage from abroad, potentially provoking tensions with cultural property nationalist forces, as the source nations have national competence over the cultural properties in question.

Cultural property internationalism

Cultural internationalism is defined by Forbes as the notion that cultural property is a global common good in which all nations and cultural groups have a shared interest[74]. Similarly, Merryman defines cultural property internationalism as being «shorthand for the proposition that everyone has an interest in the preservation and

[72] J. Wouters, C. Ryngaert, T. Ruys, G. De Baere, *International Law: A European Perspective*, cit., pp. 934-935.

[73] S. Forbes, *Securing the Future of Our Past: Current Efforts to Protect Cultural Property* in *The Transnational Lawyer*, 1996, vol. 9, no. 1, pp. 235-266.

[74] *Ibidem*.

enjoyment of cultural property, wherever it is situated, from whatever cultural or geographic source it derives[75]. According to Francesco Francioni, the conceptualisation of cultural heritage «common heritage of humanity» can be traced back to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, according to which «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»[76]. Adding to this definition, Wangkeo specifies that according to the cultural internationalist approach, cultural heritage is the common heritage of mankind and is a global common resource similar to air and water yet it is not global common property like air and water in the sense that it is not open to public access and use[77].

The cultural internationalist argument for the preservation of cultural heritage finds its prominent example in that of the international campaign to preserve the temples of Abu Simbel in Nubia Egypt during the construction of the Aswan Dam, which paved the way for the 1972 UNESCO World Heritage Convention[78]. This cultural internationalist approach is particularly exemplified in the discourse and actions of the former French Minister for Cultural Affairs André Malraux[79]. In March 1960, Malraux presided over the launch of the International Campaign for the Preservation of

[75] J. Merryman, *Cultural Property Internationalism*, in *International Journal of Cultural Property*, 12, 2005, 1, pp. 11-39.

[76] F. Francioni, *Plurality and Interaction of Legal Orders in the Enforcement of Cultural Heritage Law*, in *Enforcing International Cultural Heritage Law*, Oxford University Press, Oxford, 2013, p. 20.

[77] K. Wangkeo, *Monumental Challenges – The Lawfulness of Destroying Cultural Heritage during Peacetime*, cit., pp. 183-209.

[78] L. Meskell, *A Future in Ruins – UNESCO, World Heritage and the Dream of Peace*, cit., p. 50.

[79] A. Malraux, *'The Action of a Man Who Snatches Something from Death' (International Campaign for the Preservation of the Monuments of Nubia Speech) (transcript)*, in *The UNESCO Courier*, 39, 1986, 5, p. 60; L. Meskell, *A Future in Ruins – UNESCO, World Heritage and the Dream of Peace*, cit., p. 50.

the Monuments of Nubia[80]. Malraux launched the discourse into international policy of collective human heritage and the need for humans to act collaboratively in order to safeguard cultural heritage, in which he states of the campaign «appeal is historic, not because it proposes to save the temples of Nubia, but because through it the first world civilization publicly proclaims the world's art as its indivisible heritage»[81]. Malraux also called upon all nations to put aside their conflicts and work collectively to 'snatch from death' the threatened cultural properties, which he described as being of claim to all humans[82]. Meskell notes that images of bombed cultural properties featured heavily in UNESCO's publication the UNESCO Courier for many decades, providing a stark image showcasing the failure of acting collectively to safeguard cultural heritage[83]. Malraux stated that the inspiration for collectively finding an alternative for the cultural heritage in Nubia being threatened by the flooding due to the construction Aswan Dam would be a global effort to replicate the success of the Tennessee Valley Authority, an effort undertaken during the 1930s to transfer and safeguard US First Nations cultural heritage during the construction of the Tennessee Valley dam initiatives[84]. Accordig to Ryan and Silvanto, poorer State Parties to the 1972 World Heritage Convention often lack the resources and expertise to undertake salvage operations, and in the case of Nubia and the Aswan Dam, the Aswan Dam was commissioned by Colonel Nasser to improve the living standards of Egypt's citizens[85]. The cultural internationalist approach to the safeguarding of cultural heritage may therefore be expressed as

[80] *Ibidem*; L. Meskell, *A Future in Ruins – UNESCO, World Heritage and the Dream of Peace*, cit., p. 50.

[81] A. Malraux, *'The Action of a Man Who Snatches Something from Death' (International Campaign for the Preservation of the Monuments of Nubia Speech) (transcript)*, cit., p. 60.

[82] *Ibidem*.

[83] *Ibidem*.

[84] *Ibidem*.

[85] J. Ryan, S. Silvanto, *The World Heritage List: The Making and Management of a Brand*, in *Place Branding and Public Diplomacy*, 5, 2009, 4, pp, 290-300.

one in which the 1972 World Heritage Convention, in recognising the outstanding universal value of inscribed cultural properties, provides for a duty and framework of action for all State Parties to pool together their resources for the purposes of safeguarding cultural heritage.

Cultural nationalism

According to Forbes, «cultural nationalism» is based on the notion of state sovereignty over all cultural property on its territory. Whereas «cultural internationalism» is the view that cultural property is a global common good in which all nations and cultural groups have a shared interest[86]. According to the cultural nationalist approach, cultural property exists for serving the special interests of the nation which holds state sovereignty over the cultural property and implies that the cultural property has a national character that highlights elements of that State's culture[87]. Politicisation is theoretically defined by Wiesner as «relates to the fact that an issue or actor is public, collective, and contested. It means to mark something as collectively and publicly relevant and debatable and as an object of politics»[88]. Politicisation in the context of the inscription process under the auspices of the 1972 World Heritage Convention may be defined as the contestation for the justification of the inscription of cultural property into the UNESCO World Heritage List.

Anglin posits that a major reason for the presence politicisation and nationalism in the UNESCO World Heritage List inscription process is due to the fact that the competence for the nomination of cultural properties lies with the State Parties to the UNESCO Con-

[86] S. Forbes, *Securing the Future of Our Past: Current Efforts to Protect Cultural Property*, cit., pp. 235-266.

[87] *Ibidem*.

[88] C. Wiesner, *Rethinking Politicisation in Politics, Sociology and International Relations*, cit.

vention[89]. According to Ryan and Silvanto, the 1972 World Heritage Convention has created a «brand» of UNESCO World Heritage that is beneficial for tourism and also provides for legitimacy for sovereignty and political claims that contribute to efforts of national and governmental prestige, as well as economic revenue[90]. As a result, inscription in the UNESCO World Heritage List may be seen as a major incentive[91]. One major issue is that the current inscription process does not address the problem of a nationalist government that may be reluctant to promote the heritage of minorities within its borders[92]. An example of this is the Saudi Arabian government's decision in 2002 to demolish the 18th century Ajyad Fortress, which was demolished ostensibly for a commercial development, but also saw as an agenda of promoting Saudi Arab nationalism at the expense of the Turkish influence and Turkic minority of Saudi Arabia[93]. Wangkeo notes that in cases in which regimes have destroyed cultural property on their sovereign territory that belongs to groups not conforming to their worldview, then those regimes have rejected the notion of cultural property being part of the «common heritage of mankind»[94]. In order to illustrate this, the author cites the extreme example of the destruction of the Buddhas of Bamiyan in Afghanistan by the Taliban in 2001. Under the current operational guidelines to the 1972 UNESCO Convention for inscription into the World Heritage list, sovereign states have the competence to nominate cultural property for inscription into the list, it follows that under the current system the preservation and

[89] R. Anglin, *The World Heritage List – Bridging the Cultural Property Nationalism-internationalism Divide*, in *Yale Journal of Law & the Humanities*, 20, 2008, 2, pp. 241-275.

[90] J. Ryan, S. Silvanto, *The World Heritage List: The Making and Management of a Brand*, cit., pp, 290-300.

[91] *Ibidem*.

[92] R. Anglin, *The World Heritage List – Bridging the Cultural Property Nationalism-internationalism Divide*, cit., pp. 241-275.

[93] *Ibidem*.

[94] K. Wangkeo, *Monumental Challenges – The Lawfulness of Destroying Cultural Heritage during Peacetime*, cit., pp. 183-209.

conservation of cultural property is a responsibility of the state parties to the convention, even when the government of that nation is hostile to the cultural property in question for political reasons[95]. Wangkeo found that the system of giving the final word to UNESCO State Parties on whether or not to nominate a world heritage site places a potential incentive and competence onto the UNESCO State Parties to alter the definitions of what constitutes cultural property, leaving the path open for those State Parties to nominate cultural properties for inscription based on political criteria[96]. The author states that due to the fact that the State Parties to the 1972 UNESCO World Heritage Convention assume the responsibility for the protection of the cultural property located on their sovereign territory, «this puts preservation in direct conflict with fundamental principles of international law – state sovereignty and the right of non-intervention», noting that Turkey was unable to act to save the Ajyad Fortress[97]. Yet, it must also be noted that this could be counterintuitive, as there is an incentive to nominate that which matches the criteria of the outstanding universal value for the tangible economic and intangible global prestige benefits that nomination for inscription can provide for the state party.

Cultural nationalism and the politicisation of the inscription process into the World Heritage List

For certain states that frame their cultural property in terms of cultural and political nationalism, inscription into the UNESCO World Heritage List provides for an international recognition of their cultural and political nationalist claims. As UNESCO only allows State parties that have ratified the 1972 Convention to be part of the system of the World Heritage List, it can happen that States

[95] *Ibidem*.
[96] *Ibidem*.
[97] *Ibidem*.

with contested political claims and recognition propose to include in the List some cultural properties located in zones with a territorial dispute. If a monument is recognised as being the cultural property of a State party to UNESCO, when that State is not recognised in other international fora, then that State has achieved a form of international recognition for its territorial claims based on the State's cultural property being inscribed to the State in question within the framework of the UNESCO World Heritage List.

The authors Meskell, Liuzza, Bertacchini and Saccone examine the divergences that occur in the process of inscription into the World Heritage List between the technical recommendations provided to the World Heritage Committee for inscription and the actual decisions taken in the inscription process by the World Heritage List[98]. The authors examine the process of the inscription of the Bolgar Historical and Archaeological Complex, located in Russia[99]. They note that whilst International Council of Monuments and Sites (ICOMOS)[100] had provided technical reports to the World Heritage Committee advising against the inscription of the Bolgar Historical and Archaeological Complex into the World Heritage List[101]. ICOMOS argued that construction and redvelopment undertaken on the site of the Bolgar Historical and Archaeological Complex reduced the authenticity of the cultural property, and that plans to redevelop the site for religious tourism would compromise its outstanding universal value[102]. Nevertheless, in 2014 the World Heritage Committee inscribed the Bolgar site into the World He-

[98] L. Meskell, C. Liuzza, E. Bertacchini, D. Saccone, *Multilateralism and UNESCO World Heritage: Decision-making, States Parties and Political Processes*, cit., pp. 423-440.

[99] *Ibidem*.

[100] UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, cit.

[101] L. Meskell, C. Liuzza, E. Bertacchini, and D. Saccone, *Multilateralism and UNESCO World Heritage: Decision-making, States Parties and Political Processes*, cit., pp. 423-440.

[102] *Ibidem*.

ritage List[103]. The authors note that the Russian government, the nominating State party, heavily lobbied the World Heritage Committee to inscribe the cultural property into the World Heritage List, citing the «corridor diplomacy» undertaken by Russian delegates to UNESCO.

Casini cites the example of the 2017 inscription of the old town of Al Khalil/Hebron to the UNESCO World Heritage List as the cultural property of the State of Palestine[104]. In this instance, the old town of Al Khalil/Hebron was recognised as being the cultural property of the State of Palestine, which achieved accession as a Member State of UNESCO and a State Party to the 1972 World Heritage Convention in 2011[105]. The inscription of the old town of Al Khalil/Hebron to the World Heritage List as the Cultural Property of the State of Palestine resulted in the subsequent 2019 withdrawal of the United States and Israel from UNESCO, a move described by Casini as potentially «affecting the very essence of the UNESCO World Heritage Convention system and its future»[106].

One remedy proposed by Anglin to the issue of politicisation and nationalism of the process of inscription into the UNESCO World Heritage List is that of an «internationalist feedback loop»[107]. This is a process in which subsidiary entities beyond the government of the nation state hosting the site could also have the competence to nominate cultural property for Tentative Lists and nominations for inscription in the World Heritage List[108]. Potential subsidiary entities in this process could include a neighbouring state, a state motivated by a diaspora lobby, or an international NGO. These subsid-

[103] *Ibidem*.

[104] L. Casini, *International Regulation of Historic Buildings and Nationalism - The Role of UNESCO*, in *Nations and Nationalism*, 24, 2018, 1, pp. 131-147.

[105] *Ibidem*; J. Wouters, C. Ryngaert, T. Ruys, G. De Baere, *International Law: A European Perspective*, cit., pp. 934-935.

[106] L. Casini, *International Regulation of Historic Buildings and Nationalism - The Role of UNESCO*, cit., p. 142.

[107] R. Anglin, *The World Heritage List – Bridging the Cultural Property Nationalism-internationalism Divide*, cit., pp. 241-275.

[108] *Ibidem*.

iary entities could also submit nominations of cultural property to the World Heritage Committee for inscription in the World Heritage List[109]. This remedy could potentially bridge the divide between the cultural internationalist approach and the cultural nationalist approach by sharing the competence for nomination for inscription into the World Heritage List between the State Parties to the Convention and international interest groups. To sum up, a sharing of the competence for nomination could potentially mitigate the politicisation in the inscription process.

Conclusion

The major reason for the politicisation of the inscription process in the UNESCO World Heritage List is the fact that the original purpose of the list is that it acts as a mechanism for the universal ownership of cultural heritage by all humanity in perpetuity, with State parties ceding sovereignty over the cultural properties to the collective State parties to UNESCO. In practice, due to the fact that the competence and ultimate responsibility for the nomination, protection and conservation of these cultural properties lies solely with the State parties, in cases of contested sovereignty over territory, inscription of the cultural property into the UNESCO World Heritage List provides for international political recognition for the State's territorial claims and for the State's political and cultural nationalistic claims, as can be seem in the case of Al Khalil/Hebron and also of the presence of Palestine as a State Party of UNESCO. Given that the data in the literature demonstrates that political concerns are present in the decision making of the World Heritage Committee in regard to the inscription of cultural properties into the World Heritage List, it follows that in the balance between political concerns and outstanding universal value, the former can be attributed more weight than the latter, the World Heri-

[109] *Ibidem*.

tage inscription process would consider nominations based on political concerns rather than on outstanding universal value and authenticity.

The 1972 UNESCO Convention and the World Heritage List are cultural internationalist initiatives. The vision within them, inscribing cultural property into the World Heritage List so that it may be overseen by the international community and be preserved, conserved and maintained for all humanity in perpetuity are clear goals of the cultural internationalist. In particular, the criteria for inscription that the cultural property be of outstanding universal value and to have authenticity according to the 1994 Nara Document on Authenticity are standards which are designed to permit the realisation of the cultural internationalist vision of the pioneers of UNESCO such as André Malraux. The Operational Guidelines for the Implementation of the World Heritage Convention clearly and robustly state that only those cultural properties that are authentic and that have outstanding universal value may be inscribed. Moreover, a mechanism is in place for verification and advice on technical aspects of the World Heritage List through the presence of International Council of Monuments and Sites (ICOMOS)[110] and the Rome Centre within the decision-making process of the World Heritage Committee.

Yet, despite these measures being codified robustly in the Operational Guidelines for the Implementation of the World Heritage Convention, it is clear that politicisation is occurring in the inscription process for the World Heritage List, particularly as can be seen in concrete examples including the case of inscription of the Bolgar site into the World Heritage List, the presence of Palestine as a State Party of UNESCO, and the 2017 inscription of the old town of Al Khalil/Hebron to the UNESCO World Heritage List as the cultural property of the State of Palestine. In particular, the literature has demonstrated that the exclusive competence for nomination ly-

[110] UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, cit.

ing with the Member States, and the lack of competence for decision-making in the World Heritage Committee for International Council of Monuments and Sites (ICOMOS)[111] and the Rome Centre are elements which allow for the politicisation of the inscription process of cultural property into the World Heritage List.

Now that the 1972 World Heritage Convention commemorates its fiftieth anniversary, it must evaluate the need for a remedy to the politicisation of the inscription process into the UNESCO World Heritage List. The remedy proposed by Anglin of State Parties to the Convention sharing the competence for the nomination of cultural property to the World Heritage List with international interest groups such as neighbouring State Parties, NGOs, or other State Parties with diaspora groups could potentially mitigate the nomination of cultural property for inscription into the World Heritage List by State Parties for the pursuit of political and nationalistic agendas. Furthermore, upgrading the role of ICOMOS and the Rome Centre from being technical advisors to the World Heritage Committee to a role in which the bodies will be granted greater powers in the decision-making process or even a veto over inscriptions in particular circumstances, could potentially address the politicisation of the inscription process within the World Heritage Committee. Such measures could reverse the trend of politicising the inscription process, as well as allowing UNESCO to return to its original cultural internationalist mission of preserving for all of humanity in perpetuity cultural property that is of outstanding universal value and which conforms to the standards of authenticity required. This year's fiftieth anniversary of the 1972 World Heritage Convention is a golden opportunity to resolve the politicisation of the inscription process into the World Heritage List. If this trend is not addressed, the trend could de-legitimise the 1972 World Heritage Convention itself, with its commitment to preserve, conserve and maintain the world's cultural property of outstanding universal value becoming a casualty of politicisation.

[111] *Ibidem*.

Niccolò Lanzoni

THE WORLD HERITAGE CONVENTION, CUSTOMARY INTERNATIONAL LAW AND THE SCOPE OF PROTECTION OF CULTURAL HERITAGE IN PEACETIME*

Abtract: The 1972 World Heritage Convention (WHC) has today 194 States Parties. This almost universal membership seems to express the widespread belief that the management of cultural heritage of Outstanding Universal Value (OUV) should take place under the supervision of the international community. However, while the World Heritage (WH) Committee, which is a treaty-body composed of States Parties' representatives, has advocated strict compliance with the WHC Lists system, States Parties have grown impatient with the WH Committee's recommendations and sometimes tend to underestimate or outright ignore the impact that Economic Over-Development (EOD) might have on their cultural heritage of OUV. Furthermore, outside of this system, also taking into account the controversial scope of Art. 12 WHC, it is not entirely clear whether this collective interest in the international protection of cultural heritage implies the existence of a corresponding customary prohibition for States to intentionally destroy or damage their own cultural heritage, even of potential OUV, in peacetime. In the light of this, the aim of the present contribution is threefold: first, it will expose and rationalise the inconsistency between the WH Committee and the States Parties' attitude towards the protection of their cultural heritage of OUV before EOD instances; second, it will examine international practice outside the WHC to inductively assess whether and to what extent customary international law prohibits States' intentional destruction or damage to their cultural heritage of potential OUV in peacetime; third, it will illustrate the (ambivalent) relationship between the WHC and customary international law in this respect. Finally, it will be argued how, despite the fact that, over the last 50 years, international law on the protection of cultural heritage in peacetime has undoubtedly strengthened, States still appear reluctant to recognise a clear pre-eminence of the collective dimension of cultural heritage protection per se, especially when this conflicts with the pursuit of their economic interests.

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«Noi vogliamo distruggere i musei,
le biblioteche, le accademie d'ogni specie»[1].

1. *Introduction*

International law on the protection of cultural heritage[2] originated as part of the *jus in bello*[3]. This is understandable, as cultural heritage normally faces serious risks of destruction or damage in the context of armed conflicts[4]. Consequently, the applicable re-

[1] F.T. Marinetti, *Manifesto del futurismo*, in *I Manifesti del futurismo*, edited by F.T. Marinetti *et al.*, Lacerba, Firenze, 1914, p. 6, para. 10.

[2] For the purposes of this contribution, the expression 'cultural heritage' will be preferred to 'cultural property', since the former is broader in scope, encompassing a «form of inheritance to be kept in safekeeping and handed down to future generations», J. Blake, *On Defining the Cultural Heritag*e, in *International & Comparative Law Quarterly*, 2000, p. 83. Reference is made here only to immovable, material and 'above-water' cultural heritage, that is to say monuments, groups of buildings and sites. Cultural heritage also includes natural heritage as defined under Art. 2 of the Convention concerning the Protection of the World Cultural Heritage and Natural Heritage (Paris, 16 November 1972) (WHC).

[3] See F. Francioni, *Cultural Heritage*, in *Max Plank Encyclopedia of Public International*, edited by A. Peters, OUP, online edn, 2021, para. 1. For an overview of the contribution of international law to the protection of cultural heritage, see F. Francioni, *Il contributo del diritto internazionale alla protezione del patrimonio culturale*, in *Alberico Gentili: la salvaguardia dei beni culturali nel diritto internazionale*, edited by Centro internazionale studi gentiliani, Giuffrè, Milano, 2008, p. 317 ss.

[4] International law on the protection of cultural heritage applies in armed conflicts of both international and non-international character, see R. O'Keefe, *The Protection of Cultural Property in Armed Conflict*, CUP, Cambridge, New York, 2006, p. 326. For a recent analysis on international law on the protection of cultural heritage in the context of an armed conflict, including with respect to illicit trafficking, see R. Pavoni, *International Legal Protection of Cultural Heritage in Armed Conflict: Achievements and Developments*, in *Studi senesi*, 2020, p. 335 ss. See also International Law Commission*, Draft Principles on Protection of the Environment in Relation to Armed Conflicts*, *with commentaries*, in *Yearbook of the International Law Commission*, 2022, vol. II, Part Two (to be published), Draft Principle 4: «States should designate […] areas of environmental importance as protected zones in the event of an armed conflict, including where those areas are of cultural importance».

gime has comprehensively developed under international humanitarian law and international criminal law, both at the conventional[5] and customary level[6].

In contrast, international law on the protection of cultural heritage in peacetime appears more ambiguous and fragmented. UNESCO[7], the Council of Europe[8] and the Organisation of American States[9] did contribute to the production of conventional and soft-law instruments on this matter. Nevertheless, States have also

[5] On humanitarian law see Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954), Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954) and Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 26 March 1999); on international criminal law see Charter of the International Military Tribunal (London, 8 August 1945), Art. 6(b) and Rome Statute of the International Criminal Court (Rome, 17 July 2002), Arts. 8(2)(b)(ix) and 8(2)(e)(iv).

[6] On customary humanitarian law on the protection of cultural heritage see R. O'Keefe, *The Protection*, cit., p. 316 ss.; on customary international criminal law on the protection of cultural heritage see M. Frulli, *International Criminal Law and the Protection of Cultural Heritage*, in *The Oxford Handbook of International Cultural Heritage Law*, edited by F. Francioni, A. F. Vrdoljak, OUP, Oxford, 2020, p. 100 ss.

[7] Apart from the WHC and the 2003 Declaration (see below, n. 3.3.), see Recommendation on International Principles Applicable to Archaeological Excavation (New Delhi, 5 December 1956), Recommendation concerning the Safeguarding of the Beauty of the Character of Landscapes and Sites (Paris, 11 December 1962), Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works (Paris, 19 November 1968), Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage (Paris, 16 November 1972) and Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas (Nairobi, 26 November 1976). See also Art. 3 of the 1954 Hague Convention.

[8] See European Cultural Convention (Paris, 19 December 1954), Convention for the Protection of the Architectural Heritage of Europe (Granada, 3 October 1985), Convention for the Protection of the Archeological Heritage of Europe (Valletta, 16 January 1992), Framework Convention on the Value of Cultural Heritage for Society (Faro, 27 October 2005) and Convention on Offences relating to Cultural Property (Nicosia, 19 May 2017). See also Namur Declaration (Namur, 24 April 2015).

[9] Convention on the Protection of the Archeological, Historical and Artistic Heritage of the American Nations (Santiago, 16 June 1976).

shown some hesitancy to commit themselves to strict obligations on the management of their cultural heritage in peacetime.

Moreover, States usually react with limited protests, when not outright indifference, to the intentional destruction or damage carried out by other States to their own cultural heritage[10]. Even in the face of the most striking and heinous acts, such as the destruction of the Buddhas of Bamiyan at the hand of the Taliban[11], it has been questioned whether the international community's condemnation really reflects an *opinio juris* on the existence and/or desirability of a customary regime aimed at protecting cultural heritage *as such* – that is to say, without taking into account the possible overlapping that the protection of cultural heritage may have with other branches of customary international law, such as human rights law, international environmental law and indigenous peoples' rights law – in peacetime[12].

[10] 'Intentional destruction or damage' should be intended here as both «an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity» and «in cases of wilful neglect of cultural heritage, including with the intent of letting others destroy the cultural heritage in question», see Human Rights Council, *Report of the Special Rapporteur in the Field of Cultural Rights*, UN Doc. A/71/317, 9 August 2016, para. 32.

[11] See below, n. 3.2.

[12] International case law is also quite scarce on the issue and mainly concerns the participation of the States Parties to the WHC, see *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)*, Judgment, I.C.J. Reports 2013, p. 281, para. 106. See also *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (20 May 1992), para. 78 ss., *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (17 February 2000), paras. 71-72, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007), para. 381 ss., *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009) (*Glamis Gold*), para. 84, and *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award (18 February 2020), paras. 226, 238 and 249. The issue has also arisen in the pending *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No. ARB/15/31, in relation to the inscription of the Roşia Montană ancient gold mines in the WHL.

The present contribution aims at adding to and deepening this debate. It will be divided into three parts. The first part examines States Parties' practice within the WHC Lists system. This part will show how, on the one hand, the WH Committee, which is a treaty-body composed of States Parties' «qualified»[13] representatives[14], has been rather busy in ensuring compliance with the WHC relevant obligations while, on the other, the same States Parties have grown impatient with the WH Committee's recommendations on the impact that Economic Over-Development (EOD) might have on their cultural heritage of Outstanding Universal Value (OUV)[15]. The substantial causes of this discrepancy will also be exposed. This analysis seems particularly instructive as it provides a clear indication of how States will likely act *outside* of the Lists system when faced with the choice of whether to prioritise the preservation of their cultural heritage or the pursuit of their sovereign (mostly economic) interests when the latter is at odds with the former. The second part, after examining the controversial scope of Art. 12 WHC, explores international practice outside the WHC Lists system. It will be argued here that customary international law appears to merely prohibit (extreme) acts of iconoclasm, leaving States free to pursue EOD to the detriment of their cultural heritage, including that of (potential) OUV[16], at least when this does not result in the violation of other branches of international law, such as human rights law, international environmental law, or indigenous peoples' rights law. Finally, the contribution draws some general remarks on the relationship between the WHC and customary international law and assesses the major inconsistencies that international law on the protection of cultural heritage in peacetime still presents today.

[13] WHC, Art. 9(3).
[14] WHC, Art. 8(1).
[15] On the definition of EOD and OUV see below, nn. 2.1. and 2.2.
[16] On this definition see below, n. 3.1.

2. *The World Heritage Convention and Cultural Heritage of Outstanding Universal Value*

2.1. *Preliminary Remarks*

An examination of the WHC goes beyond the scope of the present contribution[17]. However, a few remarks seem necessary for our purposes.

First, the WHC only applies to the cultural heritage of OUV[18]. The WHC does not define the concept of OUV. The Operational Guidelines (OGs)[19] specify that OUV «means cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity»[20] and establish a set of criteria for its assessment[21]. But apart from this and other[22] useful indications, the concept of OUV remains inherently «elusive and fluid, changing over time and from differing cultural perspectives»[23].

In this respect, it is crucial to recall that «it is for each State Party […] to identify and delineate the different properties situated on its territory»[24]. States have the *exclusive* right to identify the cul-

[17] See *The 1972 World Heritage Convention: A Commentary*, edited by F. Francioni, OUP, Oxford, 2008 and M. Gestri, *Teoria e prassi di un accordo pioneristico nella gestione dei beni di interesse generale: la Convenzione del 1972 sul patrimonio mondiale, in Tutela e valorizzazione del patrimonio culturale: realtà territoriale e contesto giuridico globale*, edited by M. Gestri, M. C. Fregni, M. C. Santini, Giappichelli, Torino, 2021, p. 113 ff.

[18] WHC, Arts. 1, 2 and 3. And see OGs, para. 52.

[19] WHC.21/01 (31 July 2021).

[20] OGs, para. 49.

[21] OGs, para. 77.

[22] See F. Francioni, *The Preamble*, in *The 1972 World Heritage Convention*, cit., p. 21 and T. Scovazzi, *La notion de patrimoine culturel de l'humanité dans les instruments internationaux*, in *Le patrimoine culturel de l'humanité/ The Cultural Heritage of Mankind*, edited by J.A.R. Nafziger, T. Scovazzi, Brill-Nijhoff, Leiden/Boston, 2008, pp. 40-49.

[23] C. Forrest, *International Law and the Protection of Cultural Heritage*, Routledge, London, 2010, p. 233.

[24] WHC, Art. 3.

tural heritage they consider to be of OUV[25]. The WH Committee, with the assistance of some advisory entities[26], will then evaluate whether the property really meets the demanding threshold of OUV and will inscribe it on the World Heritage List (WHL)[27]. The WH Committee may also decide to inscribe a property on the WHL in the In Danger List (IDL)[28].

Second, it has been argued that the WHC exhibits a low degree of prescriptivity[29]. The operative part of the WHC is indeed limited to the States Parties' due diligence obligations to do «all they can» to ensure the «identification, protection, conservation, presentation and transmission to future generations» of their cultural heritage of OUV[30], and to «endeavour, in so far as possible, and as appropriate» to take a number of «effective and active measures» to achieve this goal[31]. The WHC also establishes a duty of cooperation in the protection of the world cultural heritage of OUV but, in itself, such a duty is «inherently incapable of producing legal obligations which may be internationally enforceable»[32]. It should be noted, however, that the WH Committee, as will be emphasised below, tends to interpret these obligations rather strictly, at least as far as cultural heritage included in the Lists system is concerned.

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[25] B. Boer, *Art.3: Identification and Delineation of World Heritage Properties*, in *The 1972 World Heritage Convention*, cit., p. 89.

[26] Such as the International Centre for the Study of the Preservation and Restoration of Cultural Property, which is an international organisation, the International Council for Monuments and Sites, which is an NGO, and the Union for Conservation of Nature and Natural Resources, which is a governmental-organised NGO (GONGO), see WHC, Arts. 13(7) and 14(2).

[27] WHC, Arts. 11(2) and 11(3).

[28] WHC, Art. 11(4).

[29] K.D. Kornegay, *Destroying the Shrines of Unbelievers: The Challenge of Iconoclasm to the International Framework or the Protection of Cultural Property*, in *Military Law Review*, 2014, p. 170.

[30] WHC, Art. 4.

[31] WHC, Art. 5.

[32] F. Lenzerini, *Art.12: Protection of Properties Not Inscribed on the World Heritage Convention*, in *The 1972 World Heritage Convention*, cit., p. 207.

Third, the WHC seeks to achieve a «realistic reconciliation»[33] between States Parties' cultural sovereignty[34] and the assumption 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»[35]. To overcome this «latent antinomy»[36], the WHC sets up a comprehensive system of international cooperation, assistance and monitoring and reporting on the protection of States Parties' cultural heritage of OUV[37], mainly through the establishment of the WH Committee[38], the WHC Lists system, and the World Heritage Fund (WHF)[39].

2.2. *The In Danger List*

As anticipated, the WH Committee can inscribe a property on the WHL in the IDL. This may happen, *inter alia*, when the property is threatened by «large-scale public or private projects or rapid urban development or tourism [and/or] destruction caused by changes in land use or ownership»[40]. We will refer to this type of threat as EOD.

The WH Committee usually takes the inscription in the IDL into consideration at the request of the State concerned[41]. In case of urgent need, however, it can also make a new entry on its own[42]. Interestingly, there is a clear correlation between the cause of the

[33] F. Francioni, *Thirty Years on: Is the World Heritage Convention Ready for the 21st Century?,* in *Italian Yearbook of International Law*, 2002, p. 19.

[34] WHC, Art. 6(1).

[35] WHC, Preamble. See also M. Gestri, *op. cit.*, p. 123.

[36] F. Francioni, *The Preamble*, cit., p. 6.

[37] WHC, Arts. 7, 21 ss. and 29.

[38] WHC, Art. 8 ss.

[39] WHC, Art. 15 ss.

[40] WHC, Art. 11(4). See also OGs, paras. 178-180.

[41] The inclusion is not automatic, but is subject to the decision of the WH Committee, see OGs, para. 186.

[42] WHC, Art. 11(4). See G.P. Buzzini, L. Condorelli, *Art.11: List of World Heritage in Danger and Deletion of a Property from the World Heritage List*, in *The*

threat and who takes the initiative. When the threat comes from EOD, it is unlikely that it will be the State concerned[43]. Not only that: States Parties also appear more inclined to protest against the possible or actual listing of their properties in the IDL when threatened by EOD[44]. This is not necessarily because the inclusion would take place without their consent. Indeed, practice shows that States Parties tend not to oppose the inclusion of their properties in the IDL[45]. Rather, these circumstances indicate a different sensitivity when it comes to assessing the existence of threats to cultural heritage of OUV. In essence, States Parties appear to believe that, usually, activities related to EOD do not pose a threat to their properties or, alternatively, that the protection of the latter cannot be to the absolute detriment of the former.

For instance, from 1983 to 1994, Tunisia built three dams around Lake Ichkeul to divert an important fraction of the freshwater supply towards agricultural uses and human consumption. As a result, the salinity of Lake Ichkeul and of the surrounding marshes increased, whereas the number of migrating bird populations dropped[46]. The WH Committee inscribed the Ichkeul National Park in the IDL and requested Tunisian authorities to reverse the degradation of the property[47]. Tunisia stressed that «aucune ac-

1972 World Heritage Convention, cit., p. 181 ss. See also M. Gestri, *op. cit*. See also M. Gestri, *op. cit.*, pp. 128-131.

[43] A recent study indicates that approximately 40% of the properties included in the IDL between 1990 and 2017 were threatened by EOD, but only 8% of these properties were included at the request of the States concerned. For comparison, over the same period, 54% of the properties threatened by war and/or civil unrest were included in the IDL at the request of the States concerned, see H. Hølleland et. al., *Naming, Shaming and Fire Alarms: The Compilation, Development and Use of the List of World Heritage in Danger*, in *Transnational Environmental Law*, 2018, pp. 44, 48-49.

[44] *Ivi*, p. 49.

[45] G.P. Buzzini, L. Condorelli, *Art.11*, cit., p. 191. After all, this measure entails the allocation of a «specific, significant portion» of the WHF to the financing of possible assistance, see OGs, para. 189.

[46] WHC-96/CONF.201/21 (10 March 1997), para. VII.36.

[47] Decision CONF 201 VIII.A.4 (1994), para. VII.4.

tion de sauvegarde […] n'est possible si on ne l'intègre pas dans le programme de développement économique et social de la région»[48], but also outlined an ambitious Management Plan aimed at reconciling its international obligations with EOD. Tunisia's efforts eventually paid off and the WH Committee removed the property from the IDL in 2006[49].

In 2013, the WH Committee criticised a major real estate project involving the construction of a hotel, an ice rink and a concert hall in the Historic Centre of Vienna[50]. The Austrian authorities dismissed the WH Committee's worries, arguing that Vienna had a «unique opportunity to develop the entire area […] in a manner that will generate added value»[51]. After repeated warnings, the WH Committee inscribed the property in the IDL[52]. The Austrian Government eventually stepped in and the City of Vienna unenthusiastically committed to «find out whether and which possibilities exist to develop the project in the interest of a better compatibility with the World Heritage»[53].

Again, in 2014, the Uzbek Government adopted a new 'development programme for tourism' which resulted in irreversible alterations to the Historic Centre of Shakhrisyabz: parts of the medieval quarters, historic urban layers and buildings were demolished and replaced with tourist kiosks and a modern theme park[54]. In 2016, the WH Committee inscribed the property in the IDL and urged Uzbekistan to immediately suspend all EOD projects and provide detailed documentation on the demolition[55]. As to 2023,

[48] WHC-99/CONF.209/INF.9 (7 October 1999), p. 16.

[49] Decision 30 COM 7A.12 (2006), para. 12.

[50] Decision 37 COM 7B.71 (2013), paras. 4-6.

[51] SOC/DSOC Report 2015, Historic Centre of Vienna (C 1033) (9 January 2019), p. 2.

[52] Decision 41 COM 7B.42 (2017), para. 11.

[53] SOC/DSOC Report 2019, Historic Centre of Vienna (C 1033) (19 April 2019), p. 6 As of 2022, the project has been halted and a new Management Plan enacted, see Decision 44 COM 7A.32 (2021), para. 11.

[54] WHC/16/40.COM/7B.Add (10 June 2016), p. 61.

[55] Decision 40 COM 7B.48 (2016), paras. 6-7.

Uzbek authorities are struggling to draft an Action Plan to implement the WH Committee's recommendations and are exploring the possibility of submitting a proposal of Significant Modifications to the Boundaries (SMB) of the property[56].

In these and other cases[57], State Parties' decision to halt, modify or defer EOD projects appears to depend not so much on a genuine concern for their cultural heritage of OUV, as to defend their international reputation and keep the property in the WHL. On the other hand, the name-and-shame logic has not always been so effective.

For instance, in 2004 the WH Committee included the Cologne Cathedral in the IDL[58]. The reason was the granting of a permission for the construction of a complex of skyscrapers on the opposite bank of the Rhine, compromising the visual integrity of the property[59]. The City of Cologne shrugged off the WH Committee's decision and went ahead with the project[60]. The German Government remained inert, save for the Ministry of Foreign Affairs sending a note to the Mayor of Cologne asking to «take all necessary measures» to «avert foreign policy damages»[61]. This inertia is perplexing since, although German Law does not clearly establish

[56] Decision 44 COM 7A.31 (2021), para. 3.

[57] Other WH sites that made the IDL due to EOD concerns are, for instance, the Lake Baikal, the Aeolian Islands, the Kathmandu Valley, Coro and its Port and the Group of Monuments at Hampi. The difference of sensitivity of States Parties, individually considered and as opposed to that of the WH Committee, is also signaled by the fact that they have sometimes submitted a nomination immediately after or at the same time as approving EOD projects within or nearby the tentative site. It was only when faced with the WH Committee's repeated rejections due to the very impact of these projects that they agreed to halt them – possibly leading to an international dispute when foreign investors were involved in the deal, see, for instance, *Thomas Gosling and others v. Republic of Mauritius* and *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, nt. 12.

[58] Decision 28 COM 15.B70 (2004), para. 8.

[59] See extensively D. Zacharias, *Cologne Cathedral versus Skyscrapers – World Cultural Heritage Protection as Archetype of a Multilevel System*, in *Max Planck Yearbook of the United Nations Law*, 2006, p. 274 ss.

[60] *Ivi*, p. 277.

[61] *Ivi*, p. 279.

the power of the German Government to block such a project, it does authorise it to take action in order to ensure compliance with Germany's international obligations[62]. It was only two years later that, with a low demand in the use of the new units, the City of Cologne backtracked and radically changed the project[63].

In 2011, the WH Committee strongly criticised the ongoing construction of a 3-km-long coastal beltway encircling the Historic District of Panama and urged Panama to consider alternative solutions[64]. Panama refused, pointing out that «geography is […] a constraint to the growth of the capital» and that «the new construction to upgrade the Panama Canal […] needs a more accurate communication system»[65]. The project was completed in 2014[66].

Recent practice confirms the impression that States Parties tend to underestimate the EOD impact on their cultural heritage of OUV. For instance, in its session of 2021, the WH Committee noted that, contrary to its previous requests, Hungarian authorities have almost completed a number of major new developments within the Historic Centre of Budapest[67]. The WH Committee also warned that the site of Stonehenge would be inscribed in the IDL in case the permission to build a road tunnel nearby were not withdrawn, and criticised the United Kingdom for refusing to consider any alternative to the project on the grounds that «additional benefits of a longer tunnel would not justify the additional costs»[68].

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[62] *Ivi*, pp. 330-331. See B. Boer, *Art.3*, cit., p. 359 and, *mutatis mutandis*, S. von Schorlemer, *Compliance with the UNESCO World Heritage Convention: Reflections on the Elbe Valley and the Dresden* Waldschlösschen *Bridge*, in *German Yearbook of International Law*, 2008, pp. 367-371 and 376-379.

[63] D. Zacharias, *Cologne Cathedral*, cit., p. 280. In July 2006, the WH Committee removed the Cologne Cathedral from the IDL, see Decision 30 COM 8C.3 (2006), para. 8.

[64] Decision 35 COM 7B.103 (2011), para. 3 ss.

[65] WHC-12/36.COM/7B.Add (1 June 2012), pp. 206-207.

[66] Despite the WH Committee's warnings the property is still in the WHL and was never included in the IDL.

[67] Decision 44 COM 7B.49 (2021), paras. 9-10.

[68] *Ivi*, para. 8.

In conclusion, and as will be further elaborated below[69], although the intervention of the WH Committee has usually prevented EOD projects from destroying/damaging the authenticity/integrity of the States Parties' cultural heritage of OUV, over time the latter seem to have grown impatient with such an unconditional protection. This is also confirmed by the fact that, outside the WHC Lists system, and despite Art. 12 WHC, practice shows that they seem to feel free on how to dispose of their cultural heritage, even of (potential) OUV, for economic reasons.

2.3. *Delisting*

The intentional destruction of or damage to cultural heritage of OUV have exceptionally resulted in the delisting of the property from the WHL[70]. Perhaps unsurprisingly, all cases of delisting to date are attributable to State Parties' obstinacy to carry on EOD projects to the detriment of their cultural heritage of OUV[71].

In 2000, Oman enacted a new Management Plan allowing for mining activity, including exploration and production of oil, gas and minerals, to be carried out nearby and within the Arabian Oryx Sanctuary[72]. In 2006, Oman announced that it would reduce the boundaries of the property by 90%, presumably in order to allow hydrocarbon extraction in the areas immediately outside the new

[69] See n. 2.4.

[70] The WH Committee's authority to delist a property from the WHL is provided for implicitly by the WHC, Art. 11(2), and expressly by the OGs, para. 116. Prior inscription in the IDL is not a condition for delisting the property. See also G.P. Buzzini, L. Condorelli, *Art.11*, cit., pp. 196-200.

[71] The removal of the Bagrati Cathedral from the WHL does not amount to a delisting but to a SMB of a larger site, now reduced to the Gelati Monastery, see J.A. Estrella Faria, *La protection des biens culturels d'intèrêt religieux en droit international public et en droit international privé*, in *Collected Courses of the Hague Academy of International Law*, Brill, Leiden/Boston, 2021, pp. 131-133.

[72] WHC-07/31.COM/7B (10 May 2007), p. 34.

boundaries[73]. Omani authorities were then informed that such an unilateral and drastic reduction, apart from entailing a blatant breach of the WHC, would irreparably compromise the OUV of the property[74]. Oman replied by formally requesting that the property be removed from the WHL[75].

In 2006, the WH Committee inscribed the Dresden Elbe Valley in the IDL[76]. The reason was that, following a binding local referendum, the City of Dresden had approved the construction of a four-lane vehicle bridge across the Elbe River, «in the core area of the cultural landscape»[77]. The Mayor of Dresden criticised the WH Committee's decision, but assured that the City would struggle to retain its WH status[78]. The German Government also regretted the decision, but abstained from stepping in[79]. The project was blocked, then unblocked, then appealed, then counter-appealed. Finally, following the involvement of the Länder Judiciary and of the Federal Constitutional Court, the construction of the bridge resumed[80]. The City of Dresden tried to push for a revision of the project, but met with opposition from higher administrative authorities. In the end, the WH Committee delisted the property from the WHL in 2009[81]. The bridge opened in 2013[82].

Lastly, in 2012 the WH Committee startled at the discussion going on at the City of Liverpool, with the support of the British Government, on greenlighting a thirty-year period, 5.5 billion

[73] *Ivi*, p. 33.
[74] *Ivi*, p. 34.
[75] *Ibidem*.
[76] Decision 30 COM 7B.77 (2006), para. 8.
[77] *Ivi*, para. 3. On the whole case, see D. Schoch, *Whose World Heritage? Dresden's* Waldschlößchen *Bridge and UNESCO's Delisting of the Dresden Valley*, in *International Journal of Cultural Property*, 2014, p. 199 ss.; and S. von Schorlemer, *Compliance*, cit., p. 321 ss.
[78] See D. Schoch, *Whose World Heritage?*, cit., pp. 205-206.
[79] *Ivi*, p. 205. See also S. von Schorlemer, *Compliance*, cit., p. 379.
[80] See the intricate legal affair in D. Schoch, *Whose World Heritage?*, cit., pp. 205-207.
[81] Decision 33 COM7A.26 (2009), para. 9.
[82] D. Schoch, *Whose World Heritage?*, cit., p. 213.

pounds real estate project encroaching the Historic Centre of Liverpool[83]. The WH Committee inscribed the property in the IDL and threatened to delist it from the WHL should the project be approved and implemented[84]. The City of Liverpool reacted bitterly, claiming that the project would be fundamental to regenerate the 'derelict' urban fabric, and would help reviving one of the most depressed areas of the Country. The British Government refused to hold a public inquiry and the project went ahead[85]. The WH Committee then requested the United Kingdom to place a two-years moratorium on new development, but the City of Liverpool doubled down, authorising the construction of the new Everton FC stadium within the property[86]. In 2021, with no improvement in sight, the WH Committee delisted the Historic Centre of Liverpool from the WHL[87].

2.4. *Outlook*

In the light of the preceding analysis, it is possible to draw a few remarks.

First, as mentioned, the WH Committee's intervention has usually been decisive in preventing EOD from destroying/damaging

[83] The project entails the construction of two clusters of ultra-modern buildings, including a fifty-five stories skyscraper, along the docks waterfront and has been described as «the largest scheme being considered anywhere in the world affecting a World Heritage Site», see D. Rodwell, *Liverpool: Heritage and Development – Bridging the Gap?*, in *Industrial Heritage Sites in Transformation: Clash of Discourses*, edited by H. Oevermann, H.A. Mieg, Routledge, London, 2015, p. 40 ss.

[84] Decision 36 COM 7B.93 (2012), para. 7.

[85] O. Wainwright, 'Final Warning': Liverpool's UNESCO Status at Risk over Docks Scheme, in The Guardian, 1 July 2017, available at: *www.theguardian.com/uk-news/2017/jul/01/final-warning-liverpools-unesco-status-at-risk-over-docks-scheme#:~:text=%E2%80%9CNot%20one%20person%20who%20comes,iconic%20modern%20buildings%2C%20too.%E2%80%9D*.

[86] WHC/21/44.COM/7A.Add (21 June 2021), p. 54.

[87] Decision 44 COM 7A.34 (2021), para. 11.

the authenticity/integrity of the States Parties' cultural heritage inscribed in the Lists sytem. In particular, the WH Committee has provided a rather strict interpretation of the obligations ensuing from the WHC, assisting, monitoring and exerting political pressure to urge States Parties to review or halt their projects, almost always successfully. Moreover, when faced with the most egregious violations, it did not shy away from putting the property into the IDL against the will of the concerned State Party, or even resorting to the 'nuclear option' of delisting.

It is important to recall that the WH Committee is composed by (twenty-one) States Parties' representatives[88]. Thus, «[t]he individuals who attend the meetings of the WHC do not act in their personal capacity, but as representatives of the states by which they have been appointed», and, more in general, the WH Committee «can be considered as representing the common interest of States Parties»[89]. In this sense, also considering that the WH Committee's decisions are taken by a qualified majority of two-third of its members present and voting[90], there is certainly some overlapping between the WH Committee's, although 'collectively' expressed, and the States Parties' *opinio* concerning the correct interpretation and application of the WHC[91].

[88] WHC, Art. 8(1). The «[e]lection of members of the Committee shall ensure an equitable representation of the different regions and cultures of the world», Art. 8(2). States Parties' representatives are elected every six years by the General Assembly of the States Parties to the WHC, WHC, Art. 9(1). In 2001, the General Assembly invited the States Parties to the WHC to voluntarily reduce their term of office from six to four years, see Resolution 13 GA 9 (31 October 2001), para. 6.

[89] See T. Scovazzi, *Art.8-11: World Heritage Committee and World Heritage List*, in *The 1972 World Heritage Convention*, cit., p. 150. See also M. Gestri, *op. cit.*, p. 117.

[90] Art. 13(8) WHC.

[91] As noted by Special Rapporteur Georg Nolte, «[t]he output of a treaty body composed of States representatives, and which is not an organ of an international organization, is a form of practice by those States that thereby act collectively within its framework», International Law Commission, *Fourth Report on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties by Georg Nolte, Special Rapporteur*, UN Doc. A/CN.4/694, 7 March 2016, p. 6.

Second, and notwithstanding, over time the same States Parties seem to have grown impatient with the unconditional protection of their cultural heritage of OUV in the face of EOD. In principle, this discrepancy in the interpretation and application of the WHC Lists system – strict when States Parties sit in the WH Committee through their representatives, loose when they act individually at the domestic level – is one of the many manifestations of States' Janus-faced attitude *vis-à-vis* international law. This means that, at times, and also considering that the State's organs involved in the formation/interpretation or, as in this case, supervision/monitoring of compliance with the international rules at the international level are not necessarily the same in charge of their implementation at the domestic level, there may be some inconsistency between what States say or do internationally and what they actually say or do domestically[92].

From a more substantial point of view, it is only normal that the WH Committee fulfils its supervisory tasks and responsibilities in good faith[93]. As to States Parties, several reasons may explain why, individually, they sometimes tend to risk violating their WHC obligations: the fact that States Parties believe in good faith that the impact of their projects will not destroy or damage the authenticity or integrity of the properties, as it likely was in the Historic Centre of Vienna case; the fact that, regardless, States Parties prefer to accord precedence to EOD to the potential detriment of their properties, as it likely was in the Ichkeul National Park, the Historic Centre of Shakhrisyabz, the Historic District of Panama and the Arabian Oryx Sanctuary cases; finally, the fact that there is no clear division of competences at the administrative level and that, therefore, a local choice may end up breaching the State Party's international obligations, as it likely was in the Dresden Elbe Valley case. There can also be more than one reason at a time, as it likely was in the Co-

[92] On this point see also A. Tanzi, *Introduzione al diritto internazionale contemporaneo*, CEDAM, Padova, 2021[6], p. 569 ss.

[93] See WHC, Arts. Arts. 7, 21 ss. and 29.

logne Cathedral (underestimation of the impact of the project and no clear division of administrative competences) and the Historic Centre of Liverpool (underestimation of the impact of the project and preference accorded to EOD) cases.

Third, States Parties may be tempted to strategically pick which part of their cultural heritage of OUV to place under the supervision and monitoring of the international community[94]. After all, it is no mystery that «there may be a particular motivation behind a State Party's decision to nominate a property, or to withhold the nomination»[95]. The case of the 'Delhi Imperial Capital Cities' nomination is illustrative[96].

In 2015, India proposed the property – combining the ancient Mughal capital of Shahjahanabad and the British colonial capital of New Delhi – for the WHL[97]. However, just weeks before the WH Committee's session, the Indian Minister for Foreign Affairs withdrawn the nomination[98]. The abrupt decision took observers by surprise. It has been noted that enhancing the cultural legacy of two of the most controversial periods of India's history – the Moghul Empire and British colonial rule – didn't exactly fit well with the Indian Government's nationalist agenda[99]. Although there may be some truth in this, it then turned out that the major reason behind the nomination withdrawal was that the inscription in the WHL would have hampered EOD in Delhi[100]. Thus, it seems plausible that India intentionally refrained from delegating the supervision and monitoring of part of its cultural heritage of OUV at

[94] See T. Scovazzi, *Art.8-11: World Heritage Committee*, cit., p. 171.

[95] B. Boer, *Art.3*, cit., p. 85. In this sense, «the rigid requirement of the territorial State's consent for the inscription of a property on the World Heritage List may be inconsistent with the effective safeguarding of its outstanding universal value», F. Francioni, *Thirty Years*, cit., p. 30.

[96] See extensively L. Meskell, *A Tale of Two Cities: The Fate of Delhi as UNESCO World Heritage*, in *International Journal of Cultural Property*, 2021, p. 27 ss.

[97] *Ivi*, pp. 29-31.

[98] *Ivi*, p. 28.

[99] *Ivi*.

[100] *Ivi*, p. 31.

the international level because it knew that its EOD projects – currently underway[101] – would almost certainly be at variance with the WHC. In the same vein, China has been criticised for never considering nominating the old city of Kashgar for the WHL, despite its obvious OUV . In particular, it has been argued that China's attitude can be explained in the light of its plans to purse urban development activities in the area. In fact, due to its impact, the carrying out of such activities would likely be incompatible with the obligations ensuing from the WHC.

Fourth, one might wonder what impact (if any) the WHC and its subsequent applicative practice has had on customary law. On the one hand, as the International Law Commission observes, «treaties that have obtained near universal acceptance may be seen as particularly indicative in determining whether particular rules set forth therein reflect customary law»[102]. The fact that almost all States (194) are Parties to the WHC certainly proves that the international community shares a general interest in the protection of cultural heritage of OUV[103].

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[101] See A. Kapoor, Modi the Fanatic is Using the Coronavirus Crisis to Destroy India's Heritage, in The Guardian, 21 May 2020, available at: *www.theguardian.com/culture/2020/may/21/modi-the-fanatic-is-using-the-coronavirus-crisis-to-destroy-indias-heritage*.

[102] *Draft Conclusions on Identification of Customary International Law, with commentaries*, in *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, Conclusion 11, pp. 143-144.

[103] See F. Francioni, *Custom and General Principles of International Cultural Heritage Law*, in *The Oxford Handbook*, cit., p. 544. See also F. Francioni, *General Principles Applicable to International Cultural Heritage Law*, in *General Principles and the Coherence of International Law*, edited by M. Andenas *et al.*, Brill, Leiden/Boston, 2019, p. 399; F. Francioni, *The Evolving Framework for the Protection of Cultural Heritage in International Law*, in *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law*, edited by F. Lenzerini, S. Borrelli, Brill, Leiden/Boston, 2012, p. 19; and F. Francioni, *Au-delà des traites: l'émergence d'un nouveau droit coutumier pour la protection du patrimoine culturel*, in *Revue général de droit international public*, 2007, pp. 33-34. As P. M. Dupuy has also noted: «The association of territorial sovereignty with international solidarity in this manner is thus one of UNESCO's major intellectual contributions to a general understanding of the need for rational management of the world's natural and cultural heritage», *The Impact of Legal Instruments Adopted by*

However, «the practice of parties to a treaty (among themselves) is likely to be chiefly motivated by the conventional obligation» and, therefore, «is generally less helpful in ascertaining the existence or development of a rule of customary international law»[104]. This is especially true when it comes to the practice developed in application of a treaty which enjoys almost universal participation, since, according to the 'Baxter paradox', «as the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law dehors the treaty»[105].

This issue is further complicated here by Art. 12 WHC which specifies that «the fact that a property belonging to the cultural or natural heritage has not been included in either [the WHL or the IDL] shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusion in these lists»[106]. The concrete relevance of this provision is controversial since, as already noted, the operative part of the WHC only imposes a set of duties and due diligence obliga-

UNESCO on General International Law, in *Standard-Setting at UNESCO: Normative Action and Education, Science and Culture*, edited by A.A. Yusuf, vol. I, Brill, Boston/Leiden, 2007, p. 359.

[104] International Law Commission, *Third Report on the Identification of Customary International Law by Sir Michael Wood, Special Rapporteur*, Doc. A/CN.4/682, 17 March 2015, p. 113. See also F. Pocar who, in relation to the Protocol Additional to the Geneva Conventions of 12 August 1949 (160 States Parties) noted that «the treaty itself is an important piece of State practice for the determination of customary law – although […] the impact that any subsequent practice of the contracting States in the application of the treaty which establishes their agreement or disagreement regarding its interpretation may bear on the development of a customary norm [must be carefully addressed]», *Protocol I Additional to the Geneva Conventions and Customary International Law*, in *The Progression of International Law: Four Decades of the Israel Yearbook on Human Rights – An Anniversary Volume*, edited by Y. Dinstein, F. Domb, Brill, Leiden/Boston, 2011 pp. 202-203.

[105] R.R. Baxter, *Treaties and Custom*, in *Collected Courses of the Hague Academy of International Law*, Brill, Leiden/Boston, 1976, p. 64. For a thorough analysis of the 'Baxter paradox' see J. Crawford, *Chance, Order, Change: The Course of International Law*, in *Collected Courses of the Hague Academy of International Law*, Brill, Leiden/Boston, 2014, p. 90 ss.

[106] WHC, Art. 12. See also M. Gestri, *op. cit.*, pp. 136-140.

tions on States Parties[107]. In addition, Art. 12 does not seem to take into account «the objective difficulty of establishing whether a given property that is not inscribed on the lists is really of outstanding universal value»[108]. The fact is that only a property inscribed in the WHL (or in the IDL) *actually* enjoys OUV. Before the inscription, we remain in the realm of possibility[109], as also recently underscored by the General Assembly of the States Parties to the WHC[110]. From this point of view, Art. 12 appears to mainly recall that «a given property may actually be of outstanding universal value even in the event that it is not considered as having such value by government of the territory in which it is located»[111]. Finally, the (very) poor practice of the WH Committee with respect to the application of Art. 12 may seem to corroborate this assumption[112]. As said, there is

[107] See above, par. 2.1.

[108] F. Lenzerini, *Art. 12*, cit., p. 207.

[109] F. Francioni, *Thirty Years*, cit., pp. 29-30.

[110] «The Committee commits to [r]ecognize Outstanding Universal Value only when deciding to inscribe a property on the World Heritage List […], noting that a property does not have Outstanding Universal Value if it is not inscribed on the World Heritage List. The Statement of Outstanding Universal Value arises only from inscribing a property on the World Heritage List (*Convention*, Article 12; *Operational Guidelines*, Paragraph 154)», *Declaration of Principles to Promote International Solidarity and Cooperation to Preserve World Heritage*, WHC/21/23. GA/INF.10 (9 November 2021), p. 4, para. 11, emphasis is original in the text.

[111] F. Lenzerini, *Art. 12*, cit., p. 207. See also G.R. Bandeira Galindo, *The UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage*, in *Le patrimoine culturel de l'humanité*, cit., p. 427. In *SPP v Egypt*, the investment tribunal seemed to read the obligations ensuing from the WHC as limited to the properties inscribed in WHL, see R. Pavoni, *Environmental Rights, Sustainable Development, and Investor-State Case Law: A Critical Appraisal*, in *Human Rights in International Investment Law and Arbitration*, edited by P. M. Dupuy, F. Francioni, E. Petersmann, OUP, Oxford, 2009, p. 535.

[112] On this point see F. Lenzerini, *Art. 12*, cit., pp. 210-214. The concrete reach of Art. 12 should not be entirely underestimated, however. For instance, in *Glamis Gold v United States of America* it did play some role in reinforcing the international investment tribunal's conclusion that a series of administrative measures taken by the State of California, as well as at the federal level, to preserve the sacred lands of the Quechan Indian tribe did not entail a breach of the fair and equitable treatment or result in an indirect expropriation against a Canadian gold-mining company. As it has been pointed out, the fact that the investment

some overlapping between the WH Committee's, although collectively expressed, and the States Parties' *opinio* concerning the correct interpretation and application of the WHC.

To conclude, it seems safe to assume that States' almost universal participation in the WHC, combined with the fact that, at least in theory, Art. 12 extends the general obligations/duties of protection of States Parties' cultural heritage of OUV beyond the WHC Lists system, may suggest but are not, in themselves, two sufficient elements to argue for the existence of a customary rule (or general principle) prohibiting States from intentionally destroying or damaging their cultural heritage of (potential) OUV in peacetime. This matter need now to be addressed based on an analysis of States' broader practice.

3. *The Protection of Cultural Heritage outside the World Heritage Convention*

3.1. *Preliminary Remarks*

It remains to be examined what international regime (if any) applies to the cultural heritage of Potential Outstanding Universal Value (POUV), that is that which, despite its obvious cultural/

tribunal referred to Art. 12 of the WHC is «rather extraordinary, as cultural heritage experts have repeatedly stressed that Article 12 of the WHC is an often-neglected provision», V. Vadi, *Culture Clash? World Heritage and Investors' Rights in International Investment Law and Arbitration*, in *ICSID Review*, 2013, p. 135. On this case see also E. Baroncini, *I siti e la Convenzione UNESCO del 1972 nelle controversie arbitrali internazionali sugli investimenti*, in *Tutela e valorizzazione del patrimonio culturale mondiale nel diritto internazionale*, edited by E. Baroncini, Bologna University Press, Bologna, 2021, pp. 443-446. More in general, as F. Lenzerini has noted, «the presence of Article 12 in the Convention text is to be considered as essential, because it keeps alive the idea that the regime established by the Convention is not applicable only to inscribed properties and that non-inscribed properties also deserve protection according to the Convention», *Art. 12*, cit., p. 218.

natural value[113], has not been included in the WHL, either because it has not been nominated by the State (yet) or because the WH Committee has deferred or rejected the nomination[114], an outcome accounting for almost half of the total nominations[115]. Two schools of thought have emerged in this regard.

According to some authors, including Francioni and Lenzerini, «a general *opinio juris* exists in the international community on the binding character of principles prohibiting deliberate destruction of cultural heritage of significant importance for humanity» and this duty, as in the context of an armed conflict[116], «is nothing but a manifestation of an *erga omnes* obligation»[117]. There are at least

[113] There is certainly an inherent subjectivity in any assessments of this kind. However, also in the light of the criteria used to define the concept of OUV, it does not seem impossible to argue that, sometimes, the WH Committee 'certification' is not necessary to recognise that cultural heritage whose importance justifies the fact that international community should have an interest in its protection. See also M. Gestri, *op. cit.*, pp. 137-138. In this regard, it is perhaps worth recalling that the inscription on the WHL is declaratory in nature, and should not be intended as a constitutive process. This means that the OUV of the cultural heritage inscribed is a precondition, and not the result of the inscription, see F. Lenzerini, *Art.12*, cit., p. 215.

[114] On the contrary, «the inclusion of a cultural or natural property in the national Tentative List would *ipso facto* produce the effect of putting such property under the attention of the international community, making it the object of protection of the Convention», *ivi*, p. 218.

[115] See the examples in W. Ferchichi, *La Convention de l'UNESCO concernant la protection du patrimoine mondial culturel et naturel*, in *Le patrimoine culturel de l'humanité*, cit., p. 465.

[116] R. Pavoni, *International Legal Protection*, cit., p. 356.

[117] F. Francioni, F. Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, in *European Journal of International Law*, 2003, pp. 635, 638. And see F. Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, in *Michigan Journal of International Law*, 2004, pp. 1213-1214 and F. Lenzerini, *The UNESCO Declaration concerning the International Destruction of Cultural Heritage: One Step Forward and Two Steps Back*, in *Italian Yearbook of International Law*, 2003, pp. 132-134. See also L. Lixinski, V.P. Tzevelekos, *The World Heritage Convention and the Law of State Responsibility: Promises and Pitfalls*, in *Intersections in International Cultural Heritage Law*, edited by A.-M. Carstens, E. Varner, OUP, Oxford, 2010, p. 253, M. Gestri, *op. cit.*, p. 139 and P.M. Dupuy, *The Impact of Legal Instruments*, cit., pp. 358-360.

three reasons supporting this solution: first, the widespread conventional and sot-law practice, already recalled above, on the importance of protecting cultural properties; second, «the existence of a customary norm which prohibits the commission of acts of destruction of cultural assets in wartime, [which] reinforces the strength of the corresponding principle applicable in times of peace. In fact, (…) it would be nonsensical to maintain that intentional acts of damage to cultural assets are allowed in times of peace and become prohibited as soon as a war occurs»[118]; third, the circumstance that States' domestic law usually protects the national cultural heritage of POUV, which would point at the existence, if not of a customary rule, at least of a corresponding general principle under Art 38(1)(c) of the ICJ Statute[119].

On the contrary, according to other authors, including O'Keefe, there is no definitive evidence that «a State is presently under a customary legal obligation, in time of peace, to protect, conserve and transmit to future generations cultural heritage situated on its territory»[120].

It is difficult to take a stand. Generally, practice shows that the international community will only exceptionally react before such

[118] F. Lenzerini, *The UNESCO*, cit., p. 139.

[119] See K. Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage during Peacetime*, in *Yale Journal of International Law*, 2003, pp. 196-197.

[120] R. O'Keefe, *World Cultural Heritage: Obligations to the International Community as a Whole?*, in *International & Comparative Law Quarterly*, 2004, p. 205. See also C. Forrest, *International Law*, cit., pp. 282-283, G.R. Bandeira Galindo, *The UNESCO Declaration*, cit., p. 431, C. Brenner, *Cultural Property Law: Reflecting on the Bamiyan Buddhas' Destruction*, in *Suffolk Transnational Law Review*, 2006, p. 263, R. Goy, *La destruction intentionnelle du patrimoine culturel en droit international*, in *Revue général de droit international public*, 2005, p. 279, K. Wangkeo, *Monumental Challenges*, cit., pp. 264-265 and T. Georgopoulos, *Avez-vous bien dit « crime contre la culture »? La protection international des monuments historiques*, in *Revue hellénique de droit international*, 2001, p. 473: «pourrait-on valablement soutenir que l'État où est situé le monument est lié par une règle coutumière l'obligeant à renoncer à une politique susceptible de dégrader le patrimoine culturel commun ? Rien n'est moins sûr. La pratique en la matière ne fait pas preuve d'une telle avancée du droit coutumier».

instances, also because States do not appear particularly keen on risking jeopardising their international relations over an issue that does not directly affect (or even interest) them[121].

That said, there have been a few controversial cases that may help to get a better understanding of the state of the art. It seems useful to divide the analysis according to the two reasons behind the intentional destruction of or damage to the cultural heritage of POUV, *i.e.*: iconoclasm and, more frequently, EOD.

3.2. *Iconoclasm*

The *Oxford Dictionary of Philosophy* defines iconoclasm as «the odd pair of beliefs shared by enthusiasts […] that while "false idols" have no supernatural powers they are nevertheless so dangerous that they must be destroyed rather than ignored»[122]. This definition is useful because it entails that, although fanaticism-driven acts of iconoclasm against cultural heritage are usually committed in the context of armed conflicts and framed as violations of human rights law, humanitarian law, international criminal law and/or a threat to international peace and security[123], the concept has its own autonomy and acts of this kind can also be carried out during peacetime and without a clear discriminatory intent.

History is certainly not short of such examples[124]. Following the Second World War, however, not many cases made the international headlines. In 1968, Brezhnev personally ordered the destruction of the already damaged Konigsberg Castle, an extensive Goth-

[121] «Most states will often refrain from paying the (political or economic) costs of the invocation of responsibility for something that only indirectly concerns them, in the sense that it is a matter of all states together and of none of them in particular», L. Lixinski, V. P. Tzevelekos, *The World Heritage Convention*, cit., p. 255.

[122] *Iconoclasm*, in *The Oxford Dictionary of Philosophy*, edited by S. Blackburn, OUP, online edn, 2016[3].

[123] See extensively F. Lenzerini, *Intentional Destruction of Cultural Heritage*, in *The 1972 World Heritage Convention*, cit., p. 81 ss.

[124] See F. Francioni, F. Lenzerini, *The Destruction*, cit., pp. 619-620.

ic building dating back to the 13th Century and the former seat of the Teutonic Order, as a manifestation of Prussian militarism[125]. Similarly, from 1966 to 1969, at the peak of the Cultural Revolution, Mao instructed his personal paramilitary units – the Red Guards – to attack Chinese cultural heritage of POUV, such as the White Horse Temple, the oldest Buddhist temple in China, the Famen Temple, the largest pagoda temple in China, and the historical tombs of the Ming Dynasty[126]. In Cambodia, the Khmer Rouge also destroyed a number of 'impure' artifacts, monasteries and statues during their horrific rule (1975-1979)[127]. Apparently, in these cases the international community failed to protest[128].

In the late 1960s, the communist dictator Nicolae Ceausescu launched a policy of land reform, so-called 'systematisation', aimed at achieving a more efficient use of urban and rural lands[129]. The project soon took a fanatical turn and resulted in the destruction of and/or irreparable damage to entire cultural districts in Sibiu, Brasov, Pitesti and Bucharest, and the annihilation of *thousands* of traditional villages in the countryside[130]. This time, the inter-

[125] M.J. Zielinski, *Kant's Future: Debates about the Identity of Kaliningrad Oblast*, in *Slavic Review*, 2018, p. 942.

[126] See J. Noth, *"Make the Past Serve the Present": Reading* Cultural Relics Excavated During the Cultural Revolution *of 1972*, in *Cultural Heritage as Civilizing Mission: From Decay to Recovery*, edited by M. Falser, Springer International, Heidelberg, 2015, p. 181 ss.

[127] See G.R. Bandeira Galindo, *The UNESCO Declaration*, cit., p. 402. In 1992, the Kar Sevaks, a group of Hindu extremists, stormed and demolished the splendid Babri Masjid, in India. Several States, including Bangladesh, Iran and Pakistan, protested, accusing India of not doing enough to protect Muslim holy places and minorities. However, the Indian authorities formally condemned the incident and prosecuted the authors. Moreover, albeit heatedly debated, the involvement of Indian State officials has never been proved. Therefore, this incident does not seem to represent, at least clearly, a case of *intentional* destruction of cultural heritage and will not be further discussed here. See N. Rao, C. Rammanohar, *Ayodhya, the Print Media and Communalism*, in *Destruction and Conservation of Cultural Property*, edited by R. Layton et al., Routledge, London, 2001, p. 139 ss.

[128] This author has found no official manifestation or report in any newspaper or contribution of any reaction by other States against such conduct.

[129] See K. Wangkeo, *Monumental Challenges*, p. 215 ss.

[130] *Ivi*, pp. 217-218.

national community reacted[131]. Criticism came from both Western (Austria, Canada, France, the United Kingdom and West Germany) and Eastern (Hungary) States, international organisations, NGOs and the civil society[132]. Although West Germany and Hungary seemed more interested in the well-being of German and Hungarian minorities living in Transylvania, other States, especially the United Kingdom, genuinely feared for Romania's cultural heritage of POUV[133]. Despite the numerous protests, the project only came to an halt with the fall of Ceausescu in 1989[134].

Perhaps the most infamous case of modern iconoclasm against cultural heritage in peacetime is the destruction of the Buddhas of Bamiyan at the hand of the Taliban[135]. The facts are well-known[136]. In September 1996, the Taliban seized Kabul and proclaimed the birth of the Islamic Emirate of Afghanistan (IEA). The Taliban ruled with brutality and committed serious human rights violations against the civil population. In February 2001, it ordered the destruction of all statues in Afghanistan[137]. The announcement caused international outcry, especially when it became clear that the main target were the Buddhas of Bamiyan, two imposing statues carved into a rock wall, dating back to the 9th and 11th Century[138]. Between 1 and 6 March 2001, the Taliban blew up the Buddhas, cele-

[131] *Ivi*, p. 220.

[132] *Ivi*, pp. 218-220.

[133] *Ivi*, pp. 219-220.

[134] *Ivi*, p. 220.

[135] According to some authors, the destruction of the Buddhas of Bamiyan took place in the context of a non-international armed conflict, see F. Francioni, F. Lenzerini, *The Destruction*, cit., p. 632 and H. Abtahi, *From the Destruction of the Twin Buddhas to the Destruction of the Twin Towers: Crimes against Civilization under the ICC Statute*, in *International Criminal Law Review*, 2004, pp. 16-18.

[136] On this case see extensively F. Francioni, F. Lenzerini, *The Destruction*, p. 619 ss.

[137] K. Wangkeo, *Monumental Challenges*, cit., p. 245.

[138] The WH Committee had stressed before the «inestimable value» of the Buddhas of Bamiyan, see WHC-97/CONF.208/17 (27 February 1998), para. VII.58. The Cultural Landscape and Archaeological Remains of the Bamiyan Valley have been symbolically included in the WHL after the destruction of the Buddhas, see Decision 27 COM 8C.44 (2003), para. 1.

brating the 'endeavour' as a huge success[139]. About a hundred States and several international organisations – including the UN, UNESCO, EU, the Council of Europe and the Organisation of Islamic Cooperation – harshly condemned the incident[140]. Many States emphasised the universal value of the Buddhas of Bamiyan as world cultural heritage, while (only) Ukraine, being Afghanistan a party to the WHC at the time of the events, framed the Taliban's act as a violation of international law and, *in particular*, of the WHC[141]. Two years later, the UNESCO General Conference also adopted the Declaration Concerning the International Destruction of Cultural Heritage (2003 Declaration) which, among other things, recalls that «when conducting peacetime activities, States should take all appropriate measures to conduct them in such a manner as to protect cultural heritage»[142].

The extent of the international community's reaction, culminating in the adoption of the 2003 Declaration, has shaped the debate on customary law and the protection of cultural heritage in peacetime. Thus, Francioni claimed that the 2003 Declaration is «a relevant indicator of the sense of obligation that wilful destruction of cultural heritage, whether in armed conflict or in peacetime, may entail State responsibility»[143]. On a more critical note, Lenzerini pointed out that, due to its hortatory language, the 2003 Declaration «appears to be a rather slight document [delivering] modest

[139] K. Wangkeo, *Monumental Challenges*, cit., p. 250.

[140] See all the reactions in *ivi*, pp. 246-250 and R. O'Keefe, *World Cultural*, cit., p. 195 ss.

[141] R. O'Keefe, *World Cultural*, cit., p. 198.

[142] (Paris, 17 October 2003), Art. IV. On the 2003 Declaration see G.R. Bandeira Galindo, *The UNESCO Declaration*, cit., pp. 411-444, F. Lenzerini, *The UNESCO*, cit., p. 140 ss.; T. Scovazzi, *La Dichiarazione sulla distruzione intenzionale del patrimonio culturale*, in *La tutela internazionale*, cit., p. 171 ss.; and J. Hladik, *The UNESCO Declaration concerning the International Destruction of Cultural Heritage*, in *Art Antiquity and Law*, 2004, p. 215 ss.

[143] F. Francioni, *Beyond State*, cit., p. 1219. See also L. Lixinski, V.P. Tzevelekos, *The World Heritage Convention*, cit., p. 253, P. M. Dupuy, *The Impact of Legal Instrumentas*, cit., p. 361 and J. Hladik, *The UNESCO Declaration*, cit., pp. 234-236.

progress» and that «UNESCO has lost a precious occasion for using the *momentum* created by the destruction of the Buddhas of Bamiyan in order to bring about a significant improvement in the framework of the international protection of cultural heritage»[144]. On the other side of the fence, O'Keefe noted that «while an impressive array of States jointly and severally condemned the Taliban's actions, none of them unambiguously characterized it as a violation of a legal obligation, let alone a customary one» and that, in the light of the *travaux préparatoires* of the 2003 Declaration, it is arguable that «the General Conference is not suggesting that States currently owe customary peacetime obligations in respect of cultural heritage situated on their territory»[145].

3.3. *Economic Over-Development*

EOD is arguably the main cause of intentional destruction and damage to the authenticity/integrity of States' cultural heritage in peacetime. As Francioni has recently noted, «much destruction of cultural heritage of great importance occurs in peacetime and in pursuit of an ill-conceived idea of economic development»[146]. In the same vein, in 2016 the Special Rapporteur in the field of cultural rights Karima Bennoune wished to «underscore the importance of […] addressing the widespread destruction of cultural heritage engendered by development and modernization»[147] a subject

[144] F. Lenzerini, *The UNESCO*, cit., pp. 144-145. See also T. Scovazzi, *La Dichiarazione*, cit., pp. 173-176.

[145] R. O'Keefe, *World Cultural*, cit., pp. 204, 209. See also R. Goy, *La destruction*, cit., pp. 278-279 and 288; C. Forrest, *International Law*, pp. 282-284; A.F. Vrdoljak, *Intentional Destruction of Cultural Heritage and International Law*, in *Multiculturalism and International Law*, vol. XXXV, edited by K. Koufa, Thesaurus Acroasium, Thessaloniki, 2007, pp. 386-387 and G.R. Bandeira Galindo, *The UNESCO Declaration*, cit., p. 452.

[146] F. Francioni, *Customs, General Principles, and the Intentional Destruction of Cultural Property*, in *Cultural Heritage and Mass Atrocities*, edited by J. Cuno, T.G. Weiss, Getty Publications, Los Angeles, 2022, p. 424.

[147] Human Rights Council, *Report of the Special Rapporteur in the Field of Cultural Rights*, UN Doc. A/71/317, 9 August 2016, para. 32.

she said should be explored further in the future[148].

As seen, practice shows a significant discrepancy between the WH Committee and the States Parties to the WHC when it comes to weighing the actual impact that EOD may have on their cultural heritage of OUV. While the former advocates a strict interpretation and application of the obligation ensuing from the WHC Lists system, the latter tend to underestimate or outright ignore how EOD may affect the authenticity and/or integrity of their cultural heritage of OUV[149].

This tendency *a fortiori* applies in relation to States' cultural heritage of POUV. Moreover, while the WH Committee's supervision and monitoring of the Lists system effectively exerts a compliance pull on recalcitrant States Parties, «the Convention has had no influence with regard to the very frequent cases of not-blatantly-improper actions performed by government party to the Convention within their own territory (for whatever reason, including public works, urbanistic planning, and promotion of tourism), which threaten or actually prejudice the integrity» of their cultural heritage of POUV[150]. Besides, it is highly unlikely that States will stand up for the protection of other States' cultural heritage of POUV when threatened by EOD. Even in the face of the most extreme acts, States' reaction has been sporadic and played only a marginal, unproductive role[151].

For instance, in 2002 Saudi authorities announced that they would destroy the Ajyad Fortress, an 18th century Ottoman citadel in Mecca, in order to build a five-star residential complex[152]. Tur-

[148] See Statement by Ms. Karima Bennoune, Special Rapporteur in the Field of Cultural Rights, at the 71st Session of the General Assembly, 26 October 2016, available at: *www.ohchr.org/en/statements/2016/11/statement-ms-karima-bennoune-special-rapporteur-field-cultural-rights-71st*.

[149] See above, par. 2.

[150] F. Lenzerini, *Art.12*, cit., p. 209.

[151] For further examples see R. Layton, J. Thomas, *Introduction*, in *Destruction and Conservation of Cultural Property*, cit., p. 1 ss. and other contributions from the same collection.

[152] K. Wangkeo, *Monumental Challenges*, cit., p. 185.

key protested and asked UNESCO to intervene[153]. Saudi Arabia replied that there was an urgent need of new facilities for Muslims going on pilgrimage and that, in any case, that was an internal matter[154]. UNESCO tried to facilitate diplomatic efforts but, eventually, Saudi Arabia razed the property to the ground[155].

In 2003, Myanmar's military junta authorised the construction of a 60-metre viewing tower in the ancient city of Bagan, one of the most spectacular sites of Buddhist architecture in Asia[156]. Despite UNESCO's scepticism, the tower was opened in 2005, and other tourism facilities have been built within the property since[157]. With the exception of Japan, no other State protested or took an interest in the case[158].

Another illustrative example concerns the construction of the Ilisu Dam on the River Tigris, in Turkey. This project attracted intense scrutiny because its implementation would result in the flooding of the ancient city of Hasankeyf[159]. This site has been described as an open-air museum, home to Roman, Byzantine, Seljuk and Ottoman remains, such as archeological ruins, a medieval citadel and religious monuments[160]. Despite the obvious gravity of the threat to a cultural heritage of POUV, the international community's response has been almost non-existent. Syria and Iraq – and the Arab League on their behalf – protested against the project, but only because it would dramatically reduce their water supply[161]. UNESCO has not made any statement on the whole matter.

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[153] *Ivi*.

[154] *Ivi*.

[155] *Ivi*, p. 186.

[156] F. Lenzerini, *Art. 12*, cit., p. 209.

[157] *Ivi*.

[158] In 2019, the WH Committee included Bagan in the WHL subject to Myanmar's commitment to progressively remove the hotels and all «intrusive elements» from the property, see Decision 43 COM 8B.20 (2019), para. 3.

[159] See B. Aykan, *Saving Hasankeyf: Limits and Possibilities of International Human Rights Law*, in *International Journal of Property Law*, 2018, p. 11 ss.

[160] *Ivi*, p. 12.

[161] K. Wangkeo, *Monumental Challenges*, cit., p. 233.

For their part, NGOs have tried to frame Hasankeyf's flooding as a violation of human rights and, more specifically, of Arts. 11(1)[162], 12(1)[163], and 15(1)(a)[164] of the International Covenant on Economic Social and Cultural Rights[165] and of Art. 8(1)[166] of the European Convention on Human Rights[167]. In 2011, the Committee on Economic Social and Cultural Rights did urge Turkey to stick to a human-rights based approach in its infrastructure development projects[168]. As for the European Court of Human Rights, in 2019 it declared the application inadmissible *ratione materiae*, dismissing the existence of a «universal individual right to the protection of a specific cultural heritage»[169]. The Ilisu Dam has been operational since 2018 and Hasankeyf is now submerged[170].

3.4. *Outlook*

In the light of the foregoing analysis, one element seems to condition the international community's reaction to States' intentional destruction of or damage to their cultural heritage of POUV in peacetime: the lack of any acceptable or, at least, credible justification.

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[162] «The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions».

[163] «The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health».

[164] «The States Parties to the present Covenant recognize the right of everyone to take part in cultural life».

[165] (New York, 16 December 1966).

[166] «Everyone has the right to respect for his private and family life, his home and his correspondence».

[167] (Rome, 4 November 1950).

[168] Doc. E/C.12/TUR/CO/1 (12 July 2011), para. 26.

[169] *Ahunbay and Others v. Turkey*, Case No. 6080/06, Decision, 29 January 2019, p. 2.

[170] C. Gall, An Ancient Valley Lost to Progress, in New York Times, 5 June 2020, available at: *www.nytimes.com/2020/07/05/world/middleeast/turkey-erdogan-hasankeyf-Ilisu-dam.html*.

The destruction of the Buddhas of Bamiyan provides an obvious example. Taliban's argument that such a criminal act was necessary because Sharia prohibits idol worship was not only intolerable but also, as religious authorities and Islamic States have claimed, absolutely baseless[171]. In fact, it has been observed that the destruction of the Buddhas of Bamiyan was probably intended as some sort of vendetta against the international community for having failed to recognise the Taliban's regime and having imposed crippling sanctions on the IEA[172]. Be that as it may, «the Taliban's claims that it was acting on the basis of its religious beliefs rang hollow with observers» and the destruction of the Buddhas of Bamiyan «appeared extreme and completely unjustified»[173].

It is important to note that iconoclasm does not seem to embody, in and of itself, an unacceptable reason for the destruction of or damage to cultural heritage of POUV. For instance, after the fall of the Soviet Union, no State or international institution spoke out against the removal or destruction of the many Soviet monuments – mainly statutes, buildings and war memorials – in Eastern Europe or the former Soviet Socialist Republics[174]. Similar moves have also been planned recently in Bulgaria, Czech Republic, Poland and Ukraine with only Russia complaining[175]. Sure, one could argue that a giant statute of Lenin or the nth piece of brutalist architecture do not account for cultural heritage of POUV. However, the feeling is that, beyond the actual value of these properties, the international community did not react because it viewed these acts of iconoclasm as understandable – or even welcomed – considering the controversial legacy of the Soviet Union in these States. A feeling that, given the criminal Russian invasion of Ukraine in 2022,

[171] K. Wangkeo, *Monumental Challenges*, cit., p. 252.

[172] F. Francioni, F. Lenzerini, *The Destruction*, cit., pp. 620, 634.

[173] K. Wangkeo, *Monumental Challenges*, cit., p. 263.

[174] *Ivi*, p. 266.

[175] In particular, Ukraine and Poland enacted *ad hoc* legislation banning almost all Soviet monuments across the two Countries, see Law No. 2558 of 9 April 2015 for the former and Law No. 744 of 1 April 2016 for the latter.

will understandably strengthen in the years to come, as the recent demolition of a Soviet-era 80-metre obelisk in Latvia also shows[176].

Moreover, iconoclasm is less likely to trigger other States' backlash when disguised as EOD. Ceausescu's systematisation plans provide a good example. Here, the international community's reaction was much milder, and only a few States protested because they were genuinely concerned about Romania's cultural heritage. Certainly, this could be due to the fact that the POUV of the Buddhas of Bamiyan was far more recognisable than that of the historic districts of Bucharest or the Romanian villages[177]. But a more convincing explanation is that «Ceausescu's iconoclasm in Romania was different than the Taliban's iconoclasm in Afghanistan because a better case could be made that systematization would achieve economic benefits»[178].

This brings us to the last hypothesis, namely when the intentional destruction of or damage to the cultural heritage of POUV is dictated solely or primarily by EOD. Practice shows that, in this case, States will tend to ignore other States' violence against the authenticity and/or integrity of their cultural heritage of POUV. Even when they protested, they did so for very specific or unrelated reasons and not because they thought that the other State was violating an *erga omnes* obligation to preserve its cultural heritage of POUV in peacetime[179]. Most importantly, the great majority of the international community acquiesced to these acts[180].

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[176] Associated Press, Latvia Topples Soviet-era Obelisk amid Backlash against Russia, in The Guardian, 22 August 2022, available at: *www.theguardian.com/world/2022/aug/25/latvia-topples-soviet-era-obelisk-amid-backlash-against-russia*.

[177] K. Wangkeo, *Monumental Challenges*, cit., p. 263.

[178] *Ivi*.

[179] Thus, Turkey protested against Saudi Arabia's destruction of the Ajyad Fortress because it interpreted it as an attack to its cultural legacy in the region. Japan protested against Myanmar for the poor management of the ancient city of Bagan because of the importance that Buddhism has in Japanese culture and society. Finally, as said, Syria and Iraq protested against the construction of the Ilisu Dam because the project would dramatically reduce their water supply.

[180] On the importance of the international community's acquiescence in the formation of customary international law see International Law Commission,

The case of the flooding of Hasankeyf is striking. In terms of the gravity of the damage done to the world cultural heritage, it seems no exaggeration to compare it to the destruction of the Buddhas of Bamiyan. In addition, it is questionable whether such a radical choice was really necessary. The Ilisu Dam is expected to have a life span of just 30 to 50 years and is not supposed to meet any vital need, but 'merely' to improve the Country's energy production[181]. In this sense, the flooding of Hasankeyf appears akin to the destruction of the Buddhas of Bamiyan: extreme and unjustified. Nevertheless, the international community's reaction has been the opposite, that is total silence on the former, unanimous condemnation against the latter. This cannot be explained solely on the basis that Turkey is a regional powerhouse and the IEA was a rogue entity already cut off from international relations. Rather, the crux of the matter seems to be that States share a different *opinio juris* depending on the reason behind the intentional destruction of or damage to cultural heritage of POUV.

4. *Concluding Remarks*

Since the adoption of the WHC, international law on the protection of cultural heritage in peacetime has strengthened. This is mainly due to two factors.

The first one is the increasing awareness of the multifaceted dimension of cultural heritage, which has led to an extension of its protection under different branches of international law, including

Third Report on the Identification of Customary International Law by Sir Michael Wood, Special Rapporteur, Doc. A/CN.4/682, 17 March 2015, p. 9 ss.

[181] B. Aykan, *Saving Hasankeyf*, cit., p. 14.

human rights law[182], international environmental law[183], and indigenous peoples' rights law[184].

Thus, taking human rights as an example, the recent acts of destruction and damage to the cultural heritage associated with the Rohingya and Uyghur minorities – mainly ancient villages, shrines and mosques –, in Myanmar and China respectively, entail a blatant violation of international law, as they were carried out (outside the context of an armed conflict) by State officials as part of a policy of severe ethnic discrimination and even genocide[185].

The second factor is the universal participation that the WHC has managed to achieve over the past 50 years, extending now to 194 States Parties. In passing, it is also worth recalling that the WHC has proved a successful model, inspiring the adoption of other legally binding instruments on the protection of other 'categories' of cultural heritage, such as the 2001 Convention on the Protection of the Underwater Cultural Heritage[186] and the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage[187]. Finally, one should not overlook the other regional conventional regimes, especially within the Council of Europe and the Organisation of American States, recalled above.

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[182] See, for instance, F. Francioni, *Culture, Human Rights and International Law*, in *Culture and International Economic Law*, edited by V. Vadi, B. de Witte, Routledge, London, 2015, p. 19 ss., and M.A. Renold, A. Chechi, *International Human Rights Law and Cultural Heritage*, in *Cultural Heritage and Mass Atrocities*, cit., p. 381 ss. See, more in general, the work by the Special Rapportuer(s) in the field of cultural rights, operating under the aegis of the Human Rights Council, available at: *https://www.ohchr.org/en/special-procedures/sr-cultural-rights*.

[183] See, for instance, B. Boer, *The Environment and Cultural Heritage*, in *The Oxford Handbook*, cit., p. 318 ss.

[184] See, for instance, F. Lenzerini, *Investment Projects Affecting Indigenous Heritage*, in *Culture and International*, cit., p. 72 ss.

[185] See R. Lee, J.A. González Zarandona, *Heritage Destruction in Myanmar's Rakhine State: Legal and Illegal Iconoclasm*, in *International Journal of Heritage Studies*, 2020, p. 519 ss., and R. Harris, *Uyghur Heritage under China's "Antireligious Extremism" Campaigns*, in *Cultural Heritage and Mass Atrocities*, cit., p. 133 ss.

[186] Paris, 2 November 2001.

[187] Paris, 17 October 2003.

Nevertheless, customary international law on the protection of cultural heritage in peacetime remains deficient. In particular, advocating that «a [customary norm banning the intentional destruction of cultural heritage] is to be found in the principle according to which cultural heritage constitutes part of the general interest of the international community as a whole»[188] does not seem to reflect international practice. On the contrary, the present analysis supports the idea that «cultural heritage as a common heritage of humankind is not to be equated with the assertion of a customary obligation to preserve this heritage. Such an obligation might be suggested by way of corollary. But a corollary is insufficiently norm-creating in itself to form the basis of a rule of law»[189].

That said, a distinction can be drawn according to the reason behind the intentional destruction of or damage to the cultural heritage of POUV. Arguably, international practice indicates that the international community will regard the worst acts of iconoclasm a violation of international law, as they cannot be validly defended on the basis of any reasonable justification. In this sense, the clear condemnation issued by hundreds of States and several international organisations against the Taliban's destruction of the Buddhas of Bamiyan, together with the unanimous adoption, two years later, of the 2003 Declaration by the UNESCO General Conference, more

[188] F. Francioni, F. Lenzerini, *Afghan Culture Heritage and International Law: The Case of the Buddhas of Bamiyan*, in *Art and Archeology of Afghanistan: Its Fall and Survival*, edited by J. van Krieken-Pieters, Brill, Leiden/Boston, 2005, p. 281.

[189] R. O'Keefe, *World Cultural*, cit., p. 205. See also G.R. Bandeira Galindo, *The UNESCO Declaration*, p. 432. Recently, F. Francioni has also noted that: «no corresponding customary norms [*i.e.*, no prohibitions] can be found today in relation to the destruction of cultural heritage in peacetime and in isolation from situations of armed conflict or terrorism», *Customs, General Principles*, cit., p. 424. However, the Author also notes that «this gap in the law can be filled by recourse to a wide range of general principles [*i.e.*, the prohibition of the threat or use of force, self-determination, individual criminal responsibility, elementary considerations of humanity and the principle that cultural heritage forms part of the heritage of humanity] that can be applied […] in the context of both conflict and peacetime», *ivi*.

than mere «dismay and shock»[190], seems to signal the genuine belief that such an insane conduct is (or should be) prohibited under international law. Two caveats further apply.

First, States' iconoclasm against their cultural heritage of POUV is not unlawful *in itself*. Much will depend on what that cultural heritage symbolises for the State(s) involved and for the international community as a whole: real common heritage of mankind or the controversial vestiges of a fallen regime. Second, States' iconoclasm against their cultural heritage of POUV might be viewed 'less unacceptable' when disguised as or anyway correlated to other reasons, such as EOD. The 'moderate' international reaction against Ceausescu's systematisation plans provides a good example.

This latter consideration ties in with the fact that, generally speaking, States appear to regard the development of EOD projects as compatible with their international obligations on the protection of their cultural heritage.

Within the WHC Lists system, the relevant practice is shaped by the interactions between the WH Committee and States Parties. The WH Committee – which is composed by States Parties' representatives – has managed to ensure that, in the great majority of cases, States Parties' implementation of economic and social projects did not come at the expense of their cultural heritage of OUV. Still, States Parties have sometimes adopted a loose interpretation of their obligations under this system, underestimating and/or ignoring the impact that EOD can have on the authenticity and/or integrity of their cultural heritage of OUV, exceptionally leading the WH Committee to delist the property. The reasons behind this discrepancy have already been singled out and will not be repeated here[191].

Recalling States Parties' impatient attitude towards an intransigent protection of their cultural heritage of OUV before EOD instances as required by the WH Committee in the context of the

[190] R. O'Keefe, *World Cultural*, cit., p. 198.
[191] See above, par. 2.4.

Lists system provides a clear indication of how States will likely act *outside* of such system when faced with the choice of whether to prioritise the preservation of their cultural heritage of POUV or the pursuit of their economic interests when the latter is at odds with the former.

In this regard, it is interesting to note how, over time, an ambivalent relationship seems to have developed between the WHC and customary international law, with specific reference to EOD. Indeed, the establishment of the WHC Lists system risks creating the false impression that only cultural heritage of OUV should be considered 'fully' protected under international law. The argument would go as follows: if a State Party wishes to place the protection of one of its properties under the supervision of the international community, it will submit the corresponding nomination to the WH Committee; but, if it does not (or if the property does not make the WHL), it retains its sovereign freedom on how to dispose of its cultural heritage, even of POUV. In this context, two legal frameworks would allegedly co-exist, and the practice outside the WHC Lists system, as opposed to that implementing it, would be evidence of a customary rule allowing States to intentionally destroy or damage their cultural heritage of POUV for EOD reasons[192].

This interpretation is obviously at odds with Art. 12 WHC[193], as well as the gist of the WHC which, in its Preamble, emphasises that «deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world». And yet, this is the (unfortunate) direction which international practice seems to be heading towards,

[192] See, in general, B.B. Jia, *The Relations between Treaties and Custom*, in *Chinese Journal of International Law*, 2010, p. 83.

[193] As F. Lenzerini puts it, «due to the existence of Article 12, the obligations that arise from the Convention may be invoked when an act at odds with the spirit and the purpose of the Convention itself is perpetrated or yet simply planned to the prejudice of a cultural or natural property of great importance for humanity, even in the event that such property is not inscribed on the World Heritage List or on the List of World Heritage in Danger», *Art. 12*, cit., p. 218.

as the cases of the withdrawn of the 'Delhi Imperial Capital Cities' nomination and that of the old city of Kashgar also illustrate[194].

Even more striking is the gap between the universal treaty regime and customary international law in peacetime. Under the former, the WH Committee deemed Germany's construction of a bridge across the Dresden Elbe Valley as irreconcilable with its duty of ensuring the protection, conservation and transmission to future generations of its cultural heritage of OUV, delisting the property. Under the latter, Turkey's flooding of the magnificent site of Hasankeyf for (temporally) improving its energy production cannot be regarded as unlawful.

This gap, which delineates a *lex specialis* kind of relationship, may perhaps be explained considering that, at the end of the day, the «mantra of territorial sovereignty and domestic jurisdiction»[195] remains strong and still permeates customary international law on the protection of cultural heritage in peacetime, especially when it comes to the sphere of States' economic interests.

[194] See above, par. 2.4.

[195] F. Francioni, *Thirty Years*, cit., p. 19.

Bert Demarsin

THE 1972 CONVENTION'S VIRTUAL POWERLESSNESS AGAINST THE ILLICIT TRADE IN UNESCO WORLD HERITAGE*

Abstract: Given the widespread use of the *lex rei sitae* principle in international property law disputes, the fight against the illicit trade requires an *international* control mechanism that obliges other jurisdictions to enforce on their own territory trade restrictions enacted in a foreign jurisdiction. This contribution inquires whether such obligation can be derived from the 1972 World Heritage Convention's duty to co-operate, as set forth in its Article 6, (1). Could it not be argued that a faithful reading of Article 6 implies from the Member States the same response as the 1970 Convention and the Cites Convention do with regard to illicit trade in protected heritage? That would mean that whenever assets stemming from foreign world heritage sites were to be found on their territory, the duty to co-operate under the 1972 World Heritage Convention would require all Member States to enforce the trade restrictions enacted in the state of origin. Such interpretation of Article 6, (1) could in our opinion bring a serious blow to traffickers of world heritage, taking into account the 1972 World Heritage Convention's close to universal ratification.

Introduction

Many of the species that live on our planet currently face extinction, putting biodiversity under severe pressure. One of the main reasons for the drastic decline in animal and plant populations lies in the illegal trade in fauna and flora[1]. Yet cultural heritage suffers from illicit trade just as much as natural heritage does. Illicit trafficking of cultural artefacts robs entire populations of their identity and destroys the cultural treasures our ancestors handed down to

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[1] See *www.worldwildlife.org*; D. Challender, *Illegal Wildlife Trade and World Heritage*, in *World Heritage Review*, 87, 2018, p. 54 ss.

our generation[2]. The problem of illicit trade is wide-ranging and affects just about every country in the world. In many cases the illicit trade is controlled by international networks of criminals and even terrorists, who funnel the spoils of impoverished petty thieves, operating in source countries, to unscrupulous collectors, frequenting high-end galleries and exclusive dealers in market countries[3]. War, internal conflicts and corruption often fan the flames of looters, loggers and poachers, but even in stable and well-organized regimes heritage is under a constant threat of grabby fingers[4]. Finally, it is fair to say that mass tourism undoubtedly contributes to the widespread nature of the problem[5].

In spite of their outstanding universal value and their special status following protection under the 1972 UNESCO Convention regime, world heritage sites are not spared from looting and trafficking[6]. From the Bamiyan Valley in Afghanistan to the Malian old towns of Djenné and Timbuktu; from the Garamba and Virunga National Parks in the Congo to the Madagascar Rainforests of the Atsinanana: all these sites suffer heavily from the illicit trade in protected heritage. As a result, they even figure on the List of World

[2] M. Rössler, *World Heritage Editorial*, in *World Heritage Review*, 87, 2018, p. 3.

[3] Interpol, *Countering illicit trade in goods - A guide for policy-makers*, International Criminal Police Organization, 2014, 31-34 and 49-51.

[4] See *Illicit antiquities. The theft of culture and the extinction of archeology*, edited by N. Brodie, K. Walker Tubb, Cambridge, Routledge, 2002, p. 320; S. Mackenzie, N. Brodie, D. Yates, C. Tsirogiannis, *Trafficking Culture - New Directions in Researching the Global Market in Illicit Antiquities*, Routledge, Cambridge, 2019, p. 182.

[5] A. Guiffrida, *Plunder of Pompeii: how art police turned tide on tomb raiders*, in *The Guardian*, 28 May 2021.

[6] A.F. Vrdoljak, *World heritage and illicit trade*, in *World Heritage Review*, 87, 2018, p. 8 ss.; M. Rössler, *World Heritage Editorial*, in *World Heritage Review*, 87, 2018, p. 3; V. Kong, *Cambodia: The Koh Ker restitution cases*, in *World Heritage Review*, 87, 2018, pp. 18-21; D. Challender, *Illegal Wildlife Trade and World Heritage*, in *World Heritage Review*, 87, 2018, pp. 54-55; J.E. Scanlon, *Heritage Convention. Joining forces against wildlife trafficking*, in *World Heritage Review*, 87, 2018, p. 29.

Heritage in Danger: a dubious honor and, above all, a painful indication of the seriousness of the problem[7].

In this contribution we first aim to clarify the scope of protection under the 1972 UNESCO Convention. What exactly does protection under the convention entail? The second part deals with the crucial question why artefacts and specimens stemming from world heritage sites remain so vulnerable to trafficking, in spite of the legal protection the 1972 UNESCO Convention implies. It is indeed a curious observation that inclusion in the world heritage list does not seem to shield these sites from decline caused by the illicit trade in natural and cultural heritage. Our analysis will point out that the famous principle of *lex rei sitae* is responsible for many enforcement issues resulting from the cross-border illicit trade. Indeed, *lex rei sitae* renders all sorts of protective measures enacted in the domestic legal order powerless, as they will no longer govern the object at its new foreign location. That problem will lead us to discuss the true meaning of both the 1970 UNESCO Convention and the CITES Convention system for the fight against the cross-border illicit trade. As a matter of conclusion we question whether a faithful reading of the 1972 World Heritage Convention's duty to co-operate does not imply from the Member States the same response as the 1970 Convention and the CITES Convention do with regard to illicit trade in protected heritage. Should the duty to co-operate not imply that all Member States that encounter on their soil goods stemming from world heritage sites abroad, are supposed to enforce the trade restrictions enacted in the state of origin as part of its heritage policy? In our opinion, such an approach would constitute a serious blow to traffickers of world heritage.

[7] *https://whc.unesco.org/en/danger*.

1. *World heritage: scope of the protective regime*

The 1972 UNESCO Convention on World Heritage aims to identify, protect, preserve, promote and transmit to future generations all heritage of «outstanding universal value»[8]. For these extraordinary assets the entire international community is said to bear responsibility and should provide assistance to the various Member States[9]. Yet fundamental to the conventional regime is the idea that international protection and support can only be seen as complementary to the efforts each Member State must make to preserve heritage situated on its proper territory. Indeed, a careful analysis of the provisions of Chapter II immediately makes it clear that the 1972 Convention does not seek to replace any of the efforts made by the Member States to preserve their national heritage[10]. Under Article 4, each State Party recognizes that the duty of ensuring the protection, conservation, and management of world heritage belongs primarily to the state that hosts the site on its territory[11].

> «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»[12].

[8] See 7th recital of the Preamble to the Convention concerning the protection of the world cultural and natural heritage, adopted by the General Conference at its seventeenth session, Paris, 16 November 1972. For more on the Preamble, see C. Forrest, *International law and the protection of cultural heritage*, Routledge, New York, 2010, pp. 228-229.

[9] J. Musitelli, *World Heritage, Between Universalism and Globalization*, in *International Journal of Cultural Property*, 11, 2002, p. 326; A.-M. Draye, *Beschermingvan het roerend en onroerend erfgoed*, Larcier, Brussels, 2007, p. 34.

[10] L. Meskell, *UNESCO's World Heritage Convention at 40 – Challenging the Economic and Political Order of International Heritage Conservation*, in *Current Anthropology*, 54, 2013, p. 483 ss.

[11] A.-M. Draye, *Beschermingvan het roerend en onroerend erfgoed*, cit., p. 36.

[12] Article 4, part 1 UNESCO Convention concerning the protection of the world cultural and natural heritage.

Thus in spite of the heritage sites' universal value, Article 4 specifies that the protection of world heritage rests in the hands of the State in which it is found[13]. The fact that each State is sovereign and exercises exclusive sovereign rights over all cultural and natural heritage found within its territory, is not only recognized, but relied upon as a cornerstone of the 1972 Convention[14].

In line with the above principle, Article 5 provides a tentative outline of a number of policy measures which, if implemented, will strengthen heritage protection. In particular all Member States are encouraged, in so far as possible[15], to adopt a number of general heritage management policies. Member States should also set up, within their territories, one or more specialized services for the protection, conservation, and presentation of cultural and natural heritage. Furthermore, Article 5 calls for scientific and technical research, as well as effective strategies to counteract the dangers that threaten cultural and natural heritage. In addition, membership to the 1972 Convention requires States to take legal, scientific, technical, administrative and financial measures appropriate to protect their heritage. Finally, Member States are supposed to foster the establishment or development of national/regional centers for training in heritage management and to encourage scientific research in this field[16]. In that regard, the UNESCO Recommendation of 15 November 1972 concerning the protection, at the national level, of the cultural and natural heritage suggests a number of measures that

[13] G. Carducci, *National and International Protection of the Cultural and Natural Heritage*, in *The 1972 UNESCO Convention*, edited by F. Francioni, Oxford University Press, Oxford, 2008, p. 108.

[14] J. Simmonds, *UNESCO World Heritage Convention*, in *Art Antiquity and Law*, 2, 1997, p. 253; C. Forrest, *International law and the protection of cultural heritage*, Routledge, New York, 2010, 241.

[15] C. Forrest, *International law and the protection of cultural heritage*, cit., p. 244.

[16] C. Forrest, *International law and the protection of cultural heritage*, cit., pp. 243-244.

States can take to protect, preserve, and present cultural and natural heritage[17].

Article 4 of the 1972 UNESCO Convention, in requiring Member States to acknowledge their duty to provide protection of world heritage located within their territory, has left the mechanism and the content of that duty to each particular state. This is explicitly said to include the property law in that state[18]. As such, a range of property law issues fall entirely within the remit of the territorial State, including who can own heritage assets, how title is acquired, passed on and lost, and whether adverse possession can lead to ownership[19]. This also entails domestic legislation and protective heritage policies that bear an impact on property law. From the perspective of the conventional regime, they are a national issue as well, and are as such somewhat irrelevant to the international regime[20]. In practice, all Member States did enact some particular administrative regime for protected heritage, aiming at its preservation and management. It for instance caused them to restrict certain human activities, exclude particular objects from being physically displaced or legally transferred, install all sorts of monitoring systems, impose a duty of care on heritage owners and custodians and allocate funding to all sorts of conservation measures.

Even though the main responsibility for the world heritage located in their territories rests with the individual Member States, the latter recognize that precisely because of the sites' outstanding universal value, their protection and conservation is of global concern. In that respect, Article 6, (1) states the following:

[17] For the text of the recommendation, see *http://whc.unesco.org*.

[18] Article 6 (1) UNESCO Convention concerning the protection of the world cultural and natural heritage.

[19] C. Forrest, *International law and the protection of cultural heritage*, cit., p. 246.

[20] G. Carducci, *National and International Protection of the Cultural and Natural Heritage*, cit., p. 108; C. Forrest, *International law and the protection of cultural heritage*, cit., p. 246.

> «Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property right provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate»[21].

As a result, international co-operation and assistance are at the core of the 1972 Convention. That is also clear from the text of Article 7 of the Convention. Although the provision does not really add anything concrete, Article 7 reiterates the idea of international co-operation for the benefit of world heritage.

> «For the purpose of this Convention, international protection of the world cultural and natural heritage shall be understood to mean the establishment of a system of international co-operation and assistance designed to support States Parties to the Convention in their efforts to conserve and identify that heritage»[22].

The co-operation and assistance the above articles allude to are most directly given through the mechanisms established by Chapters IV and V of the Convention[23]. Chapter IV concerns the World Heritage Fund, being the financial support mechanism set up under the Convention[24], while Chapter V sets out the conditions and arrangements for international assistance[25].

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[21] Article 6 (1) UNESCO Convention concerning the protection of the world cultural and natural heritage.

[22] Article 7 UNESCO Convention concerning the protection of the world cultural and natural heritage.

[23] C. Forrest, *International law and the protection of cultural heritage*, cit., p. 245.

[24] For more on the Fund, see F. Lenzerini, *World Heritage Fund*, in *The 1972 UNESCO Convention*, cit., pp. 269-287; C. Forrest, *International law and the protection of cultural heritage*, cit., pp. 267-271.

[25] A. Lemaistre, F. Lenzerini, *International Assistance*, in *The 1972 UNESCO Convention*, cit., pp. 269-287; C. Forrest, *International law and the protection of cultural heritage*, cit., p. 262-267.

Co-operation and assistance, however, can never prejudice the national sovereignty of a State Party. Article 6, (2) therefore rendered any foreign interference in the management of world heritage located in a particular Member State, entirely conditional on the latter's explicit request[26].

> «The States Parties undertake, in accordance with the provisions of this Convention, to give their help in the identification, protection, conservation and presentation of the cultural and natural heritage referred to in paragraphs 2 and 4 of Article 11 if the States on whose territory it is situated so request»[27].

Whilst the key provisions under Chapter II set out to establish international duties to actively co-operate on issues of world heritage, Article 6(3) introduces a final obligation of a different nature[28]. It requires that «[e]ach State Party to this Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage referred to in Articles 1 and 2 situated on the territory of other States Parties to this Convention»[29].

Indeed, international co-operation on heritage protection first and foremost implies that all countries refrain from any deliberate harmful behavior, affecting the heritage located in other Member States. While that may seem obvious, the idea was nevertheless explicitly inscribed in the 1972 UNESCO Convention.

All things considered, the content of the international obligation to co-operate and assist is rather modest, with no specific level

[26] C. Forrest, *International law and the protection of cultural heritage*, cit., p. 245.

[27] Article 6 (2) UNESCO Convention concerning the protection of the world cultural and natural heritage.

[28] C. Forrest, *International law and the protection of cultural heritage*, cit., p. 245.

[29] Article 6 (3) UNESCO Convention concerning the protection of the world cultural and natural heritage.

of help, or the nature of that help actually articulated[30]. Membership to the 1972 Convention does not, for instance, require States to bring about changes to their domestic property law in order to grant world heritage a special level of protection in case it happened to cross borders as a result of illegal trade.

2. *Fighting illicit trade: quite a challenge for lawyers and law enforcement agencies*

The illicit trade in cultural and natural heritage (or any other good) is a cross-border problem by excellence. The vital links in the illegal supply chain tend to take place in a multitude of jurisdictions. For example, the mastermind behind an illicit trafficking chain may reside in jurisdiction A, while the goods are illegally 'procured' in country B, transported and distributed through country C, and finally delivered to customers in jurisdiction D[31]. The online economy made this even more complex, as the list of criminal actors (and jurisdictions involved) gets longer. The server/platform hosting the online shop or distribution system may be located in jurisdiction E, while the proceeds of the entire operation end up in country F, where they are to be laundered and injected into the legal economy[32]. Accordingly, e-commerce and schemes of money laundering set up in a number of well-chosen jurisdictions will enhance the cross-border nature of the trade even more. So, be-

[30] C. Forrest, *International law and the protection of cultural heritage*, cit., p. 245.

[31] Interpol, *Countering illicit trade in goods - A guide for policy-makers*, cit., 6-7.

[32] For more on money laundry and illicit trade, see R.S. Ross, S.C. Walls, *Reaching beyond banks: how to target trade-based money laundering and terrorist financing outside the financial sector*, in *Handbook of Research on Counterfeiting and Illicit Trade*, edited by P.E. Chaudhry, Elgar, Cheltenham, 2017, p. 123 ss. Specific information on money laundering and the (fight against the) illegal trade in cultural goods, see A. Mosna, *Art Laundering: Protecting Cultural Heritage Through Criminal Law*, University of Luxembourg, Luxembourg, 2020, p. 431.

yond the slackening of border controls and the authorities' failure to monitor protected heritage and keep it from being embezzled and ransacked, the illicit trade benefits greatly from the widespread use of modern technologies and virtual flows of money. Therefore, illicit trade (in heritage or any other good) is nothing short but the dark side of the digital economy and the globalized movement of goods and financial assets[33].

Illicit trade is a phenomenon that is very hard to combat due to the transnational nature of trafficking. Legal systems, however, are primarily built and enforced by nations. Rather than being designed by and for the international community, legal systems operate on a national level: a specific territory that defines a particular system's scope of application. Anything truly international (such as the illicit trade in cultural and natural heritage) that transcends the said territory, is difficult to equate with the law's standard orientation on a single state. When goods, transactions and funds cross borders, cases get infinitely more complicated, as the events have a connection to several legal regimes which may differ and even collide. Univocal solutions seem impossible as numerous legal systems are involved and conflicting laws fail to provide an adequate answer to issues that surpass the national scope. Even worse: conflicting legal regimes risk to give rise to legal loopholes that may help the unscrupulous, yet legally savvy. Objects that have been illegally obtained in one jurisdiction may see their legal status change further down the supply chain, from black to grey or even bright white. We now explain how this change in legal status occurs. Due to its transnational dimension, the legal fight against the illicit trade is exceedingly challenging from a legal point of view.

Looting, poaching, illicit excavation, extraction, and theft are the mere starting point of the illicit trade in natural and cultural heritage. Smuggling tends to be an essential aspect of this type of crime as well. Smuggling occurs when goods circulate and appear

[33] Interpol, *Countering illicit trade in goods - A guide for policy-makers*, cit., 6 and 10.

on the international market in spite of administrative restrictions that limit the goods' free circulation. Such administrative restrictions may take various forms. Measures aimed at excluding private individuals from acquiring cultural artifacts or fauna and flora by classifying these goods as non-tradeable (*res extra commercium*) are a first example.

Sometimes, however, the administrative restrictions' goal is not to eliminate all trade in goods of a particular type, but rather to ensure that these goods remain on the domestic market, without being exported abroad. Such restrictions on the free circulation of goods may be part of some sort of trade embargo or make up a security measure that fits into a wider foreign policy. Cross-border trade in arms or military equipment, for instance, will be banned in case of export to dubious regimes, to countries where human rights are grossly violated, to countries on the brink of bloodshed or to outright war zones[34]. Some goods, such as natural[35] or cultural heritage[36], are even entirely excluded from export. Indeed, many countries pursue a heritage policy geared towards the protection of monuments, sites and collections or to the preservation of biodiversity on their soil. Trade restrictions are an essential part of such heritage policy. They secure legal control over these valuable assets and make sure the latter remain accessible and available for the benefit of the nation's greater good.

In essence, all trade restrictions, that either entirely or partially ban free circulation, affect the legal status of a particular object or objects of a certain type. These restrictions will have their full effect as long as the objects they apply to remain on the domestic territory. Somewhat paradoxically, however, they risk losing all force when the protected objects do leave the home jurisdiction through

[34] See Interpol, *Countering illicit trade in goods - A guide for policy-makers*, cit., 21-25 and 82 ss.

[35] See Interpol, *Countering illicit trade in goods - A guide for policy-makers*, cit., 31-34 and 107 ss.

[36] See Interpol, *Countering illicit trade in goods - A guide for policy-makers*, cit., 49-52 and 130 ss.

illicit trade, and smugglers thus commit what the circulation restrictions essentially seek to prevent. Here we get to the heart of the problem of the transnational illicit trade that renders the phenomenon so hard to counter from a legal point of view. Indeed, a number of maxims in private international law essentially help to create a legal vacuum that allows cross-border trafficking to thrive. In the following paragraphs we explain how the legal vacuum we just referred to comes about.

The enforcement of a country's heritage policy outside the domestic territory poses major problems for any legal system, as a result of the quasi-universally established conflict of law principle, known as *lex rei sitae*. Indeed, according to the dominant legal doctrine, this basic rule governs the question of applicable law in case of cross-border property disputes[37]. *Lex rei sitae* is Latin for «the law of the place where the object is situated». The maxim gives expression to the idea that the law governing an object's legal status and its transfer of title is dependent upon, and varies with, its location. International practice clearly shows how well-established the *lex rei sitae* rule is as a conflict rule in international property law disputes[38].

Following the *lex rei sitae* principle, an object's legal status is thus determined on the basis of its location. For movable property, however, that location is variable. By their very nature, movable objects can be relocated from one place to another as a result of hu-

[37] See, *e.g.*, *Dicey, Morris and Collins on the conflict of laws*, II, edited by L. Collins, Sweet & Maxwell, London, 2006, pp. 1164-1165; K. Kreuzer, *La propriété mobilière en droit international privé*, in *Receuil des cours*, 259, 1996, p. 49; K. Siehr, *The Return of Cultural Property Expropriated Abroad*, in *Comparative and Private International Law – Essays in Honor of John Henry Merryman on his Seventieth Birthday*, edited by D.S. Clarck, Duncker & Humblot, Berlin, 1990, p. 433.

[38] See, *e.g.*, *Dicey, Morris and Collins on the conflict of laws*, II, cit., pp. 1164-1165; C. Armbrüster, *La revendication de biens culturels du point de vue du droit international privé*, in *Rev. crit. DIP*. 93, 2004, p. 732; D. Fincham, *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, in *Colum. J.L. & Arts*, 32, 2008, pp. 114-115; G. Carducci, *La restitution internationale des biens culturels et des objets d'art volés ou illicitement exportés*, L.G.D.J., Paris, 1997, p. 154; P. O'Keefe, L. Prott, *Movement*, in *Law and the Cultural Heritage*, III, edited by P. O'Keefe, L. Prott, Butterworth & Co Ltd., London, 1989, pp. 638-639.

man travel, trade, or other forms of traffic of goods. As the object's location changes, the connecting factor relevant to decide international property disputes changes with it. This legal phenomenon is known among scholars specialized in conflict of laws as the *conflit mobile*, a legally challenging issue that significantly complicates the fight against the illicit trade[39].

The problem of *conflit mobile* in international property litigation means that when a movable good is transferred to another location, the applicable legal regime may change entirely. Decisive will be the object's new location and the latter's jurisdictional setting. A consistent application of the *lex rei sitae* principle unavoidably leads to that conclusion. As a result, it becomes essential to determine as of what moment the law applicable at the object's new location starts to actually govern the legal status of the object at hand. Does this happen automatically as soon as the movable property enters another jurisdiction or does the property law of the object's previous location continue to apply, either entirely or at least for certain aspects[40]? Indeed, the successive application of different property law regimes to the same object brings about a situation of potential conflict, which is the very essence of the *conflit mobile*[41]. Which law should be applied when prohibited merchandise is traded across borders? Several possibilities arise in this respect. One could, for instance, think of the law applicable in the jurisdiction restricting the free circulation of the good. A second possible answer is the law of the jurisdiction the good is found in as a result of smuggling activities in breach of those trade restrictions. Yet things could even be more complicated in case an object successively went through multiple jurisdictions upon its disappearance from the State of origin.

[39] See J.A. Van Der Weide, *Mobiliteit van goederen in het IPR. Tussen situsregel en partijautonomie*, in *Recht en Praktijk*, CXLIV, Kluwer, Deventer, 2006, p. 33 ss.

[40] For more information on the various theories that exist regarding that subject, see J.A. Van Der Weide, *Mobiliteit van goederen in het IPR. Tussen situsregel en partijautonomie*, cit., pp. 35-41.

[41] F. Rigaux, M. Fallon, *Droit international privé*, Larcier, Brussels, 2005, p. 677.

With each change of jurisdiction, another potentially applicable regime emerges[42].

In the case of a cross-border flow of movable property, location is not the only variable; so is time. Therefore, information regarding the disputed object's location alone is just not enough to solve an international property law dispute. In addition, it is also crucial to link each new location as precisely as possible to a specific period of time[43]. After all, according to the *lex rei sitae* principle and bearing in mind the problem of *conflit mobile*, property law that applies to a specific territory, only governs a movable object's legal status *during the time the latter was actually present on that same territory*. A simple example will make things clearer: French law governs all transfers of title regarding a specific movable good that occurred during the exact period of time the latter was present on French soil.

Both *lex rei sitae* and *conflit mobile* are well-established rules of international property law[44]. The former determines the law applicable to a movable good, the latter aims to recognize and uphold rights in rem acquired or lost in a foreign jurisdiction, even in the event of subsequent moves. The problem of illicit trade cannot be fully understood in isolation from the above principles. They, after all, imply that trade bans established by a specific jurisdiction (for example for reasons of heritage protection) remain a dead letter as soon as the goods, whose circulation they intend to restrict, nevertheless cross the border in an illegal way[45].

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[42] For a fine illustration of this thought, see V. Sagaert, *Over de lotgevallen van een gestolen Breughel in het IPR-goederenrecht*, in *Rechtskundig Weekblad*, 2008-2009, p. 966.

[43] J.A. Van Der Weide, *Mobiliteit van goederen in het IPR. Tussen situsregel en partijautonomie*, cit., p. 46.

[44] See B. Audit, *Le statut des biens culturels en droit international privé français*, in *R.I.D.C.*, 1994, p. 418; A. Weidner, *Kulturgüter als res extra commercium im internationalen Sachenrecht*, in *Schriften zum Kulturgüterschutz*, edited by W. Fiedler, E. Jayme, K. Siehr, De Gruyter, Berlin, 2001, p. 101.

[45] K.G. Siehr, *Globalization and National Culture: Recent Trends Towards a Liberal Exchange of Cultural Objects*, in *Vand. J. Transnat'l L.*, 38, 2005, p. 1087.

Since marketability is an essential aspect of an object's legal status, the latter fully depends on the law of the place where the good is located at the time of sale (in accordance with the *lex rei sitae* principle). As a result, the fight against the transnational illicit trade can only be successful, if countries are willing to recognize and enforce on their own territory the trade restrictions imposed in foreign countries. Until they do, trade restrictions imposed in a specific (domestic) legal order are virtually meaningless at the international level. After all, it is enough to clandestinely bring the goods these bans target abroad to simply circumvent them. The mechanism is plain and simple: the second these goods make their way into another jurisdiction, a new legal regime will determine their property status. Obviously, the latter may not hit the goods at hand with the same trade restrictions as the law of the state of origin does. Smugglers and traffickers are well-aware of the differences between jurisdictions in terms of the regulations governing the property status of (illicit) goods. By transporting a good from country A to country B, its legal status can change from being banned from all trade to being fully marketable. For those with bad intentions this offers numerous prospects, especially in a highly globalized and digital economy. For all these reasons, international co-operation is indispensable to cut off circuits of transnationally operating traffickers. Illicit trade can only be curbed if jurisdictions co-operate internationally, across jurisdictional boundaries. In essence, such co-operation always comes down to the same thing: jurisdictions should accept to enforce within their own territory the trade restrictions that have been established abroad, by other countries.

3. *The need for international co-operation in the fight against the illicit trade in cultural heritage: a first illustration*

In the first chapter we explored the scope of the protective regime established by the 1972 World Heritage Convention. At the domestic level, Member States are supposed to deploy a heritage

policy, generally resulting in administrative measures to assure site preservation. Most often, trade restrictions (e.g. *extra commercium* status, export ban, right of pre-emption…) are a standard component of these heritage policies as well, especially when it comes to movable heritage.

Chapter 2, however, made it clear that the international enforcement of these trade restrictions is particularly troublesome due to the principle of *lex rei sitae*. Therefore, governments around the world seek to monitor and control all transnational flows of protected heritage, as they may give rise to gaps in the protective regimes. After all, goods that are banned from the trade in country X as a result of national heritage legislation, should not be able to enter the trade in country Y, where the same bans do not exist. In order to achieve that result, custom controls are crucial. They exist to avoid the legal problem of extraterritorial enforceability we explained only minutes ago. As a preventive measure, customs controls aim to ensure that protected heritage never leaves the country that issued the protection.

Unfortunately, the net that custom authorities are casting is not without loopholes, especially in jurisdictions where corruption runs rampant and lack of public funds cripples the system. Therefore, curative measures are equally necessary. They come into play in case protected heritage does resurface in a foreign jurisdiction as a result of smuggling activities. After all, an object's legal status is governed by the law of the country where it is located. An ornament that was once part of a listed building in country A does not enjoy any protection in country B. An artefact from a protected site in country X, does not feature on any list of protected objects in country Y. The international enforcement of a country's domestic measures to protect heritage runs aground, which gives the problem of illicit trade a global dimension. Since the problem of illicit trade in heritage is fundamentally international, the solution is believed to be as well. The 1970 UNESCO-Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Own-

ership of Cultural Property should be seen against this particular background[46].

The 1970 UNESCO Convention tackles, on a global scale, the illegal circulation of cultural objects that has increasingly troubled the art trade since World War II. To date, the Convention has been ratified by 142 states. As such, it is considered to be the most important international law instrument in the fight against the illegal trade in cultural heritage. The UNESCO Convention aims to establish a system of import and export controls designed to dry up illegal flows of cultural goods. Although the illicit trade in cultural heritage was a global problem affecting virtually every country, the negotiation process proved far from easy. Indeed, lengthy treaty negotiations proved necessary to strike a balance between the interests of the so-called source countries, rich in cultural heritage, and the market countries that were wary of hindering the art trade too much. In the end, a compromise was found in a 26-article text[47].

Article 3 is the key provision of the 1970 UNESCO Convention. It states, in general terms, that all import, export and transfer of ownership of cultural property effected contrary to the provisions adopted under the Convention, is regarded as illicit[48]. As such, Article 3 is the driver behind the international enforcement of domestic heritage policies enacted by each of the Member States[49].

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[46] UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property - 1970, *www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/illicit-traffic-of-cultural-property*.

[47] R. Abramson, S. Huttler, *The Legal Response to the Illicit Movement of Cultural Heritage*, in *L. & Pol'y Int'l Bus.*, 5, 1973, p. 932; R.E. Lerner, J. Bresler, *Art Law – The Guide for Collectors, Investors, Dealers, & Artists*, I, Practising Law Institute, New York, 2012[4], p. 613; C. Forrest, *International law and the protection of cultural heritage*, cit., p. 166.

[48] P.J. O'Keefe, *Commentary on the 1970 Unesco Convention*, Institute of Art and Law, Genève, 2007, p. 41; J. Ulph, *International Initiatives*, in J. Ulph, I. Smith, *The illicit trade in Art and Antiquities*, Hart Publishing, Oxford, 2012, p. 39.

[49] While Article 3 unmistakably captures the core idea of the UNESCO Convention, a number of authors note that, strictly speaking, no obligations arise from this provision. The measures that actually allow to put the Convention's core idea

Minutes ago we explained that none of the administrative measures countries enact to protect cultural goods continue to be enforceable when the latter leave the territory of the source country. Not only does a source state face evidential difficulties in such a case; above all, the problem lies in the fact that most countries simply refuse to comply with trade restrictions that another country may have introduced as part of its domestic policy to protect cultural heritage. It is precisely this problem that the UNESCO Convention seeks to address[50]. In essence, the international instrument aims to ensure that Member States support the heritage policies of other Member States to the Convention. In the spirit of the 1970 UNESCO Convention support implies that Member States enforce in their own jurisdiction the heritage policy measures enacted by other Member States[51]. In this regard, Article 2 explicitly states:

> «The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting therefrom. To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations».

The provisions of the 1970 UNESCO Convention are not self-executing. Accordingly, Member States are expected to give ef-

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into practice are primarily found in the Articles 5 to 7. See P. Bator, *An essay on the International Trade in Art*, in *Stan. L. Rev.*, 34, 1982, p. 377; R. Abramson, S. Huttler, *The Legal Response to the Illicit Movement of Cultural Heritage*, cit., p. 961.

[50] C. Forrest, *International law and the protection of cultural heritage*, cit., p. 174.

[51] C. Forrest, *International law and the protection of cultural heritage*, cit., p. 176.

fect to their obligations under the convention by enacting domestic legislation. For *civil law* jurisdictions that may amount to important changes in the field of property law, as the implementation of the UNESCO Convention may require them to erode the protection they commonly award to bona fide purchasers.

4. *The need for international co-operation in the fight against the illicit trade in natural heritage: a second illustration*

The previous chapter made it clear that the 1970 UNESCO Convention seeks to achieve the extraterritorial enforcement of domestic heritage policy measures through mutual recognition and co-operation. The international approach to the problem of illicit trade clearly makes sense, given the principle of *lex rei sitae*. Indeed, the issue requires a legal-technical response at the international level, making domestic circulation restrictions enforceable on the territory of other Member States in order to overcome the loopholes the *lex rei sitae* principle unavoidably gives rise to. In the following paragraphs we focus on the illicit trade in natural heritage (fauna and flora). Our analysis will lead to the same conclusion, as the answer to the problem will once more lie in legal co-operation at the international level. Again, an international treaty must provide relief to ensure transnational enforceability of domestic heritage policy measures.

Governments across the world have enacted environmental policies to preserve biodiversity and natural heritage sites on their territory. A key element of these conservation policies are protective measures for the benefit of specific animals and plants, such as trade bans. They are one of the tried and tested ways to ensure the survival of valuable fauna and flora on the territory[52]. These trade restrictions and protective measures are an essential part of the spe-

[52] T. Fajardo De Castillo, C. Gersetter, K. Klaas, L. Porsch, L. Smith, *Wildlife Crime,* European Parliament, Brussels, 2016, p. 8.

cies legal status. According to the principle of *lex rei sitae*, the latter is governed by the law of the place where the species are located. As a result, cultural and natural heritage policy measures both face the same legal challenge of international enforcement. Again, a legal instrument at the international level proved necessary to effectively fight the transnational illicit trade in protected fauna and flora. The 1973 CITES Convention is the international instrument when it comes to natural heritage preservation[53]. The preamble to the CITES Convention stresses the capital importance of international co-operation in the fight against the illicit trade, just like the 1970 UNESCO Convention does for cultural heritage.

The CITES Convention was not the first attempt to regulate the global trade in fauna and flora. In colonial times, for instance, several conservation treaties existed[54]. Although they were essentially based on the same principles, these first natural heritage treaties remained a dead letter in practice. Things are clearly different with the CITES Convention, which currently has no less than 183 Member States. As the treaty regime enjoys a remarkable degree of consensus, the CITES Convention received a close to universal approval. Similar to the 1970 UNESCO Convention, the provisions of the CITES Convention lack direct effect. They require implementation in the Member States in order to give rise to legally binding obligations that may actually reduce the illicit trade in fauna and flora. Most Member States made sure to implement the treaty obligations faithfully. For all these reasons, CITES makes up the absolute basic text in the field of international nature conservation.

[53] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, 3 March 1973. See *www.cites.org*.

[54] See, e.g., the Convention between the Congo Free State, France, Germany, Great Britain, Italy, Portugal and Spain for the Preservation of Wild Animals, Birds and Fish in Africa, London, 19 May 1900. The Convention of London relative to the Preservation of Fauna and Flora in their Natural State of November 8, 1933 is another example.

The CITES Convention provides a regulatory framework for international trade in wild animal and plant species[55], without prohibiting it altogether. During the Convention's drafting process, a total ban was believed to be unworkable, as experts believed it would shift the trade entirely to the black market. Therefore, the CITES Convention opted for a more realistic approach: a graded system, based on the classification of protected species. Three lists make up the annexes to the CITES Convention. Annex I concerns the list of all species threatened with extinction that may be affected by trade[56]. Appendix II lists all species that, while not yet threatened with extinction, risk to become endangered if trade is not subject to strict regulations[57]. The list in Appendix III includes all species a State Party declared subject to a regulation aimed at preventing or restricting exploitation[58]. Depending on the appendix, different restrictions on the free trade apply. For all species listed in the annexes, the CITES Convention clarifies the obligations of the Member States. In general terms they are required to prohibit and penalize all possession of and trade in fauna and flora in breach of the CITES Convention.

5. *Conclusion*

This contribution argued that given the widespread use of the *lex rei sitae* principle in international property law disputes, the fight against the illicit trade requires international co-operation. After all, national measures intended to curb free trade within a given jurisdiction by conferring a special property status on certain goods (export restrictions, inalienability…), all lapse when these goods, in spite of the circulation restrictions imposed, nevertheless become

[55] The CITES Convention does not have a holistic approach to species conservation. Its focus is limited to the international trade in endangered species.

[56] Article II, part 1 CITES Convention.

[57] Article II, part 2 CITES Convention.

[58] Article II, part 3 CITES Convention.

the subject of all kinds of illicit cross-border transactions. *International* illicit trade therefore requires an *international* control mechanism that obliges other jurisdictions to enforce on their own territory trade restrictions enacted in a foreign jurisdiction. Although such does not seem to be the dominant interpretation, we wonder whether such obligation cannot be derived from the 1972 World Heritage Convention's duty to co-operate, as set forth in its Article 6, (1). Could it not be argued that a faithful reading of Article 6 implies from the Member States the same response as the 1970 Convention and the CITES Convention do with regard to illicit trade in protected heritage? After all, one could seriously question what 'co-operation' in this field really entails, if not the mutual recognition of each other's protective and restrictive measures. In addition, we observe that Article 6(2) solely excludes any active interference (i.e. not requested) in the heritage management of sites located in other Member States; it does not oppose the enforcement of heritage policies of other State Parties within its proper jurisdiction. In our view, the duty to co-operate under the 1972 World Heritage Convention should require all Member States to enforce the trade restrictions enacted in the state of origin, whenever assets stemming from foreign world heritage sites were to be found on their territory. Such an interpretation of Article 6, (1) could in our opinion bring a serious blow to traffickers of world heritage, taking into account the 1972 World Heritage Convention's close to universal ratification.

Anna Mosna, Michele Panzavolta

GETTING THE PROTECTION OF HERITAGE DOWN TO A FINE ART: WORLD (CULTURAL) HERITAGE AND CRIMINAL LAW*

Abtract: This contribution analyses the criminal law implications of the 1972 World Heritage Convention. To this end, the relationship between criminal law and cultural heritage protection is assessed and the values at stake are discussed. The article focuses on the criminal law protection offered by other international conventions and examines against that background the silence that the 1972 World Heritage Convention itself guards on this matter. Acknowledging the fragmentation of criminal law protection of cultural heritage at the international level, this chapter highlights the important innovation of the 2017 Nicosia Convention that proposes a comprehensive criminal law framework and – being open for signature also to non-member States of the Council of Europe – has the potential of conferring cultural heritage protection and preservation consistency on a global scale.

Introduction

The present article intends to analyse what, if any, are the implications of the 1972 UNESCO Convention concerning the protection of the world cultural and natural heritage (in short, the 1972 World Heritage Convention, hereafter 1972 WHC)[1] on the level of criminal law. In doing so, it will discuss the relationship that the principle of the protection of cultural heritage entertains with criminal law and its enforcement. It is often said that criminal law, as a regulatory tool to offer protection to certain interests (legal goods) should be used as a means of last resort (*ultimum re-*

* Double-blind peer reviewed content.

[1] Convention concerning the protection of the world cultural and natural heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151 (World Heritage Convention).

medium)[2]. Should then criminal law – and the related enforcement and investigative measures – be used, and to what extent, to protect cultural heritage, and more specifically the world cultural heritage? The present contribution intends to discuss this by looking at the most relevant provisions of international law. It does so by moving from the 1972 WHC, where a provision concerning criminal law is notably absent, to the other main international Conventions related to the protection of art[3] and the framework of the Council of Europe (hereafter CoE), with its own conventions.

The article is structured as follows. Section 1 briefly introduces the general topic of criminal law and the protection of art. Section 2 describes the context and precursors of the 1972 WHC, while Section 3 introduces the 1972 WHC and underscores the innovative approach of the convention with regard to the concept of cultural heritage it enshrines. Section 4 discusses the concept of cultural heritage as included in the 1972 WHC and identifies parallels and differences to other international conventions providing some form of cultural heritage protection; Section 5 maps the provisions of criminal sanctions in international legal instruments, while Section 6 considers the implications of the 1972 WHC in terms of criminal responsibility and compares them with the criminal implications of the other United Nations (hereafter UN) conventions. It goes on to reflect on the main issues related to criminalization with regard to cultural heritage and natural heritage. Section 7, finally, looks at the framework of the Council of Europe and at the obligations of criminalisation that it entails.

[2] A. Ashworth, *Principles of criminal Law*, Oxford University Press, Oxford, 2016, pp. 32, 40.

[3] For the purposes of this contribution, the concept of 'art' encompasses cultural objects such as archaeological artefacts and antiquities as well as 'fine art', including sculptures, paintings, engravings, etc. Thus, the notion of 'art market' defines the market in these all these goods.

1. *Criminal law and protection of cultural heritage*

Cases of devastation, plunder, pillage, destruction or damage of cultural heritage have not been infrequent in human history, particularly in the context of war. One of the most famous early cases, which led to reparations, was the crime committed against the library of Leuven. In the night of 25 August 1914 German troops ravaged the city of Leuven and set fire to the library of the Catholic University of Leuven[4].

Also in recent years we have witnessed the destruction of invaluable testimonies of cultural heritage. It suffices to think of the destruction of the historic city of Dubrovnik, of the Old Bridge of Mostar, of the Bamiyan Buddhas, or of the ancient sites of Timbuktu, Palmyra and Nimrud[5].

Episodes of art destruction took place also outside of war contexts. World heritage sites such as the Etruscan necropolises of Cerveteri and Tarquinia have been – and continue to be – systematically targeted by looters, the so-called *tombaroli*, that dig for archaeological material destined to enter the illicit trade in cultural objects[6].

Destruction and looting often occur in connection with each other harming movable *and* immovable cultural heritage alike to the detriment of local communities and humankind as a whole. They can be considered two sides of the same coin, although their relationship and sequence may change depending on the context. To effectively protect cultural heritage, be it moveable or immovable in nature, the threat represented by this link must be duly considered.

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[4] B. Delmartino, *Reparation for the Violation of Property Rights During War*, PhD manuscript defended on 22 March 2006, p. 266.

[5] P. Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, in *Georgetown Journal of International Law*, 37, 2006, pp. 245, 288.

[6] P. Watson, C. Todeschini, *The Medici Conspiracy: The Illicit Journey of Looted Antiquities, From Italy's Tomb Raiders to the World's Greatest Museums*, Public Affairs, New York, 2006, pp. ix-xiv.

1.1. *Destruction and damage as a form of domination, annihilation or cultural cleansing*

Destruction of cultural heritage in time of war and oppression is not a rare occurrence. Examples of what can be defined as «symbolic domination» or «symbolic annihilation» are the attacks on the *Stari Most* and on the historic city of Dubrovnik during the Balkan wars[7]. Iconoclasm has stirred the deliberate destruction of the ancient Buddhas of Bamiyan through the Taliban which was condemned by the General Assembly of the State Parties to the World Heritage Convention as a crime against the common heritage of humanity[8]. With even greater outrage has the international community reacted to the destruction of the remains of the cities of Nimrud and Palmyra, which has been defined as outright «cultural cleansing»[9]. Similarly the destruction of religious mausoleums in the city of Timbuktu by the groups Ansar Dine and Al-Qaeda in 2012 – carried out by the moral brigade *Hesbah* led by Al Mahdi – represents an attempt to remove the religious and artistic roots of the inhabitants of Timbuktu.

While the intent to establish domination over another people – and its culture – or even to erase it altogether is at the core of cultural heritage destruction, this does not exclude that, in addition, other offences driven by more economical than ideological motives take place. While the largest and most representative monuments are razed to the ground, often conspicuously to make the offence more searing, smaller items are looted, smuggled abroad, and injected into the (official) international art market. This occurred, for in-

[7] P.B. Campbell, K.A. Paul, *Funding Conflict Through Cultural Property: The Destruction and Trafficking of Cultural Heritage by Islamic State*, in *Dealing with Terrorism. Empirical and Normative Challenges of Fighting the Islamic State*, edited by M. Engelhart, S. Roksandić Vidlička, Duncker & Humblot, Berlin, 2019, p. 125.

[8] R. O'Keefe, *Protection of Cultural Property under International Criminal Law*, in *Melbourne Journal of International Law*, 11, 2010, pp. 339, 340.

[9] P.B. Campbell, K.A. Paul, *op.cit.*, p. 118.

stance, during the destructive activities in Palmyra. Innumerable artefacts gained through widespread and intense looting were smuggled through Lebanon and Turkey towards Western countries, such as the United Kingdom, where they were sold on the legal art market in London[10]. The example of Palmyra shows that destruction of cultural heritage for symbolic or ideological reasons can tie with profit related reasons. It makes antiquities looting and smuggling a source of income aiding survival and continuity of those terrorist groups that perpetrated the destruction in the name of 'cultural cleansing' in the first place[11].

1.2. *Destruction and damage to allow for looting*

Irreparable damage and destruction of world heritage may, however, also occur because of intense looting purely driven by the desire of economic gain. Wherever ancient civilisations once prospered, there is illicit excavation and looting of cultural artefacts[12]. Heritage sites are targeted by looting that damages and increasingly destroys them and that becomes more aggressive the more the cultural artefacts to be found are requested on the art market[13]. As il-

[10] D. Gill, *Context Matters "From Palmyra to Mayfair: The Movement of Antiquities from Syria and Northern Iraq"*, in *Journal of Art Crime*, 15, 2013, pp. 73, 74-75.

[11] P.B. Campbell, *The Illicit Antiquities Trade as a Transnational Criminal Network: Characterizing and Anticipating Trafficking of Cultural Heritage*, in *International Journal of Cultural Property*, 20, 1013, pp. 113, 130; although the importance of antiquities trafficking for terrorism financing is debated – as empirical evidence is scarce – the fact that there is a relationship between the two phenomena is no longer doubted, see N. Brodie and others, *Illicit Trade in Cultural Goods in Europe: Characteristics, Criminal Justice Responses and an Analysis of the Applicability of Technologies in the Combat against the Trade – Final Report*, European Commission, 2019, p. 112.

[12] A. Mosna, *Give Art Market Regulation a Chance*, in *Maastricht Journal of European and Comparative Law*, 29, 2022, pp. 304, 309.

[13] C.C. Coggins, *Illicit Traffic in Pre-Columbian Antiquities*, in *Art Journal*, 29, 1969, p. 94.

licit digging is not carried out with the precautions and techniques of scientific excavation, artefacts are extracted without consideration and due registration of their context. Not only does this prevent a scientific examination and interpretation of the past and cuts the ties between the artefacts and the people that identify with what they represent: it leaves scarred, at times completely destroyed, sites behind.

A prominent example of how illicit looting harms heritage sites while feeding a transnational dynamic of antiquities trafficking, illegal trade and laundering activities is represented by the case surrounding the so-called 'Euphronios Krater'. The Krater was found during illegal excavations in the Etruscan necropolis of Cerveteri, in Italy. Tomb robbers sold it to Giacomo Medici who smuggled the Krater to Switzerland. Probably the Krater had been deliberately broken into pieces to make recognition harder and smuggling out of Italy easier. Medici sold the artefact to Robert E Hecht, an American antiquities dealer. Once Hecht had the Krater restored in Zurich – to conceal the traces of the crimes of looting and damaging and make it physically look pristine again – and had provided it with a false provenance – to make it look legally in order – he was able to sell it to the Metropolitan Museum of Art of New York for an immense profit[14].

Only in the early 2000s criminal investigations in Italy against Medici and Hecht uncovered that the provenance was forged[15]. In the following, the Metropolitan Museum and the Italian Government reached an agreement for the return of various cultural objects, including the Euphronios Krater, looted and unlawfully exported out of Italy, in exchange for long-term loans of other, comparable objects[16]. As important as the restitution of the Krater to Italy is for

[14] P. Watson, C. Todeschini, *op.cit.*, pp. ix-xiv.

[15] N. Brodie, *Euphronios (Sarpedon) Krater*, in *Trafficking Culture: Researching the global traffic in looted cultural objects*, 6 September 2012 (*https://traffickingculture.org/encyclopedia/case-studies/euphronios-sarpedon-krater*).

[16] E. Povoledo, *Ancient Vase Comes Home to a Hero's Welcome*, in *The New York Times*, 19 January 2008 (*https://www.nytimes.com/2008/01/19/arts/design/19bowl.html*).

the cultural value it represents, this event is of mainly symbolic value. In many other instances proof of the illicit origin, of the fraud and laundering of the antiquities in question is not reached and even where it is – as in the case of the Victorious Youth by Lysippos that is still at the J. Paul Getty Museum in Malibu – they are not always returned[17].

1.3. *Other forms of damage and destruction*

Destruction and damage of cultural heritage can also take place outside of contexts of national or international conflicts, or without direct connection with an intent to obtain a profit. Sometimes it can be simply the result of sheer violence without ideological underpinnings. An example can be found in the events that took place in February 2015 in Rome, when Dutch hooligans rampaged for two days under the influence of drugs and alcohol and inflicted irreparable damage to a 17-century landmark fountain, Bernini's 'Barcaccia' in Piazza di Spagna[18].

Other times it could be the result of ignorance (of the cultural value) and/or negligence in maintaining, defending and protecting cultural heritage. Lack of attention and neglect are at the origin of the 2010 collapse of the 'Schola Armaturarum Juventus Pompeiani', also known as 'House of Gladiators', in Pompeii. After surviving the volcanic eruption of AD79 and Allied bombing in World War II, the building broke down due to the heavy November rains

[17] L. Lapin, *Statement from Lisa Lapin, Vice President of Communications, J. Paul Getty Trust, Regarding Decision by Italy's Court of Cassation on the Legal Ownership of the Victorious Youth* (*http://news.getty.edu//content/1208/files/Statement%20regarding%20Victorious%20Youth%20December%203%2C%202018(1).pdf*).

[18] V. Giannoli, *Roma Devastata Dai Tifosi Olandesi. Sovrintendenza: "Danni Irreparabili a Barcaccia". Marino: L'Olanda Non Pagherà. Il Questore: "Io Non Faccio Morti"*, in *La Repubblica*, 20 February 2015 (*https://roma.repubblica.it/cronaca/2015/02/20/news/europa_league_-107752865/*).

of that year, the decaying restored concrete roof, questionable management and political neglect[19].

While the criminal relevance of wilful destruction of cultural heritage seems relatively uncontested[20], reckless or negligent actions leading to damage or destruction of art might not always require criminal enforcement. Nonetheless, it cannot be excluded that even in light of the *ultima ratio* principle these conducts could require criminalization.

1.4. *What role for criminal law?*

When looking at the different forms of damage and destructions that cultural heritage can undergo, the question that naturally arises is whether criminal law should be used as a regulatory tool to protect cultural heritage. It seems a truism to say that criminal law protection is needed. While few can entertain doubts on the need for criminal regulation, the shape and content of such regulation and even the level (national, supranational, international) on which it should be adopted are less self-evident.

All countries have laws that criminalize wilful damage and destruction of property, hence the obvious consequence that destruction or damage of cultural heritage falls naturally in the sphere of protection accorded by criminal law. This alone would justify the use of criminal enforcement. The question that arises is whether

[19] E. Addley, *Neglected Ruins of Pompeii Declared a "Disgrace to Italy"*, in *The Guardian*, 11 November 2010 (*https://www.theguardian.com/world/2010/nov/11/the-second-fall-pompeii*).

[20] Article 518-duodecies of the Italian Criminal Code, for example, punishes anyone who destroys, disperses, damages or renders wholly or partially unusable cultural goods – even when they are of his property – by imprisonment of two to five years and a fine of between 2.500 and 15.000 EUR. Moreover, everyone who defaces cultural goods or uses them in a manner that is incompatible with their historical or artistic character or that is prejudicial to their conservation or integrity is punished by imprisonment between six months and three years and a fine of an amount between 1.500 and 10.000 EUR.

cultural heritage should receive protection in criminal law just as any property. As it was aptly mentioned many decades ago, «the possibility of civil reparations is of very minor interest when we are concerned with property which is essentially irreplaceable»[21]. This prompts the interrogative whether the protection of cultural heritage should be given a higher degree of importance in the hierarchy of legal interests protected by criminal law.

To assess this matter, the values at stake must be considered. The cultural heritage of a society is a witness of its collective history, a mirror of its identity. Awareness of this shared heritage is at the core of a group's sense of community[22]. The interest in its preservation is therefore intimately tied to human rights[23]. This is confirmed by the Fribourg Declaration on Cultural Rights according to which cultural rights are an expression of and a prerequisite for human dignity[24].

Similarly, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights recognise an essential link between cultural heritage and human rights by protecting everyone's right to the realization of those cultural rights that are essential to one's dignity[25] and the right to take part in the cultural life of their community[26]. In this sense, the UN Committee on Economic, Social and Cultural Rights affirmed in its General Comment No 21 that cultural rights are an integral part

[21] UNESCO DOC 5 C/PRG/6, UNESCO 27 March 1950.

[22] P.M. Bator, *An Essay on the International Trade in Art*, in *Stanford Law Review*, 34, 1982, pp. 275, 304.

[23] W. Bren, *Terrorists and Antiquities: Lessons from the Destruction of the Bamiyan Buddhas, Current ISIS Aggression, and a Proposed Framework for Cultural Property Crimes*, in *Cardozo Arts & Entertainment Law Journal*, 34, 2016, pp. 215, 217.

[24] Preamble para 2 of the Cultural Rights: Fribourg Declaration 2007.

[25] Article 22 of the Universal Declaration of Human Rights 1948 (adopted by the UN General Assembly, 10 December 1948) A/RES/217A (III).

[26] Article 27 para 1 ibid; see also Article 15 para 1 (a) International Covenant on Economic, Social and Cultural Rights 1976 (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

of human rights[27]. The report of the independent expert in the field of cultural rights, Farida Shaheed, acknowledged the shift towards cultural heritage protection as a «crucial value for individuals and communities in relation to their cultural identity»[28].

On the European level, the right of every person to engage with cultural heritage as an aspect of the right freely to participate in cultural life is enshrined in the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (2005 Faro Convention)[29]. This right comprises the right to benefit from cultural heritage both individually and collectively, to participate in the process of study, protection and conservation, and to have access to cultural heritage[30]. The European Commission remarked the essential role of cultural heritage as a defining factor of people's identity and acknowledged that it «is a powerful instrument that provides a sense of belonging amongst and between European citizens»[31].

The human rights aspects that are interwoven with cultural heritage corroborate the argument that cultural heritage is what in con-

[27] General comment n. 21: Right of everyone to take part in cultural life (art 15 para 1(a) of the Covenant on Economic, Social and Cultural Rights) (UN Committee on Economic, Social and Cultural Rights 21 December 2009) E/C.12/GC/21 (General comment n 21); M. D'Addetta, *The Right of Access to and Enjoyment of Cultural Heritage: A Link Between the Protection of Cultural Heritage and the Exercise of the Right to Participate in Cultural Life*, in *Cultural Heritage Scenarios 2015-2016*, edited by S. Pinton, L. Zagato, Edizioni Ca'Foscari, Venezia, 2017, p. 473.

[28] Para 20 of the Report of the independent expert in the field of cultural rights, Farida Shaheed (UN Human Rights Council 21 March 2011) A/HRC/17/38 (Report of the independent expert).

[29] Preamble of Framework Convention on the Value of Cultural Heritage for Society 2005 (adopted 27 October 2005, entered into force 1 June 2011) 199 CETS 1 (2005 Faro Convention); S. Pinton, *The Faro Convention, the Legal European Environment and the Challenge of Commons in Cultural Heritage*, in *Cultural Heritage. Scenarios 2015-2016*, cit., p. 317.

[30] Articles 4 (a), 12 (a) and (d) and 14 of the 2005 Faro Convention.

[31] Para 1.1. of the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *Towards an integrated approach to cultural heritage for Europe* (22 July 2014, COM(2014) 477 final).

tinental European systems may defined an autonomous legal good (*Rechtsgut* or *bene giuridico*) and in common law systems a legal interest (setbacks of which may be punishable pursuant to the harm principle) of its own. This seems to justify the use of criminal law measures to protect cultural heritage every time less invasive means do not suffice to counteract the pernicious behaviour[32], in accordance with their subsidiary nature[33]. Moreover, the dichotomous nature of cultural heritage – that includes not only a material, tangible dimension ('property aspect'), but also an immaterial significance linked to human life, identity and history ('cultural aspect') – suggests that an even stronger protection than that accorded to 'ordinary' property is consistent with the values at stake.

Another point that arises is whether the need for criminal regulation should be left to the decision of the national lawmakers or whether it should be wholly or partly streamlined at international level. The following sections will address particularly this point, by looking at the existing landscape of cultural heritage protection in public international law, to begin with the 1972 WHC.

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[32] *Ivi*, para 1.1; T. Bull, *Lack of Due Diligence and Unregulated Markets: Trade in Illicit Antiquities and Fakes in Hong Kong*, in *Art and Crime: Exploring the Dark Side of the Art World*, edited by N. Charney, Praeger, Santa Barbara, 2009, p. 37; S. Manacorda, *Criminal Law Protection of Cultural Heritage: An International Perspective*, in *Crime in the Art and Antiquities World*, edited by S. Manacorda, D. Chappell, Springer, New York, 2011, p. 24; A. Visconti, *Le Prospettive Internazionali Di Tutela Penale: Strategie Sanzionatorie e Politico-Criminali*, in *Beni culturali e sistema penale*, edited by S. Manacorda, A. Visconti, Vita e Pensiero, Milano, 2013, pp. 144, 146, 149-150, 158-159; P.R. Williams, C. Coster, *Blood Antiquities: Addressing A Culture of Impunity in the Antiquities Market*, in *Case Western Reserve Journal of International Law*, 49, 2017, pp. 103, 107-108.

[33] S. Moccia, *Riflessioni Sulla Tutela Penale Di Beni Culturali*, in *Rivista italiana di diritto e procedura penale*, 1993, pp. 1294, 1296; A. Massaro, *La Tutela Penale Dei Beni Culturali Nella Prospettiva Del Principio Di Necessaria Offensività*, in *Cultura e Diritti per una Formazione Giuridica*, 6, 2017, pp. 35, 35, 42.

2. *The context of the 1972 WHC: prior experiences*

At the time of its adoption the 1972 WHC had been preceded by two important United Nations Conventions on cultural heritage protection: the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter 1954 Hague Convention)[34] and the 1970 UNESCO Convention on the means prohibiting and preventing the illicit import, export and transfer of ownership of cultural property (hereinafter 1970 UNESCO Convention)[35].

The 1954 Hague Convention came into being as a reaction to the devastations of cultural heritage during the Second World War[36]. Already Article 6 b) of the *Charter of the International Military Tribunal at Nuremberg* had explicitly included within the jurisdiction for war crimes of that Tribunal the «plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity»[37].

Protection of cultural property in times of war finds an early codification in the so-called *Lieber Code* of 1863[38]. Issued during the Civil War, this set of instructions for the government of armies of the United States of America in the field states under Article 35

[34] Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 215 (1954 Hague Convention).

[35] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231 (1970 UNESCO Convention).

[36] J. Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, Dartmouth Publishing Company Limited, Aldershot, 1996, p. 21.

[37] See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945, United nations treaty Series No. 251 (1951, 279 ss.). An equivalent provision does not appear in the Special Proclamation on the Establishment Of An International Military Tribunal For The Far East.

[38] ICTY, Trial Chamber II, *Proseuctor v Pavle Strugar*, Judgment, 31 January 2005, case No. IT-01-42-T, § 461, p. 105, fn 779.

that «(c)lassical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded». Article 36 provides, furthermore, protection to cultural objects seized by the armies of the United States from private appropriation, or wanton destruction or injury[39].

In 1874 a project for an international Declaration concerning the laws and customs of war was adopted, on the initiative of Henry Dunant and with the assistance of the Emperor of Russia, by the Brussels Conference. Article 8 of the Brussels Declaration requires to treat cultural property in occupied territories as private property even when it is State property and provides that seizure and destruction of such property or wilful damage to it should be made subject of legal proceedings. Articles 16 and 17 require with regard to sieges and bombardments that «all necessary steps must be taken to spare, as far as possible, buildings dedicated to art, science, etc». Although the 1874 Brussels Declaration was not ratified, it served as a reference point for future codifications of laws[40].

In this sense, the 1880 Oxford Manual of the Institute of International Law contains the same relevant standards as the Brussels Declaration. The Manual specified under Article 84 that those who violated its rules were liable to undergo criminal law punishment[41]. Similarly, the 1907 IV Hague Convention and Annexed Regulations, which represent customary international law, have also been influenced by the Brussels Declaration. They impose specific protection for cultural artefacts: «In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military

[39] J. Toman, *op.cit.*, p. 7.
[40] *Ivi*, p. 9.
[41] *Ivi*, p. 10.

purposes … It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand» (Article 27). Furthermore, in times of enemy occupation, «(t)he property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. … All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings» (Article 56)[42].

Following the First World War, the Commission on the Responsibility of the authors of the war and on the enforcement of penalties presented a report to the preliminary Peace Conference. This report includes an assessment of the German Empire's and it's Allies' responsibility regarding the war as well as the facts regarding breaches of the laws and customs of war committed by their forces on land, on sea, and in the air during the war. Among these facts, considerable attention is given to the arbitrary destruction of public and private property as well as specifically to the «wanton destruction of religious, charitable, educational, and historic buildings and monuments» in Belgium[43].

As mentioned above, the destruction by German troops of the University Library of Leuven was an example early on in the war[44]. This was one of the events that led to various attempts in the following years to introduce new legal instruments for the protection of cultural heritage in armed conflict. The 1935 Washington Convention, also known as 'Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments' or 'Roerich Pact'

[42] M. Lostal, *International Cultural Heritage Law in Armed Conflict: Case-Studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan*, Cambridge University Press, Cambridge, 2017, pp. 20-21.

[43] *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalities*, in *The American Journal of International Law*, 14, 1920, pp. 95, 115.

[44] M. Lostal, *op.cit.*, p. 22.

was drawn up by the Governing Board of the Pan-American Union. Article V provides that monuments and museums, and scientific, artistic, educational, and cultural institutions shall cease to enjoy the privileges recognized in the present treaty in case they are made use of for military purposes. As the Pact has been ratified only by American States, it did however not apply during the Second World War. As the State Parties to the Roerich Pact later ratified the 1954 Hague Convention, the Pact is considered to have fallen into desuetude[45].

After the Second World War, the 1949 Fourth Geneva Convention established in its Article 53 that «any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations». These provisions did however not treat cultural heritage as a separate category from civilian property[46].

The 1954 Hague Convention focused instead explicitly on the protection of cultural property, which received thereby autono-

[45] J. Toman, *op.cit.*, pp. 16-18; M. Lostal, *op.cit.*, p 22.

[46] The protection is somewhat more specific in the earlier 1907 Hague Conventions. For instance Article 56 of the Fourth 1907 Hague Convention provided that «The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings». (Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907). The Ninth Hague Convention forbade the bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings. Moreover Article 5 of that Convention establishes that «[i]n bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes» (with a duty for inhabitants to signal the protected places) (Convention (IX) concerning Bombardment by Naval Forces in Time of War. The Hague, 18 October 1907).

mous and specific protection in public international law. Nevertheless, the scope of application of the Convention is the same as that of Article 2 of the earlier Geneva Conventions[47]: that is, «in addition to the provisions which shall take effect in time of peace», «in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them»; and also in «cases of partial or total occupation of the territory of a High Contracting Party» (Article 18). It remains however debated whether the Convention would cover all cases of conflicts with specific reference to non-international conflicts (which are mentioned in the Convention under Article 19).

Another relevant predecessor of the 1972 WHC was the 1970 UNESCO Convention. This Convention was a response to another threat to cultural heritage that manifested itself and raised international awareness in the first decades following the Second World War: the growth of the international market in art and other cultural objects[48]. Moreover, in these years, newly independent States sought to recover cultural heritage removed during colonialism. This led the UNESCO in the 1960s to start drafting a convention laying down rules for the movement and transfer of this kind of goods[49]. The 1970 UNESCO Convention mandates that the import, export or transfer of ownership of cultural property that occurs in violation of national provisions of State Parties adopted in accordance with the Convention be illicit (Article 3). Likewise, Article 11 imposes that «the export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as

[47] J. Toman, *op.cit.*, p. 195.

[48] L. Machado Haertel, *The Past, Present: The Parthenon Sculptures Dispute as an Example of the ICPRCP's Role on Claims Barred by the Non-Retroactivity of the 1970 UNESCO Convention*, in *International Journal of Cultural Property*, 28, 2021, pp. 479, 480-481.

[49] P. Gerstenblith, *UNESCO (1970) and UNIDROIT (1995) Conventions*, in *Encyclopedia of Global Archaeology*, edited by C. Smith, Springer, New York, 2020, pp. 10802-10803.

illicit». These two articles enshrine the spirit of the Convention responding to the dynamics that led to its drafting.

3. *The 1972 World Heritage Convention*

Protection for cultural heritage sites in peace time was finally granted under the 1972 UNESCO Convention concerning the protection of the world cultural and natural heritage. The innovation inherent in the 1972 WHC consists in the holistic approach adopted by UNESCO for the protection of a world heritage that encompasses both natural heritage and cultural heritage. The combination of these two aspects is justified by the significance they have for human existence.

Both enrich present human life because they ground it to its material and spiritual origin. Both link humanity to something greater, be it nature of which humankind is a part and an expression, or culture that is itself an expression of human social endeavour, ingenuity, and art. Both are non-renewable resources that, once destroyed, are lost. Both must be protected to ensure that also future generations can enjoy their heritage and thrive in the consciousness of a common belonging.

While today awareness of this connection between nature and culture and their common link to humanity seems vanishing at times – as recent attacks of eco-activists against works of art in different European museums suggest[50] – at the time in which the Convention was discussed and adopted, it was a present concept linked to growing environmentalist concerns[51]. The 1972 WHC intends to protect natural and cultural heritage from interferences made

[50] K. Jhala, *Eco Activist Attempts to Glue His Head to Vermeer's Girl with a Pearl Earring*, in *The Art Newspaper*, 27 October 2022 (*www.theartnewspaper.com/2022/10/27/eco-activist-attempts-to-glue-his-head-to-vermeers-girl-with-a-pearl-earring*).

[51] J. Blake, *On Defining the Cultural Heritage*, in *International and Comparative Law Quarterly*, 49, 2000, pp. 61, 62.

in the name of 'progress' and social development which, particularly in the early 1970s, tended to be accepted, even generally perceived as a human right linked to humanity's need for development[52]. This determination to protect world heritage from threats deriving from changing social and economic conditions is anchored in the Preamble of the 1972 World Heritage Convention[53].

In this perspective, the 1972 WHC can also be seen as the first instrument that establishes a cultural (and natural) heritage protection against destruction and damage not only when they are inflicted as form of domination, annihilation, cultural cleansing or to allow for looting and illegal profit, but also from virtually any other form of damage and destruction, even when this is not accompanied by a direct criminal intent. The scope of application of the Convention in question is, however, determined by the definition of cultural heritage included therein. This will be examined in the following Section.

4. *The concept of cultural heritage*

With regard to the objects that are offered protection, the scope of application of the 1972 WHC differs considerably from the scope of the 1954 Hague Convention and of the 1970 UNESCO Convention. The 1954 Hague Convention covers cultural property understood as *movable or immovable property* of great importance to cultural heritage, buildings whose main and effective purpose is to preserve and exhibit movable cultural property, and centres con-

[52] *40 Years World Heritage Convention: Popularizing the Protection of Cultural and Natural Heritage*, edited by M.T. Albert, B. Ringbeck, De Gruyter, Berlin, 2015, pp. 55-58.

[53] See Preamble of World Heritage Convention: «Noting that the cultural heritage and the natural heritage are increasingly threatened with destruction not only by the traditional causes of decay, but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction …».

taining monuments[54]. The 1970 UNESCO Convention, given its goal to contrast the illicit movement and trade in cultural property, covers only *movable property*. Its notion of cultural property thus comprises property designated by States based on their importance for archaeology, prehistory, history, literature, art or science. These categories include, among others, archaeological material, antiquities, artworks, rare manuscripts and old books[55]. Conversely, the World Heritage Convention protects exclusively *immovable heritage* which, as far as cultural heritage is concerned, refers to classical monument preservation[56]. It identifies three different categories of cultural heritage comprising monuments including, among others, architectural works, works of monumental sculpture and painting; groups of buildings; and sites[57].

Another difference compared to the 1954 Hague Convention and the 1970 UNESCO Convention consists in the choice of the term 'heritage' instead of 'property'. Although there does not seem to be general agreement on the relationship between the two concepts – in certain cases they are used interchangeably while in others 'cultural property' is treated as a sub-category of 'cultural heritage'[58] – they have distinctive connotations that suggest a different consciousness behind the specific wording chosen by the World Heritage Convention. The term 'property' used in the 1954 Hague

[54] Article 1 1954 Hague Convention.

[55] Article 1 1970 UNESCO Convention.

[56] M.-T. Albert, B. Ringbeck, *op.cit.*, p. 50.

[57] Article 1 World Heritage Convention: «For the purpose of this Convention, the following shall be considered as "cultural heritage": monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view».

[58] J. Blake, *op.cit.*, p. 66.

Convention and in the 1970 UNESCO Convention focuses on the material aspect of cultural artefacts and denotes a certain commodification aligning them with other types of property that are susceptible of being assigned a market value and of being freely traded[59]. Growing awareness of the inadequacy of this term to reflect an understanding of cultural objects as expression of a collective history that gives people a sense of belonging and community led, in 1972, to the preference of the concept of 'heritage'. The term used by the World Heritage Convention highlights the significance of the goods falling into this category as symbolic of the culture and, thus, of the identity of a group or society[60]. As manifestation of human life cultural heritage is a witness to the history and the validity of a particular view of life[61].

While property law focuses on the protection of the rights of the owner and possessor, heritage law aims at protecting heritage to allow present and future generations to enjoy it[62]. This is reflected in the World Heritage Convention's intent to protect «outstanding examples»[63] of cultural heritage worth being transmitted to future generations[64]. In this perspective, cultural objects and their setting form a fragile and irreplaceable whole for the people to identify with, be aware of and learn about their past[65]. This justifies a notion of cultural heritage, similarly to natural heritage, as non-re-

[59] *Ibidem*.

[60] M. D'Addetta, *op.cit.*, p. 472.

[61] L.V. Prott, P.J. O'Keefe, *"Cultural Heritage" or "Cultural Property"?*, in *International Journal of Cultural Property*, 1, 1992, p. 307.

[62] *Ivi*, p. 309.

[63] J. Blake, *op.cit.*, p. 80.

[64] Article 4 World Heritage Convention; B. Hauser-Schäublin, L.V. Prott, *Introduction: Changing Concepts of Ownership, Culture and Property*, in *Cultural Property and Contested Ownership*, edited by B. Hauser-Schäublin, L.V. Prott, Routledge, London-New York, 2016, p. 10.

[65] A. Mosna, *More than Antiquities Trafficking: The Issue Is Antiquities Laundering*, in *Global Perspectives on Cultural Property Crime*, edited by M.D. Fabiani, K. Melody Burmon, S. Hufnagel, Routledge, London-New York, 2023, p. 113.

newable resource that is closely linked to the concept of «common heritage of mankind»[66].

The notion of cultural heritage as belonging to «mankind as a whole»[67] raises the question as to whether the cultural heritage is here understood as belonging to humanity as such rather than to a specific group. A question that is central to the debate seeing positions of so-called 'cultural internationalism' opposed to arguments linked to so-called 'cultural nationalism'. These concepts were coined by John Henry Merryman[68] to describe one of two opposite approaches to cultural heritage protection and preservation[69]. Although their suitability to capture the heart of the issue and to allow for an unbiased dialogue may – and should – be questioned, this chapter will use this terminology for clarity's sake due to its widespread use in the relevant literature.

Cultural internationalism considers cultural goods to belong to the common cultural heritage of all mankind. As they may not be seen as exclusively belonging to one nation, best possible protection may – and is even likely to – occur outside the state of origin, in countries with a strong economy that can 'afford' the technically most advanced conservation methods and offer a better platform for 'humanity as a whole' to see and enjoy cultural goods[70]. The 1954 Hague Convention is usually considered the legal basis upon which this theory rests as it states that «damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind»[71]. In this perspective, cultural heritage

[66] J. Blake, *op.cit.*, p. 69.

[67] Preamble of the World Heritage Convention: «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».

[68] See J.H. Merryman, *Two Ways of Thinking About Cultural Property*, in *The American Journal of International Law*, 86, 1980, p. 831.

[69] R.W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, in *Fordham International Law Journal*, 16, 1992, pp. 1033, 1045.

[70] J.H. Merryman, *op.cit.*, p. 837.

[71] Preamble of the 1954 Hague Convention.

protection is conceived as a universal concern to be tackled at an international level[72]. Developing this theory further with regard to movable property, champions of cultural internationalism maintain that there is no valid reason to tie cultural goods to a specific region, group or society. Instead, unrestricted trade of cultural goods will ensure that the goods in questions reach people and places where they can be best cared for and valued[73].

Cultural nationalism, on the other hand, understands cultural goods as belonging to their nation of origin. It follows that protection of cultural goods must consist in their thorough anchoring to the national territory of the state of origin for it is only in this original context that cultural goods can unfold their full value[74]. This theory is in line with the spirit of the 1970 UNESCO Convention, according to which cultural property represents a basic element of civilization and national culture. As its true value can be appreciated only against the background of the fullest possible information about its origin, history and traditional setting, every state has the duty to protect cultural property existing within its territory against theft, clandestine excavation and illicit export[75].

The World Heritage Convention combines the approaches according to which cultural heritage belongs to mankind as a whole and to a particular group, respectively. While affirming that «all the nations of the world» share an interest in cultural heritage protection and are called to assist each other in this endeavour, the Convention vests the individual states in which monuments are located with the primary responsibility of protecting cultural heritage. The World Heritage Convention arguably establishes an implicit hierarchy between 'mankind as a whole' and single nations not on-

[72] K. Chamberlain, *War and Cultural Heritage*, Institute of Art and Law, Leicester, 2004, pp. 26-27.

[73] J.H. Merryman, *Thinking about the Elgin Marbles*, in *Michigan Law Review*, 83, 1985, pp. 1880, 1917-1921.

[74] L. Casini, *La Globalizzazione Giuridica Dei Beni Culturali*, in *Aedon*, 2012 (*www.aedon.mulino.it/archivio/2012/3/casini.htm*).

[75] Preamble of the 1970 UNESCO Convention.

ly regarding the responsibility to act and protect, but also regarding their bond to monuments in specific regions[76].

This suggests that the concept of cultural heritage enshrined in the World Heritage Convention identifies specific groups living around and 'with' monuments as their preferred custodians recognising the importance of monuments being preserved and protected in their original location and context. While this issue seems less central when dealing with immovable goods (which by definition are rooted in the soil and are hence more stable and less likely to be torn out of their context), widespread damaging and destruction of world heritage sites often result in immovable goods being broken down into movable pieces and entering illicit trafficking flows. Moreover, illegal excavations of world heritage sites with the aim to loot movable cultural objects therein is usually accompanied by serious damage, if not outright destruction, of the sites themselves. It seems therefore reasonable to argue that for national legislation to offer heritage sites a level of protection in line with the World Heritage Convention, not only must there be provisions in place directly protecting immovable heritage, but also effective protection of movable goods, this being just as important to prevent damage to cultural heritage and to ensure that future generations will be able to enjoy their heritage and establish a relationship to the past it represents[77].

[76] Preamble to the World Heritage Convention: «Considering that, in view of the magnitude and gravity of the new dangers threatening them, 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, by the granting of collective assistance which, although not taking the place of action by the State concerned, will serve as an efficient complement thereto».

[77] U. Mattei, *Patrimonio Culturale e Beni Comuni: Un Nuovo Compito per La Comunità Internazionale*, in *Protecting Cultural Heritage as a Common Good of Humanity: A Challenge For Criminal Justice*, edited by S. Manacorda, A. Visconti, Ispac, Milano, 2014, p. 31.

5. *The protection of heritage by means of criminal law within the international Community*

The 1972 WHC does not contain any reference – even on an implicit level – to the use of criminal law for the protection of its provisions. Article 5 of the Convention calls for the adoption of a «general policy» (*a*) which should include the taking of «appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, preservation and rehabilitation of this heritage» (*d*). Such provisions fall significantly short of requiring the adoption of criminal law measures, particularly given the aforementioned principle of subsidiarity of criminal law enforcement. While no reference is made to measures of prevention, or enforcement, the other terms do not seem to point at criminal law enforcement either.

This begs the question of what the silence of the 1972 WHC exactly means. Did the drafters of the convention wish to exclude the use of criminal law enforcement (or at least did they intend not to expressly incentivize it)? Or did they rather believe that sufficient criminal law protection was already required by the earlier instruments? Were they simply indifferent toward the issue? No mention is made of the issue in the draft convention[78].

The silence of the 1972 WHC is also mirrored by the 2003 Convention for the Safeguarding of Intangible Cultural Heritage, although one could readily observe that the «intangible cultural heritage», by its very nature 'intangible' nature, is less suited to be protected by means of criminal law[79]. Contrary to this approach, the

[78] Draft Convention for the Protection of the World Cultural and Natural Heritage and Draft Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage, General Conference 17 C Seventeenth session, Paris 15 June 1972.

[79] «Intangible cultural heritage» is defined in article 2 of the Convention as «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» and is «manifested inter alia in the following domains: (a) oral traditions

2001 Convention on the Protection of Underwater Cultural Heritage establishes in its Article 17 that «Each State Party shall impose sanctions for violations of measures it has taken to implement this Convention», and that such sanctions «shall be adequate in severity to be effective in securing compliance with this Convention and to discourage violations wherever they occur and shall deprive offenders of the benefit deriving from their illegal activities». Although no explicit reference is made to criminal law, it could be argued that criminal enforcement is implicitly encouraged, at least for more serious violations that require stronger dissuasion. Silence on sanctions is therefore not a given in the type of conventions aimed at protecting and defending cultural heritage.

Also, it could certainly not be said that provisions relating to criminal law were absent in public international law at the time of the adoption of the 1972 WHC. The point requires to look at the landscape of international public law, starting again from the 1954 Hague Convention.

5.1. *International public law and obligations to protect cultural property by means of criminal law in times of war*

The 1954 Hague Convention contains an explicit reference to the use of criminal law and penalties as a means of protection of cultural heritage. Article 28 of the Hague Convention explicitly states that parties should take «all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention». It should be reminded (see above § 2) that the scope of application of the Convention refers mostly to cases of conflicts and occupation (Article 18), although it remains partly unclear

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».

whether it stretches to non-international conflicts. Article 19 states that «in the event of an armed conflict not of an international character», «each party shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property». Such provisions are certainly those of Article 4 of the Convention – titled «Respect for cultural property» – but it remains discussed whether Article 28 on sanctions falls therein[80].

It is worth observing that the protection of the 1954 Hague Convention has meanwhile been further strengthened by the two subsequent Protocols that have been adopted, and particularly by the second protocol[81].

The provisions of the 1954 Convention must be viewed in the larger context of international public law and particularly of international customary law. It is in fact largely unanimous opinion that the provisions of the 1954 Hague Convention reflect rules of international customary law[82]. Such conclusion can easily be gathered by the number of cases convictions that have been passed by national, *ad hoc* and international tribunals with regard to the destruction of cultural property[83].

Moreover, explicit criminal law protection is foreseen in Article 3(d) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (hereafter ICTY), which expressly confers jurisdiction upon the ICTY for war crimes including the «seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science». This has led the *ad hoc* Tribunal to

[80] See on this debate, R. O'Keefe, *Protection of cultural property under international criminal law*, in *Melbourne Journal of International Law*, 11, 2010, p. 360. See also J. Toman, *op.cit.* p. 202 (also discussing the specific issues of liberation wars) and pp. 213-215.

[81] Second Protocol to the Hague Convention of 1954 for the protection of cultural property in the event of armed conflict. The Hague, 26 March 1999.

[82] See J. Toman, *op.cit.*, p. 203, R. O' Keefe, *op.cit.*

[83] On this, see R. O'Keefe, *op.cit.*, p. 343 ss.

pass a number of landmark judgements that helped clarify the extent of the protection afforded by international criminal law[84].

The criminalization of acts of destruction and damage of cultural property is also explicit in the Statute of the International Criminal Court (hereafter ICC). Article 8 includes among the war crimes the act of «intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives»[85].

The Elements of crime detail the provision by spelling out the requirements of the offence of attacking protected objects. They state explicitly that «1. The perpetrator directed an attack. 2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives. 3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack. 4. The conduct took place in the context of and was associated with an armed conflict not of an international character. 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict».

The ICC case-law on this offence is very limited. In fact it revolves around one very famous and debated case, concerning the destruction of the old city of Timbuktu and monuments: the case of Prosecutor v Ahmad Al Faqi Al Mahdi[86]. When the groups of Al Qaeda and Ansar Dine took control of the city of Timbuktu they

[84] Strugar Trial; Brdanin case, Blaskic case, Galic case, Tadic case.

[85] See Article 8(2)(b)(ix) for international armed conflicts and article 8(2)(e)(iv) for non-international armed conflicts.

[86] *Situation in the Republic of Mali in the Case of the Prosecutor v Ahmad Al Faqi Al Mahdi* [2016] ICC Trial Chamber VIII ICC-01/02-01/15, Judgment and Sentence.

ordered Mr. Al Mahdi – the leader of the morality brigade called *Hesba* – to destroy the mausoleums and mosques connected to the traditional religious practices of the population. Despite having expressed reservations on the order, Mr. Al Mahdi went on to execute the order. The case was prosecuted by the ICC and led to the conviction of the perpetrator for destruction of ten of the most well-known sites in Timbuktu, nine of which had the status of protected UNESCO World Heritage Sites[87].

5.2. *International public law and obligations to protect cultural property by means of criminal law in peace time*

Outside the event of an armed conflict, cultural heritage enjoys indirect protection under international criminal law in that its willful destruction may be relevant as an element indicating the specific genocidal intent required for the establishment of the crime of genocide[88]. Likewise, the destruction of cultural heritage, if com-

[87] *Ivi*, pp. 17-23.

[88] *The Prosecutor v Radislav Krstić* [2001] ICTY Trial Chamber IT-98-33-T, Judgment para 580: «Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide. The Trial Chamber however points out that where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group»; see also *The Prosecutor v Radislav Krstić* [2004] ICTY Appeals Chamber IT-98-33-A, Judgment Partial Dissenting Opinion of Judge Shahabuddeen para 53: «the question is whether there was the required intent, not whether the intent was in fact realised. Second, the foregoing is not an argument for the recognition of cultural genocide. It is established that the mere destruction of the culture of a group is not genocide: none of the methods listed in article 4(2) of the Statute need be employed. But there is also need for care. The destruction of culture may serve evidentially to confirm an intent, to be gathered from other circumstances, to destroy the group as such. In this case, the

mitted for discriminatory purposes could be considered as a conduct through which the crime against humanity of persecution manifests itself[89].

Moreover, the 1970 UNESCO Convention equally contains provisions of criminal sanctions. These however, do not cover the entire scope of protection as described above. Indeed, compromises that had to be made during the negotiations – mainly to encourage the participation of the United States – allow for a much narrower interpretation of the provisions of the 1970 UNESCO Convention[90]. In fact, penalties (or administrative sanctions) are imposed pursuant to Article 8, in combination with Articles 6(b) and 7(b), only for exportation from the territory of a State Party (but not the import into the territory of another State Party!) of cultural property without the required export certificate and for the import of cultural property stolen from a museum or a religious or secular public

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razing of the principal mosque confirms an intent to destroy the Srebrenica part of the Bosnian Muslim group»; M. Frulli, *Advancing the Protection of Cultural Property through the Implementation of Individual Criminal Responsibility: The Case-Law of the International Criminal Tribunal for the Former Yugoslavia*, in *The Italian Yearbook of International Law*, 15, 2015, pp. 195, 213; R. O'Keefe, *op.cit.* (n. 8), pp. 387-388; M. Lostal, *op.cit.*, p. 43.

[89] *Attorney-General of the Government of Israel v Adolf Eichmann* [1961] District Court of Jerusalem Criminal Case No 40/61, Judgment para 57; *The Prosecutor v Dario Kordić and Mario Čerkez* [2001] ICTY Trial Chamber IT-95-14/2-T, Judgment para 207: «This act, when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of "crimes against humanity", for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects»; R. O'Keefe, *op.cit.* (n. 8), p. 381; M. Frulli, *The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency*, in *European Journal of International Law*, 22, 2011, pp. 203, 217; M. Lostal, *op.cit.*, p. 43; B. Varesano, *La Tutela Del Patrimonio Culturale: Riflessioni a Margine Della Sentenza Di Merito Resa Dalla Corte Penale Internazionale Nel Caso Al-Faqi Al-Mahdi*, in *Diritto penale contemporaneo*, 2017, pp. 243, 249.

[90] P.J. O'Keefe, *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (1970)*, in *Encyclopedia of Global Archaeology*, cit., pp. 2699-2700; L. Machado Haertel, *op.cit.*, p. 481.

monument or similar institution in another State Party «after the entry into force of this Convention for the States concerned, provided that such property is documented as appearing in the inventory of that institution». This latter limitation is particularly sensitive as it excludes archaeological objects that are illegally excavated from the scope of application of the provision, as such items by their very nature will not be included in any inventory[91].

This highlights how the 1970 UNESCO Convention, despite being valuable as a legal instrument to counter trafficking and other forms of illegal trade in cultural property, leaves a considerable protection gap. By excluding the import of unlawfully excavated archaeological objects from its protection, the 1970 UNESCO Convention refrains from unfolding its full potential to disincentivize theft and looting of cultural property as well as destructive activites often-connected to many forms of unlawful taking as laid out above. Therefore, the reasoning according to which, although the 1970 UNESCO Convention covers only moveable goods, its protection extends – albeit indirectly – also to cultural heritage sites remains rather abstract.

6. *The criminal implications of the 1972 WHC convention*

As mentioned, the comparison with the Conventions preceding the 1972 WHC (and even with those following it) shows that the silence of the latter on the point of sanctions is to some extent remarkable. It could be argued that the 1972 WHC does not address the point of criminalization (or, more generally, of sanctions) because criminalization was already mandated by other instruments and/or by customary international law. Following a similar line of reasoning, it could be argued that the 1972 WHC is meant to integrate the

[91] T. Scovazzi, P.G. Ferri, *Recent Developments in the Fight against the Illicit Export of Archaeological Objects: The Operational Guidelines to the 1970 UNESCO Convention*, in *Art Antiquity and Law*, 20, 2015, pp. 195, 199.

existing protection of cultural heritage, by «establishing an effective system of collective protection of the cultural and natural heritage of outstanding universal value, organized on a permanent basis and in accordance with modern scientific methods» (last *considerandum* of the preamble to the 1972 WHC). In other terms, the drafters might have looked at the 1972 WHC as an instrument that was intended to promote cultural protection, rather than to prevent and repress destruction. While all these arguments are plausible, it was already mentioned that the preparatory works do not help to shed light on the issues. Leaving aside speculation on the drafters' intentions, it could be said that none of the above arguments militates conclusively against the introduction in the Convention of an article on sanctions, which could have helped clarify and strengthen some elements of the protection of cultural heritage – as it will be argued below.

Be this as it may, can it be said that because of this silence the 1972 WHC remains neutral with regard to the criminal protection of cultural heritage? Can it be concluded that the Convention plays no role in the criminal protection of heritage, and it is therefore of no relevance for the criminal lawyer? The answer is in the negative.

Despite its silence on sanctions, the Convention plays a relevant role also in the field of criminal law. To understand this point it is sufficient to look at some of the landmark cases of international and *ad hoc* criminal tribunals concerning the destruction of cultural property in times of conflicts. These cases clearly refer to the special status of the damaged or destroyed sites as cultural world heritage sites.

In *Prosecutor v Al Mahdi*, the ICC writes: «all the sites but one … were UNESCO World Heritage sites and, as such, their attack appears to be of particular gravity as their destruction does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also the people throughout Mali and the international community»[92].

[92] ICC; Trial Chamber VII, Judgment and Sentence, 27 September 2016, No. ICC-01/12-01/15, § 80 (p. 38).

What is then the relevance of the 1972 WHC for criminal law? Its relevance can be broken down into two functions. First, the Convention has a crucial 'flagging' function. It allows for an easy identification of what cultural property and cultural heritage is. In other terms, by establishing a system for recognition of 'world heritage', the 1972 WHC allows for an easy identification of protected sites, which largely relieves courts from the burden of having to justify that some monuments, buildings, sites were of historic of artistic value and hence fell under the protection of the existing criminal law. This helps overcome the difficulties of defining culture. In this respect the Convention simplifies the prosecutorial burden of proof (and the motivation of judicial decisions) with regard to the protected status of the attacked sites, monuments, buildings, etc. Scholars have already underscored how much courts and tribunals have so far relied on the UNESCO listing as an indicator of the protection[93].

This 'flagging' or identification function operates not only at the moment of enforcement (repression), but also as form of prevention, meaning that it allows already beforehand to clearly identify protected sites, thus enhancing the element of foreseeability of the criminal laws on protection of art and heritage. This point surfaces for instance in the ICTY decisions on the destruction of the town of Dubrovnik, where the Court emphasizes that the UNESCO listing made the character of protected clear and visible, with also clear consequences on the feelings of the inhabitants, who «had thought that they were safe in the Old Town as it had UNESCO status»[94]. This is also further stressed in a later part of the judgement where the Court highlights «the unique cultural and historical character

[93] U.S. Bishop-Burney, *Commentary to Prosecutor v Ahmad Al Faqi Al Mahdi*, in *The American Journal of International Law*, 111, 2017, pp. 129-132 (at p. 131). F. Capone, *The international Criminal Law Aspects of the Protection of Global Commons: The case of Cultural Heritage*, in *The Protection of General Interests in Contemporary International Law*, edited by M. Iovine, F.M. Palombino, D. Amoroso, G. Zarra, Oxford University Press, Oxford, 2021, pp. 211-238 (at p. 233).

[94] ICTY, Trial Chamber II, *Proseuctor v Pavle Strugar*, Judgment, 31 January 2005, case No. IT-01-42-T, § 50, p. 16.

of which was a matter of renown, as was the Old Town's status as a UNESCO World Heritage site', also adding 'that protective UNESCO emblems were visible»[95].

It should here be recalled that flagging has always been an important element of the protection of cultural heritage, since the early Hague Conventions of 1907 (and also in the later Hague Convention of 1954), with those Conventions establishing the need for the protected cultural property to «bear a distinctive emblem» (see for instance, article 6 of the 1954 Hague Convention). The UNESCO listing takes this need of 'flagging' protected artifacts to a higher level, hence making also the criminal law provisions more precise and foreseeable.

While the flagging function is of clear value in enhancing the protection, particularly within criminal law, it opens up however potential risks. The downside is that there may be overreliance on the UNESCO listing, leading to a shrinking of the protection offered by criminal law. The literature already criticizes the International Courts for using the UNESCO listing as the main criterion of identification of protected sites and monuments, failing to identify other standards. They observe that «While the [ICC] Statute does not require UNESCO recognition of a building for it to qualify for protection, courts and tribunals have often used recognition by UNESCO as an indicator of such protection»[96]: this however leads the Court to neglect to «provide a complete or precise analytical framework» for the application of the relevant criminal provisions (in the case, Article 8(2)(e)(iv) ICC Statute): «Except in cases where a site may be listed with UNESCO or otherwise recognized as a world heritage site, however, existing legal instruments and previous decisions provide scant detail on how a court or tribunal might determine whether an object qualifies for protection»[97].

[95] ICTY, Trial Chamber II, *Proseuctor v Pavle Strugar*, Judgment, 31 January 2005, case No. IT-01-42-T, § 329, p. 140.

[96] U.S. Bishop-Burney, *Commentary to Prosecutor v Ahmad Al Faqi Al Mahdi*, cit., p. 132.

[97] *Ivi*, p. 130.

In a similar vein scholars have written: «While in principle the ICC Statute does not require UNESCO recognition of a building for it to qualify for protection, courts and tribunals have so far relied on it as an indicator of such protection and there is uncertainty with regard to the framework applicable to future attempts to prosecute attacks against cultural heritage in which all or the majority of the sites lacks special status from UNESCO»[98]. As scholars have pointed out, the definition of cultural heritage remains «a "liminal notion", i.e. a notion that legal norms cannot define without referring to other disciplines or science»[99]. This makes it especially difficult for courts (and prosecutors) to identify art, besides those instances – such as the listing of the 1972 WHC – where global consensus has already been reached. As difficult as defining art remains, the 1972 WHC is not the only indicator of protected heritage (as it will be even clearer in discussing the second function).

The second function played by the 1972 WHC is also apparent in the above quote of the judgment of Trial Chamber VII in *Prosecutor v Al Mahdi*. There the court states that because the actions were directed against UNESCO sites they were «of particular gravity». In other terms, the Convention is significant for criminal lawyers in that it introduces a graduation in the gravity of offences. Attacks against world heritage are a more serious offence than attacks against (any other type of) cultural heritage. The Convention creates within protected heritage the sub-category of heritage «of outstanding universal value» (Articles 1 and 2 1972 WHC), which makes the offences against the latter of greater gravity. While cultural heritage is always worthy of protection as a legal interest, the sub-category of 'heritage of outstanding universal value' is worthy of even greater protection and it makes the seriousness of the offence greater. To put it in other terms, while all heritage is protected even when it is not of 'outstanding universal value', heritage that is 'of outstanding

[98] F. Capone, *op.cit.*, pp. 211-238 (at p. 233).

[99] L. Casini, *The Future of (International) Cultural Heritage Law*, in *International Journal of Constitutional Law*, 16, 2018, pp. 1-10 (at p. 3).

universal value' receives an enhanced protection, in that the perpetrator destroying or damaging such world heritage will be subjected to a harsher penalty.

This approach is by no means new, and it is reflected also in earlier judgments of international and *ad hoc* courts, such as the *Jokic* and *Strugar* judgment of the ICTY. The Court there underscored that «it is a crime of even greater seriousness to direct an attack on an especially protected site, such as the Old Town [of Dubrovnik]»[100]. Likewise in the *Miodrag Jokic* case, this was considered to be an element that made the offence more serious, and also due to this reason the Court refused to treat this element as a separate aggravating circumstance[101].

Next to these two functions, there is a further implication of the 1972 WHC for criminal law which ought to be discussed. While silence on sanctions does not stand in the way of the relevance of the Convention for criminal lawyers, it does however create possible problems (besides the risk – already highlighted above – of the restriction of the protection for the heritage of non-outstanding universal value or for the heritage whose outstanding universal value has not yet been officially recognised). It connects to the fact that while the 1972 WHC can influence the interpretation of the existing criminal laws on the protection of cultural heritage, it falls ultimately on those other provisions to establish the scope of protection under criminal law. In this respect it should be noted that such scope is significantly fragmented.

[100] ICTY, Trial Chamber II, *Proseuctor v Pavle Strugar*, Judgment, 31 January 2005, case No. IT-01-42-T, § 461, p. 191.

[101] ICTY, Trial Chamber I*, Prosecutor v Miodrag Jokić*, Sentencing Judgement, 18 March 2004, Case No.: IT-01-42/1-S, § 67, p. 18: «The Trial Chamber deems that the crime of destruction or wilful damage done to institutions dedicated to religion, charity, education, and the arts and sciences, and to historic monuments and works of art and science subsumes the fact that the Old Town was an undefended and culturally valuable site, thus especially protected under international law. It therefore finds that this special status of the Old Town has already been taken into consideration in the definition and evaluation of the gravity of the crime and should not be considered also in aggravation».

Cultural heritage receives protection in times of war (in both international and non-international conflicts), thanks to customary international law and to Treaty law (1954 Hague Convention and its two protocols, The Protocols of the Geneva Conventions, etc.). Outside of war times, however, the protection remains scant. Destruction of world heritage does not as such constitute a crime against humanity or a form of genocide. The 1970 UNESCO Convention focuses its protection on movable property, concerned as it is with the prevention of repression of clandestine and unlawful acts of smuggling of art. The conducts punished by the 1970 UNESCO Convention revolve around the export and import of art manufacts (see Article 8). Destruction and damaging of world heritage sites do not therefore fall in the scope of criminalization of those Conventions.

It could be argued that international public law should refrain from requiring criminalization of conducts that do not have an international (or transnational) dimension. War crimes have an intrinsic transnational dimension. The smuggling of art between countries in consequence of looting – punished by the 1970 UNECSO Convention – has a clear transnational dimension. It could then be said that other forms of damage and destruction do not have a similar dimension and their criminalization should therefore be left to the liberty of each sovereign country. This reasoning forgets however that the protection of cultural heritage possesses an inherent transnational dimension, because it protects works, monuments, buildings, sites, and other artefacts 'of outstanding universal value'. The transnational dimension lies precisely in the universal value of the objects protected. This requires therefore that the protection of such world heritage be uniform on a global level, and this with regard to all relevant threats that could attempt to the integrity of such heritage.

The need for a more systematic, coherent and uniform protection of culture is becoming stronger by the day, as it also highlighted by regional initiatives such as those of the Council of Europe with the Nicosia Convention.

7. *Existing obligations of criminalization: The 2017 Nicosia Convention*

The World Heritage Convention requires State Parties to take effective and active measures – including legal measures – for the protection, conservation, and presentation of the cultural and natural heritage on its territory[102]. A direct imposition criminalisation of conduct that is harmful to cultural heritage is not included among its provisions. Conversely, a more recent international legal instrument, the Council of Europe Convention on Offenses relating to Cultural Property (hereafter 2017 Nicosia Convention), includes specific requirements of criminalisation and duties of judicial cooperation to create a common ground to protect cultural property and counter criminal offences relating to cultural property[103].

The 2017 Nicosia Convention is the first international agreement to provide an exhaustive criminal law framework for the prevention of and the contrast to criminal offenses concerning cultural objects[104]. It thereby reflects an understanding of cultural heritage as key component of peoples' identity that must be safeguarded to ensure its transmission to future generations and for which criminal law intervention is justified. Considering its vulnerability as a unique, fragile, non-renewable and non-relocatable resource and of the increasing threats to cultural heritage the 2017 Nicosia Convention aims at establishing an international policing strategy to contrast destruction of and damage to cultural heritage as well as trafficking of cultural objects[105.]

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[102] Article 5 of the World Heritage Convention.

[103] Preamble of the Council of Europe Convention on Offences relating to Cultural Property (adopted 19 May 2017, entered into force 1 April 2022) 221 CETS 1 (2017 Nicosia Convention).

[104] T. Davis, S. Mackenzie, *The International Politics of Cultural Heritage Crime in Cambodia: Past, Present and Future*, in *The Palgrave Handbook on Art Crime*, edited by S. Hufnagel, D. Chappell, Palgrave Macmillan, 2019, p. 753.

[105] Article 1 para 1 (a) of the 2017 Nicosia Convention; D. Fincham, *The Blood Antiquities Convention as a Paradigm for Cultural Property Crime Reduction*, in *Cardozo Arts & Entertainment Law Journal*, 37, 2019, pp. 299, 300.

The Nicosia Convention provides for a comprehensive protection of cultural heritage through criminal law. It does not distinguish between times of war and peace, just as it does not distinguish between movable and immovable property. The offences enshrined in the Convention include not only destruction and damage to immovable and movable cultural property (Article 10), but also various forms of unlawful taking and illegal transnational movement (Articles 3-9)[106]. This reflects a conscience of the fact that threat to cultural heritage originates not only from destruction of monuments and other cultural objects but derives also from other conduct motivated by personal gain of the perpetrator, such as theft, illicit excavation and other forms of taking, illicit import and export which primarily concern movable cultural property and give rise to illegal trade in cultural property[107].

To ensure concerted action against such offenses, the 2017 Nicosia Convention obliges State Parties to confirm the criminal relevance of the theft and other forms of unlawful appropriation of cultural property, of unlawful excavation and removal of such property, of its illegal importation and exportation, of the acquisition of unlawfully sourced cultural objects, of their placing on the market, of the falsification of documents relating to movable cultural property, as well as of the destruction and damage of cultural property[108].

[106] The Italian lawmaker has implemented the Convention by reforming the legal framework on cultural heritage protection through criminal law. While the criminal law protection already included offences of destruction, unlawful taking and unlawful import and export, the introduction of ad hoc offences for different forms of laundering of cultural goods is directly derived from the Nicosia Convention, see G.P. Demuro, *I Delitti Contro Il Patrimonio Culturale Nel Codice Penale: Prime Riflessioni Sul Nuovo Titolo VIII-Bis*, in *Sistema Penale*, 2022, pp. 1, 18.

[107] Compare *Situation in the Republic of Mali in the Case of the Prosecutor v Ahmad Al Faqi Al Mahdi* [2016] ICC Trial Chamber VIII ICC-01/02-01/15, Queen's University Belfast Human Rights Centre and the Redress Trust observations pursuant to Article 75(3) of the Statute and Rule 103 of the Rules para 24; R. O'Keefe, *op.cit.* (n. 8) p. 340; F. Lenzerini, *Suppressing and Remedying Offences against Culture*, in *The Cultural Dimension of Human Rights*, edited by A.F. Vrdoljak, Oxford University Press, Oxford, 2013, pp. 248-249.

[108] Articles 3-10 of the 2017 Nicosia Convention.

By including typical conduct not only of those who damage and destroy cultural heritage, but also of looters, traffickers and launderers, the Convention offers an innovative and comprehensive approach that considers all above-outlined stages of the illicit trade in cultural objects[109].

A new approach promoted on the international level is crucial since particularly in matters of cultural heritage protection, national positions and applicable laws sensitively differ. Depending on the concept of cultural heritage – understandings can roughly be divided into those mainly influenced by the theory of 'cultural nationalism' and those inspired by the theory of 'cultural internationalism' – that is accepted in a society and a nation, the relevant legal instruments will be more, or less, protective. This is also true regarding the extent to which criminal law measures are resorted to protect cultural heritage from damage and looting, illicit export and illicit trade.

Although the 2017 Nicosia Convention was adopted under the auspices of the Council of Europe, its reach goes beyond the members of the Council of Europe, as it is open for signature also by non-member States[110]. The 2017 Nicosia Convention has therefore the potential to act as a bridge to third countries and to give the task of cultural heritage protection and preservation a global dimension[111]. It represents a chance to overcome national asymmetries and to respond (more effectively) to offenses that are usually transnational in nature and thus require coordinated action and cooperation[112].

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[109] D. Fincham, *op.cit.*, p. 303.

[110] 2017 Nicosia Convention art 27 para 1 and art 28 para 1; D. Fincham, *op.cit.*, pp. 302-303, 334.

[111] M.M. Bieczyński, *The Nicosia Convention 2017: A New International Instrument Regarding Criminal Offences against Cultural Property*, in *Santander Art and Culture Law Review*, 3, 2017, pp. 255, 270-271.

[112] E. Mottese, *Preventive Measures in the Council of Europe Convention on Offences Relating to Cultural Property; An Overview*, in *Santander Art and Culture Law Review*, 4, 2018, pp. 121, 122.

8. *Conclusions*

The goal of the present work was to discuss the implications within criminal law of the WHC 1972. In order to address this point, the article has looked into the more general context of criminal law enforcement geared towards the protection of cultural heritage. It has therefore introduced the international law (customary and Treaty law) that provides for protection by means of criminal law of cultural heritage. Such law appears still very fragmented, particularly with regard to its scope. It is only recently – with the Nicosia Convention – that efforts have been made to streamline the criminal law protection and make it more systematic and coherent.

The need for a coherent international framework of sanctions against conducts harming cultural heritage of outstanding universal value does not require lengthy and intricate considerations, as it is quite evident. World heritage can be equated to the global commons, something that deserves protection on a global scale because of its intrinsic global cultural value for all mankind. It is consequently paramount that the law offers a uniform global protection, also with regard to criminalization and criminal law enforcement. A level playing field on a global scale contributes to better protection and it also ensures that cooperation in criminal law enforcement runs smoothly, whenever it is needed. Overcoming the fragmentation of existing laws is therefore necessary.

In light of the above considerations, the silence of the 1972 WHC on sanctions is remarkable – and to some extent deplorable. This article has argued that this silence should not be taken as indifference, or even worse irrelevance. The 1972 WHC has in fact twofold implications with regard to the application of criminal law. On the one hand, it plays a 'flagging' function, by enhancing the identification of protected cultural objects. On the other hand, it creates a graduation in the severity of offences, which serves to better underscore the legal interests at stake: while all attacks against cultural heritage ought to be countered, the attacks against world heritage

require greater severity in the response as the protected legal interest is a higher ranked global interest.

The silence of the Convention is however problematic, in that it does not contribute to address the existing problems of fragmentation. Moreover, the risk of an overreliance on the UNESCO listings might actually be detrimental for the protection of cultural heritage at large. In light of these reflections, it might be worth considering if the best way to celebrate the anniversary of the Convention is not to consider the drafting of a protocol which addresses specifically the point of sanctions. This could (and should) be done by ensuring consistency with the Nicosia Convention (possibly also promoting the signing of the Convention on a global scale). The rules on actions should also bring more clarity on the fact that offences against world heritage are as such of a higher gravity, which entails that the overall gravity of attacks against world heritage can never be downplayed in light of factual circumstances of the case. One thing is sure: clear rules on sanctions are needed in order to bring the protection of world heritage down to a fine art.

Raquel Regueiro Dubra

CHALLENGES TO INTERNATIONAL RESPONSIBILITY FOR THE INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE IN THE ERA OF ROBOTIC WARFARE*

Abstract: The development and the use of lethal autonomous weapons systems (LAWS) in armed conflicts entails a dehumanization of the battlefield. Applied to LAWS, artificial intelligence calls into question the autonomy of the machine to assess the role of the human operator due to the doubts raised regarding the reliability and the predictability of a robot that will be confronted with hostile, changing, and complex environments. The unquestionable advantages of robotic warfare for the states that possess such technology are opposed to the also indisputable risks involved in the use of killer robots in armed conflicts. Moreover, the determination of the degree of autonomy of the machine and the role of the human operator are two interrelated and fundamental elements that nurture the debate regarding the intentional destruction of cultural heritage by war machines.
This chapter focuses on the discussion of the rules on international responsibility and the possibilities of attribution of acts of intentional destruction of cultural heritage to assess the effectiveness of International Law when faced with new scenarios in armed conflicts.

1. *Introduction*

Cultural heritage is vulnerable at war, and its protection against destruction remains a challenge for International Law. In an era of robotic warfare that challenge is even bigger in a field such as lethal autonomous weapons systems whose development will increase as conflicts are less fought as human-to-human battles and more with the use (and sometimes abuse) of autonomous warfare devices. As it entails a dehumanization of war, the advantages of robotic warfare are undeniable. Indeed, lethal autonomous robots are a force

* Double-blind peer reviewed content.

multiplier and are believed to be the future of war[1]. Marchant highlights their multiple benefits on the battlefield: the party to the conflict that possesses them can conduct military operations over a wider area, strike an enemy at a longer range and robots are cheaper to maintain and ensure fewer soldier casualties on the battlefield[2]. Without emotion or desire for self-preservation, robots will apply a «judgment» not clouded by human feelings. Four states and one international organization lead the global competition in the development of autonomous lethal systems. The United States spearheads the ranking, with military spending of 649 billion dollars (2018), which is higher than the combined investment of its four nearest competitors (China, Russia, South Korea, and the European Union)[3]. Some of these countries also oppose negotiations on a ban on lethal autonomous weapons.

When applied to lethal autonomous weapons, artificial intelligence brings into question the autonomy of the machine to assess the role of the human operator due to the doubts raised regarding the reliability and the predictability of a machine that will be confronted with hostile, changing, and complex environments. The unquestionable advantages of robotic warfare for the states that possess such technology are opposed to the also indisputable risks the use of killer robots in armed conflicts entails. Moreover, the determination of the role of the human operator (the more autonomy of the machine, the less human control) is a fundamental element for the discussion of International Law rules, such as the rules related to the intentional destruction of cultural heritage and state responsibility. The limits of International Law are found in situations of

[1] R. Sparrow, G. Lucas, *When Robots Rule the Waves?*, in *Naval War Collection Review*, 69, 2016, 4, p. 49.

[2] G.E. Marchant *et al.*, *International Governance of Autonomous Military Robots*, in *Columbia Science and Technology Law Review*, 2011, 12, p. 272.

[3] In 2018, China's military budget was 250 billion dollars, Russia had a military expenditure of 61 billion, South Korea's expenses were 43 billion and the 28 EU members had a combined budget of 28,1 billion. See J. Haner, D. Garcia, *The Artificial Intelligence Arms Race: Trends and World Leaders in Autonomous Weapons Development*, in *Global Policy*, 10, 2009, 3, p. 333.

robust artificial intelligence – with only a very limited if no human control of the machine – , malfunctions, and the responsibility of private parties – such as the manufacturers of parts of the robot's code or armed groups.

This chapter aims to discuss the legal framework of the intentional destruction of cultural heritage and its interaction with lethal autonomous weapons systems to assess if the existing human/state-centered rules on international responsibility are sufficient to address the challenge of the intentional destruction of cultural heritage by machines.

2. *The legal framework for the intentional destruction of cultural heritage*

As Luke states, the issues related to the protection of cultural heritage do not lie in the quantity of international legal instruments that refer to the question[4]. From the 1863 Lieber Code until the 1899 Hague Regulations, not only the principle that cultural heritage shall be protected in times of armed conflicts has been established but also that its destruction is forbidden and should be made the subject of legal proceedings (see Article 56 of the 1899 Hague Convention on Land Warfare).

The adoption of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, under the auspices of UNESCO, reinforced that protection. Article 4 of the Convention states the obligation to refrain from any act of hostility directed against cultural property situated in the territory of any Contracting Party to the treaty, whether the armed conflict is of international or internal character (Articles 18 and 19) and in situations of occupation (Article 5). The First Protocol to the 1954 Hague Convention (1954) regulates specifically the protection of cultural property during occupation, and the Second Protocol (1999) develops the rules of the 1954 Hague Convention and includes new obliga-

[4] E.C. Luck, *Cultural Genocide and the Protection of Cultural Heritage*, in *J. Paul Getty Trust Occasional Papers in Cultural Heritage Policy*, 2018, 2, p. 11.

tions such as precaution in attacks (Article 7), precautions against the effects of hostilities (Article 8), and individual criminal responsibility and jurisdiction (Articles 15 to 21)[5]. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property completes the protection, and Article 6(3) of the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage states that every state party to the Convention commits to not take «any deliberate measures which might damage directly or indirectly the cultural and natural heritage» situated on the territory of other states parties[6]. The Convention recognizes that cultural and natural heritage constitutes a world heritage. Therefore, as Higgins underlines[7], attacks on cultural heritage are attacks on the shared identity of humankind even if Ireland and Schofield stress that, as an agent of globalization, the 1972 UNESCO Convention was a promulgation of western notions of heritage[8].

However, these legal instruments do not directly address the intentional destruction of cultural heritage. The 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage is a non-binding instrument although it recognizes the importance of cultural heritage and defines its «intentional destruction» 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 offense to the principles of humanity and dictates of public conscience, in the

[5] See also C. Forrest, *International Law and the Protection of Cultural Heritage*, Routledge, New York, 2010.

[6] For an example of regional protection, see the *Council of Europe Convention on Offences relating to Cultural Property*, adopted on 5 May 2017 and that entered into force on 1 April 2022.

[7] N. Higgins, *The Protection of Cultural Heritage During Armed Conflict: The Changing Paradigms*, Routledge, New York, 2020, p. 16.

[8] See T. Ireland, J. Schofield, *The Ethics of Cultural Heritage*, in T. Ireland, J. Schofield, *The Ethics of Cultural Heritage*, Springer, New York, 2015, p. 3

latter case in so far as such acts are not already governed by fundamental principles of International Law» (Article II).

The need to focus on the intentional destruction of cultural heritage lies in the premise that cultural heritage is part of public space and creates an interactive link with the real life of people. As culture itself is seen as «the underlying dimension of sustainability»[9], it can be divided into three main categories: culture as capital (material heritage), culture as creativity (scientific and artistic creations), and anthropological view of culture (all material and spiritual activities and products of a given social group that distinguishes it from other social groups)[10]. Cultural heritage thus comprises «intangible cultural heritage» as defined by Article 2 of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage which includes: oral traditions and expressions (and language), performing arts, social practices and rituals, knowledge and practices concerning nature and the universe, and traditional craftsmanship[11].

Cultural heritage also is an important dimension of human rights because it is essential to «the sentiment of belonging to a collective, a social body and the transmission of this sentiment to future generations»[12]. The need to preserve and safeguard it is thus a human rights issue. As Blake states, the importance of cultural heritage does not lie only in itself, but also to its particular significance for individuals and communities. Cultural heritage serves the construction of identity on several levels: individual, social group,

[9] M. Gerner, *Managing Cultural Sustainability: Safe Haven, Cultural Property, and Sustainability in Best Practice*, in *Cultural Heritage and International Law. Objects, Means and Ends of International Protection*, edited by E. Lagrande *et al.*, Springer, Cham, 2018, p. 175.

[10] See J. Hall, *Les défis culturels de la Cour pénale internationale*, in *Cultural Heritage and International Law. Objects, Means and Ends of International Protection*, cit., p. 210.

[11] See Ch. Waelde, *ICH and human rights: ICH, contemporary culture and human rights*, in Ch. Waelde et al., *Research Handbook on Contemporary Intangible Cultural Heritage. Law and Heritage*, Elgar Publishing, Cheltenham, 2018, p. 147.

[12] F. Francioni, J. Gordley, *Enforcing International Cultural Heritage Law*, Oxford University Press, Oxford, 2013, p. 12.

nation, and universal[13]. Therefore, legal provisions protect the human rights dimension of cultural heritage, such as Article 15 of the 1966 International Covenant on Economic, Social and Cultural Rights which recognizes the right to cultural life, and Article 27 of the 1966 International Covenant on Civil and Political Rights, that states the right to heritage for minority communities. Moreover, in its 2016 Report[14], the Special Rapporteur in the field of cultural rights pointed out that the intentional destruction of cultural heritage entails a violation of several human rights: the right to be free from discrimination, the right to freedom of thought, conscience and religion, the right to take part in cultural life, and the right to freedom of artistic expression and creativity. It is therefore «impossible to separate a people's cultural heritage from the people itself and that people's rights»[15].

Armed conflicts affect cultural heritage in tangible and intangible ways. According to Stig Sorensen and Viejo-Rose, «the relationship between cultural heritage and conflict involves a dynamic of construction, destruction, and reconstruction»[16]. Any damage to cultural property belonging to any people means damage to the cultural heritage of all mankind, as stated in the Preamble of the 2003 UNESCO Declaration. Article 53 of 1977 Protocol additional I of the 1949 Geneva Conventions reinforces the 1954 Hague Convention and thus the legal protection of cultural heritage in times of conflict as it states the prohibition to commit acts of hostility directed against historic monuments, works of art, or places of worship which constitute the cultural and spiritual heritage of peoples, to use such objects in support of the military effort and to make such objects the target of reprisals. Article 16 of 1977 Protocol II

[13] J. Blake, *International Cultural Heritage Law*, Oxford University Press, Oxford, 2015, p. 273.

[14] *Report of the Special Rapporteur in the field of cultural rights*, Doc. A/71/317 of 9 August 2016.

[15] *Ibid.*, §52.

[16] *War and Cultural Heritage. Biographies of Place*, edited by M.L. Stig Sørensen, D. Viejo-Rose, Cambridge University Press, New York, 2015, p. 8.

extends the rule to non-international armed conflict, although the provision does not specifically forbid reprisals. Customary Rule 38 of international humanitarian law also states that special care must be taken to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes, and historic monuments unless they are military objectives, and that the property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity. The exception of «military necessity» is also found in Article 4 of the 1954 Hague Convention. The Special Rapporteur in the field of cultural rights expressed the concerns existing in the international community regarding the possible abuse of the military necessity exception and pointed out that only «imperative» military necessity is acceptable[17]. The Protocol II of the 1954 Hague Convention specifies the rule when it states that imperative military necessity only applies when the cultural property has been transformed into a military objective and it is impossible to obtain a military advantage by other means (Article 6).

The militarization of artificial intelligence and the creation of lethal autonomous weapons systems challenge the specific requirements of the intentional destruction of cultural heritage. Indeed, when (as it happens with LAWS) the weapon used in the act of destruction is not forbidden in International Law, the lack of prohibition casts doubt on the legal analysis of the destruction of cultural heritage when the action is not committed nor directed by a human but by a machine.

[17] *Report of the Special Rapporteur in the field of cultural rights*, op. cit., §63. See also J.N. Clark, *The Destruction of Cultural Heritage in Armed Conflict: The «Human Element» and the Jurisprudence of the ICTY*, in *International Criminal Law Review*, 2018, 18, p. 43.

3. *Lethal autonomous weapons systems as new weapons*

Garcia underlines that the militarization of artificial intelligence is the third major transformation in warfare (after the inventions of gunpowder and nuclear weapons) and that it poses problems for the stability of the international system[18]. As Sharkey states[19], the issues raised are numerous: LAWS will proliferate as they create a clear military advantage for the state that possesses them, their use can lower the threshold for armed conflicts as the decision to use them is easier than if troops were to be deployed, they are a good response to the increase of the pace of battle but can lead to a loss of control of the battlespace and a continuous global battlefield, the unpredictability of the interaction of the system with a competing hostile device and the speed interaction with devices from another state can result in accidental conflict, non-state actors – such as armed groups – or private companies could acquire and develop them, some governments could use LAWS to oppress their population, and, as machines, they are vulnerable to cyber-attacks. International bodies also consider other numerous potential risks: harm to civilians and combatants in contravention of International Humanitarian Law, lowering the threshold for the use of force, arms races and proliferation of such weapons, the possible hacking of those machines[20], and their use to destroy, directly or incidentally, cultural heritage.

In that context, the debate on the use of these machines raises the question of their definition. The Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems (GGE), created under the Convention on Conventional Weapons (CCW, 1980)[21], acknowledges states'

[18] D. Garcia, *Lethal Artificial Intelligence and Change: The Future of International Peace and Security*, in *International Studies Review*, 2018, 20, p. 335.

[19] N. Sharkey, *Why Robots Should Not Be Delegated with the Decision to Kill*, in *Connection Science*, 29, 2017, 2, pp. 182-183.

[20] *Ibidem*.

[21] The Group has been established following the decision of the High Contracting Parties to the *Convention on Prohibitions or Restrictions on the Use of Certain*

responsibility for the deployment of such weapons as well as the need for and the lack of consensus on a characterization of those systems[22]. However, proposals to define LAWS exist. The Netherlands describes LAWS as weapons that – without human intervention – select and attack targets that meet predefined criteria, following a human decision to deploy the weapon, but without the possibility to detain the attack by human intervention once it has been launched.[23] For the United Kingdom LAWS are «autonomous system[s] […] capable of understanding higher level intent and direction. From this understanding and its perception of its environment, such a system can take appropriate action to bring about the desired state. It can decide a course of action, from several alternatives, without depending on human oversight and control, although these may still be present»[24]. For the United States of America, LAWS are «a weapon system that, once activated, can select and engage targets without further intervention by a human operator». However, the American definition is broader than the one of the Netherlands and the United Kingdom as it includes «human-supervised autonomous weapons systems that are designed to allow human operators to override operation of the weapon system but can select and engage targets without further human input after activation»[25]. The definition of the European Parliament is more general: «weapon systems without meaningful human control over the critical functions of selecting and attacking individual targets»[26].

Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects in the Fifth Review Conference, Doc. CCW/CONF.V/10.

[22] *Report of the 2017 Session of the Group of Governmental Experts on Lethal Autonomous Weapons* (LAWS), Doc. CCW/GGE.1/2017/3, 22 December 2017.

[23] Statement of the Netherlands, GGE, CCW, Geneva, 27 August 2018.

[24] Statement of the United Kingdom, GGE, CCW, Geneva, 10 April 2018.

[25] Cf. *The Weaponization of Increasingly Autonomous Technologies: Concerns, Characteristics and Definitional Approaches*, UNIDIR, Vol. 6, 2017.

[26] European Parliament Resolution of 12 September 2018 on Autonomous Weapons Systems (2018/2752(RSP)), Official Journal of the European Union (2019/C433/10).

The absence of consensus on the LAWS definition lays essentially in the belief by several states that these advanced systems do not yet exist[27]. In this sense, the GGE highlighted that it may not be sufficient to take into consideration exclusively the technical characteristics of the devices due to the rapid evolution of technology in the field of artificial intelligence[28]. Already in 2009, the US Department of Defence had recognized that, in a few years, LAWS would probably be able to take critical decisions without human intervention[29]. Thus, the impact of artificial intelligence on LAWS is without question.

However, traditionally, robotics and artificial intelligence have been two separate fields of study. Robot autonomy would then be included in robotics that pertains to engineering, the «physical world» as defined by Burri[30], while AI is a piece of computer code that belongs to the «digital world». The progress of robotics has been slower – still is – than that of IA. However, in the study of lethal autonomous weapons systems, both disciplines, robotics and artificial intelligence, must be analyzed jointly since such devices prejudge the existence of both components[31].

Indeed, a killer robot equipped with AI will adapt its responses to changing circumstances and decide on its own how and when to carry out its task. Some authorized voices deny that a machine would ever reach that level of autonomy, considering it highly unlikely that – even with artificial intelligence – the technology could produce a system endowed with such a sophisticated perception that it could

[27] For the positions of the United Kingdom, France, and Spain, see Statement of the United Kingdom, GGE, CCW, Geneva, 10 April 2018; Statement of France, GGE, CCW, Geneva, 27 August 2018; Statement of Spain, GGE, CCW, Geneva, 9 April 2018. Cf. also R. Jacobson, *Lethal Autonomous Weapons Systems: Mapping the GGE Debate*, in *DIPLO Policy Papers and Briefs*, 2017, 8, p. 2.

[28] *Report of the 2018 Session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems*, Doc. CCW/GGE.1/2018/3, 23 October 2018.

[29] Unmanned Aircraft Systems Flight Plan 2009-2047, U.S. Air Force, 2009.

[30] T. Burri, *The Politics of Robot Autonomy*, in *European Journal of Risk Regulation (EJRR)*, 7, 2016, 2, p. 359.

[31] *Ibidem*.

take, in a totally autonomous way, decisions based on its own intention and on the understanding of the environment in which it operates[32]. However, other authors remind us that robotics has existed for more than a century and that true progress is made not in the machine but, above all, in its autonomy, that is, in artificial intelligence[33]. In that sense, some believe that the laws of physics are more likely to limit the capabilities of LAWS than the deficiencies in AI[34].

As Rahwan and others note «machine behavior […] cannot be fully understood without the integrated study of algorithms and the social environment in which these algorithms operate»[35]. The nature of the environment, the interaction of the machine with it, and the complexity of the task at hand are factors that affect the predictability and reliability of those systems[36]. While algorithms are predictable «in their output for a given input»[37] – because they are rule-based – , their ubiquity, complexity, and, sometimes, opacity entail their possible unpredictability when applying a predictable output to a given circumstance[38]. To reach predictability and to make the robot reliable, machine-learning, including deep learning, is a common and powerful method, through the assignment of an objective the LAWS must achieve based on the data at their disposal. This way, the system creates its own knowledge and uses it to achieve the task[39]. The bigger the «intelligence» of the machine, the bigger its autonomy.

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[32] *Lethal Autonomous Weapon Systems (LAWS)*, Speaker's summary, Stroud-Turp, Ministry of Defence, United Kingdom in Autonomous Weapon Systems: Implications of Increasing Autonomy in the Critical Functions of Weapons Experts meeting, Versoix, Switzerland, 2016, p. 57.

[33] T. Burri, *op. cit.*, p. 360; J. Haner, D. Garcia, *op. cit.*, p. 331.

[34] S. Russell, *Take a Stand on AI Weapons*, in *Nature*, 2015, 521, p. 416.

[35] I. Rahwan *et al.*, Machine Behaviour, *Nature*, 2019, 568, p. 477.

[36] *Autonomy, Artificial Intelligence and Robotics: Technical Aspects of Human Control*, International Committee of the Red Cross, Geneva (2019).

[37] *Ibidem*.

[38] *Ibidem*. See also I. Rahwan *et al.*, *op. cit.*, p. 478.

[39] See *Autonomy, Artificial Intelligence and Robotics*, *op. cit.*, p. 14; *The Weaponization of Increasingly Autonomous Technologies: Artificial Intelligence*, in *UNIDIR*, 8, 2018, p. 2.

The use of LAWS in armed conflicts can affect cultural heritage through its destruction by a direct military attack, whether committed by agents of a state or private parties, such as non-state armed groups, or as collateral damage, making cultural property and heritage particularly vulnerable[40].

4. *The challenge to the state/human-centered framework: intentional destruction of cultural heritage by a machine as a violation of International Law and impact on attribution*

Despite the evolution over the last fifty years, International Law is mainly focused on the state as its primary subject. The inclusion of lethal autonomous weapons systems on the battlefield entails a change of paradigm the actual international rules do not seem to be adequate to address. Regarding the intentional destruction of cultural heritage, the existing legal framework focuses on state responsibility and individual criminal responsibility. In both cases, the link is the human element. However, the concept of LAWS itself entails a lack of human interaction. This new reality is a challenge the international community needs first to recognize and then address.

4.1. *The human element as a requirement for the intentional destruction of cultural heritage in International Criminal Law*

As discussed previously and stating the words of the Concept on cultural heritage in conflicts and crises of the European Union External Action Service, «cultural heritage is by nature politically sensitive, highly complex with a high degree of symbolic significance, emotionally charged and with a risk of political manipulation concerning its history, ownership and use»[41].

[40] See M. Gerner, *op. cit.*, p. 176.

[41] Council of the European Union – European External Action Service, *Concept on Cultural heritage in conflicts and crises. A component for peace and security in*

The intentional destruction of cultural heritage is characterized by the discriminatory intent of the perpetrators of such acts. As Lenzerini states, the goal is not usually to destroy cultural heritage *per se* but rather to affect the communities/peoples for which the latter is important and an essential element of their life[42]. Therefore, the *mens rea* of the wrongdoers is to target a human community, including the international community as a whole. The latter is reinforced by several resolutions adopted by the United Nations Security Council under Chapter VII of the Charter related to specific situations, such as resolutions 1267 (1999), 1483 (2003), 2056 (2012), 2170 (2014), 2139 (2014), 2199 (2015), and 2249 (2015). However, resolution 2347 (2017) was the first one the Security Council passed that aims solely attention to the destruction and trafficking of cultural heritage during armed conflict, and the resolution is not focused on one specific situation having, therefore, a general geographical scope. In the resolution, the Security Council condemns the unlawful destruction of cultural heritage, links its protection with the maintenance of international peace and security even though the resolution itself was not adopted under Chapter VII of the UN Charter, and recognizes that any attack against cultural heritage can be an attempt to deny historical roots and cultural diversity and can amount a war crime.

The criminalization of the intentional destruction of cultural heritage as a war crime had already been established in Article 3(d) of the 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 7 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, and Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the 1998 Rome Statute that characterize as a war crime «intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and

European Union's external action, Doc. 9962/21 of 18 June 2021.

[42] F. Lenzerini, *Intentional Destruction of Cultural Heritage*, in F. Francioni, A.F. Vrdoljak, *The Oxford Handbook of International Cultural Heritage Law*, Oxford University Press, Oxford, 2015, p. 76.

wounded are collected, provided they are not military objectives». Article 8 of the Rome Statute does not consider the outcome of the attack or the effective destruction of the building[43] according to the interpretation done by the Trial Chamber VIII in the Al-Madhi Case[44]. Neither does it address the moment of the attack or its duration, although the perpetrator must intend the buildings to be the object of the attack, whether the intent is direct or indirect (*mens rea*). Regarding the *actus reus*, the buildings are protected if they are not military objectives. In addition, the intentional destruction of cultural property must not only happen during an armed conflict – whether of international or non-international character – but must also be closely connected to that armed conflict[45].

The unlawful and deliberate destruction of cultural property can amount not only to war crimes but also to crimes against humanity and even genocide. The International Criminal Tribunal for the Former Yugoslavia recognized in several judgments that, as customary International Law, the intentional destruction of cultural property could amount to a crime against humanity[46] if the destruction is discriminatory and whether committed in the context of an armed conflict or in time of peace[47]. However, if committed in time of peace, the destruction must be linked to another act. The Office

[43] Regarding the incidental damage because of an attack, see The Office of the Prosecutor, *Policy on Cultural Heritage*, International Criminal Court, June 2021, §49.

[44] Trial Chamber VIII, The Prosecutor v. Ahmad Al Faqi Al Madhi, Judgment, Doc. ICC-01/12-01/15, 27 September 2016, §§47-48. See also K. Wierczynska, A. Jakubowski, *Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgement in the Al-Madhi Case*, in *Chinese Journal of International Law*, 2017, pp. 695-721.

[45] See R. O'Keefe, *Cultural Heritage and International Criminal Law*, in *Sustainable Development, International Criminal Justice, and Treaty Implementation*, edited by S. Jodoin, M-C. Cordonier Seger, Cambridge University Press, New York, 2013, p. 122.

[46] See, for instance, Prosecutor v. Babic, Trial Chamber Judgement, Doc. IT-03-72-S, 29 June 2004, and Prosecutor v. Krajisnik, Judgement, Doc. IT-00-39-T, 27 September 2006.

[47] See R. O'Keefe, *op. cit.*, p. 141.

of the Prosecutor of the International Criminal Court notes that «crimes against or affecting cultural heritage are often committed in the context of an attack against a civilian population»[48], particularly a part of the crime of persecution based on race, religion, gender, or political views (Article 7(1)(h) of the 1998 Rome Statute).

Finally, when the destruction of cultural heritage does not seek only physical destruction but rather the identity or the history of a group of people, that act can amount to a crime of genocide. Although cultural genocide is not part of International Law as such, due to the lack of consensus to include it in the 1948 Convention for the Prevention and Sanction of the Crime of Genocide that requires the physical or biological destruction of a group (Article II), the intentional destruction of cultural heritage can be evidence of the specific intent (*dolus specialis*) required by Article 6 of the 1998 Rome Statute[49].

Most of the acts that amount to a war crime, crimes against humanity, or genocide can be committed using lethal autonomous weapons systems. The machine can kill, torture, inflict great suffering, attack the civilian population, etc. Regarding cultural heritage, LAWS can destruct it, attack civilian objects, and cause excessive damage even if incidentally. However, International Criminal Law focuses solely on a person being held responsible for the commission of those acts, whether as the author, an accomplice, or a collaborator. Despite the lack of human interaction that defines LAWS, at some point, humans are the ones that create the machines and that give them the original instructions to perform their mission.

Indeed, for a robot to be effective, several elements must be taken into consideration. The mission itself and the environment will determine the tasks that must be performed. The technology capability will also drive the tasks. However, the resources, the costs, the interoperability and, most important, the Law (rules of engage-

[48] The Office of the Prosecutor, *op. cit.*, §61.

[49] See *Report of the Special Rapporteur in the field of cultural rights*, *op. cit.*, §29. See also Office of the Prosecutor, *op. cit.*, §79.

ment, International Law, national regulations, etc.) will be the constraints.

According to 1951 Fitt's list[50], machines are better than humans at responding quickly to control signals, applying great force smoothly and precisely, storing information briefly, erasing it, reasoning deductively, and doing many complex operations at once. Even if the list is outdated and the distinctions are simplified, Arkin pointed out that LAWS will follow the rules of engagement of the laws of war better than humans[51]; as Smith points out: «LAWS will dot degrade, rape, pillage or kill for pleasure»[52]. However, many are the risks of automation control: automation bias-dependency, out-of-the-loop human performance, poor situation, and mode awareness, unexpected action, mistrust and under-use, unresponsiveness to change, and skill fade[53].

The Bonner-Taylor PACT System[54] states six levels of autonomy depending on the role of the computer in the action of the human operator. In level 0, the operator commands and retains full authority (teleoperation). From level 1 to level 4, the human is assisted by the computer. In level 1, the machine will advise the pilot only if requested (he/she still retains full authority). The system will also act as an advisor in level 2, even if not requested. In level 3, the computer will back up the human operator by giving advice and feedback on the action. The switch occurs in level 4 when it is not

[50] P.M. Fitts, *Human Engineering for an Effective Air-navigation and Traffic-control System*, 1951.

[51] R.C. Arkin, *Governing Lethal Behaviour in Autonomous Robots*, Chapman and Hall/CRC, New York, 2009.

[52] P.T. Smith, *Just Research into Killer Robots*, in *Ethics and Information Technology*, 21, 2019, p. 285. See also E. Burton *et al.*, *Ethical Considerations in Artificial Intelligence Courses*, in *AI Magazine*, 2017, p. 24.

[53] R.M. Taylor, *Capability, Cognition and Autonomy*, RTO-MP-088 NATO, 2002, p. 4. See also S. Reeves, W. Johnson, *Autonomous Weapons: Are You Sure These Are Killer Robots? Can We Talk about It?*, in *The Army Lawyer* DA PAM 27-50-491, 2014, p. 25.

[54] The Pilot Authorization and Control of Tasks (PACT) System has been developed to determine the level of autonomy of Unmanned Aerial Systems, Cf. R.M. Taylor, *op. cit.*, p. 17.

the computer that backs the pilot but otherwise: the human operator takes control of the machine, which will act unless revoked by the human. In level 5, the machine will act automatically unless the pilot interrupts it. One new level must be added for LAWS: the robot will perform the mission without human intervention.

The relation human-machine is the first challenge when discussing killer robots[55]. Under International Law, the determination of the autonomy of the machine[56] is essential for the assessment of the challenges of the International Humanitarian Law concepts of proportionality and distinction, and for the determination of international responsibility for instance, as the outcome will dramatically differ when the robot is only supervised or has, what Burri defines[57] as, «task-level» autonomy or is an autonomous self-learning system. Therefore, the focus must be placed, contrary to the Bonner-Taylor Pact, on the role of the human operator As Hall outlines, «autonomy is not exclusively about the intelligence of the machine but rather its human interface»[58].

In teleoperation, the operator retains full authority as the reactions of the machine are remotely controlled with the issue of commands step by step for the robot to complete. An automated system is a pre-programmed system, which is not autonomous as the behavior and the reaction will be in accordance with the fixed built-in functionality. The systems teleoperated or automated are not autonomous. A robot with «task-level» autonomy can perform the task autonomously, after having received a command from the human operator. This autonomous non-learning system is not an automated system as the built-in functionality or set of rules are fixed and dictate the behavior of the machine which is goal-directed. An

[55] See H. Huelss, *Deciding on Appropriate Use of Force: Human-machine Interaction in Weapons Systems and Emerging Norms*, in *Global Policy*, 10, 2019, 3, p. 356.

[56] See B. Boutin, T. Woodcock, *Aspects of Realizing (Meaningful) Human Control: A Legal Perspective*, Research Paper Series, No. 7, Asser Institute, May 2022.

[57] T. Burri, *op. cit.*, p. 343.

[58] B.K. Hall, *Autonomous Weapons Safety*, in *JFQ B6*, 2017, p. 87.

autonomous self-learning system (as LAWS) will act according to a modifiable set of rules to improve its goal-directed reactions and behavior.

Autonomy raises several dilemmas as humans are not only physically distanced from the action[59] but also «detached from the decision to fire/kill and their execution»[60]. As Solovyeva and Hynek point out, LAWS not only change the nature of warfare, but also raise legitimate concerns about the predictability of the performance of the machine, the dehumanization of lethal/destruction decision-making, the depersonalization of the enemy, and, possibly, the non-combatant, the nexus between the humans and machines in coordinated operations, the strategic considerations on the impact of LAWS on international security and, finally, the use of LAWS in lawless zones[61]. Even if LAWS intelligence is narrowed, as it is limited to a domain of knowledge, as they are autonomous, they function out of human control once deployed. However, human interaction and presence will still exist at the moment of the design and development of the machine. That «control by design» differs from the «control in use»[62] that, in the case of LAWS, will not exist anymore.

The lack of interaction between humans and machine entails that those artificial moral agents – as LAWS are – cannot be held morally responsible for their wrong actions but are morally accountable for their wrongdoings[63]. However, for a machine to make ethical decisions, that machine must «possess intentions and auton-

[59] As it happens with systems that are remotely operated such as drones, unmanned ground, and underwater vehicles, See A. Solovyeva, N. Hynek, *Going Beyond the Killer Robots Debate*, in *Central European Journal of International and Security Studies*, 12, 2018, 3, p. 170.

[60] *Ibidem*.

[61] *Ivi*, pp. 191-192.

[62] *Autonomy, Artificial Intelligence and Robotics: Technical Aspects of Human Control*, International Committee of the Red Cross, 2019, p. 8.

[63] W.A. Bauer, *Virtuous vs. Utilitarian Artificial Moral Agents*, in *AI & Society*, 2020, 35, p. 263.

omy that are identical to human intentions and autonomy»[64]. The requirement is highly difficult to meet nowadays as it is doubtful that AI can reach that level at this point. Therefore, the behavior of the machine will ultimately be the result of a programming choice if the system is not given the ability to update the values that have been originally assigned and to make ethical autonomous choices[65]. Once it is given such ability, the concern will raise as it will be necessary to find and select the data for the machine to use in making moral judgments and find a method to implement them as well as decide what will be the limits of the robot's assessment for an effective moral decision making[66]. Although autonomous systems are less predictable than the machines controlled to some extent by humans, their behavior is necessarily originally programmed by humans even if those humans no longer make the final decision. However, the determination and proof of the degree and level of human interaction with the robot remain highly difficult in cases of prosecution for actions that amount to international crimes.

4.2. *State's international responsibility: attribution as a challenge*

Neither the 1954 Hague Convention nor its two Protocols regulate state responsibility for the destruction of cultural heritage. However, Article VI of the 2003 UNESCO Declaration states that «a state that intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish any intentional destruction of cultural heritage of great importance for humanity […] bears the responsibility for such destruction, to the extent provided for by International Law». Even if the legal schol-

[64] K.W. Miller *et al.*, *This Ethical Trap Is for Roboticists, not Robots: On the Issue of Artificial Agent Ethical Decision-Making*, *Science and Engineering Ethics*, 2017, 23, p. 390.

[65] *Ivi*, p. 397.

[66] W. Wallach, C. Allen, *Framing Robot Arms Control*, in *Ethics and Information Technology*, 15, 2013, p. 129.

ars are divided regarding the character of the obligations recognized in Article VI[67], the Four 1949 Geneva Conventions and their additional Protocols state several rules that are also international custom, such as Article 3 of the Four Geneva Conventions, Article 16 of Protocol II, and Article 53 of Protocol I[68].

The lack of regulation of LAWS raises the question of whether human control of the machine, should it exist, is relevant for the application of the existing international rules. The GEE always outlined the human accountability and responsibility for decisions on the use of force, including in armed conflicts[69].

Nevertheless, the Group identified[70] International Law is to apply only to two out of six phases of the activities related to LAWS. The predevelopment phase (0) starts with the political decision to develop LAWS, which entails research and development (phase 1). That first stage (phases 0, 1, and 2) will end with the testing, evaluation, and, eventually, certification of the machine (phase 2). During the first stage, national law will be applicable as well as industry standards for phases 1 and 2. The second stage is directed to the effective use of the weapon: it begins with the deployment, training, command, and control processes (phase 3) in which International Law rules are of application. The norms will also be relevant in phase 4 (effective use and possible abort). However, international rules are absent in the post-use assessment (phase 5). This conclusion is not surprising. The International Court of Justice stated[71] in 1996 that some weapons – back at the time, nuclear weapons – are not authorized nor forbidden by International Law, being their

[67] See P. Vigni, *Cultural Heritage and State Responsibility*, in F. Francioni, A.F. Vrdoljak, *The Oxford Handbook of International Cultural Heritage Law*, cit., p. 610.

[68] See also *Protection of Cultural Property: Military Manual*, UNESCO, 2016.

[69] *Report of the 2018 Session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems*, Doc. CCW/GGE.1/2018/3, 23 October 2018.

[70] *Ibidem*.

[71] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, 8 July 1996, ICJ Reports, 1996, p. 226.

use – for offensive or defensive purposes – the core element to determine breaches of International Law.

Thus, the lack of regulation of certain weapons, as LAWS, obliges to focus on the use states do of the machines for an assessment of the challenges those robots pose to International Law. As Wright stressed in 1967: «It may be that some weapons should be regarded as inherently offensive, but no agreement to this effect has been made, and general International Law, following the opinion of most strategists, has regarded the offensive or defensive character of weapons as dependent on their intended use. Any weapon can be used either defensively or offensively»[72]. Wright's reasoning related to the Cuban quarantine applies to LAWS[73] as those machines can be used for offensive actions (that are more likely to breach International rules, such as the principle on the prohibition of the use of force) or for defensive purposes (for instance, when the state is acting in self-defense as a response to an armed attack). No state will suggest that robots, including LAWS, should not be designed to comply with existing laws, including international rules[74]. However, the mere existence of those systems increases exponentially the risk of possible violations of International Law. Cultural heritage can be destructed in offensive and defensive operations. Therefore, the intended use of the weapons is here of less significance. In this connection, the International Committee of the Red Cross sug-

[72] Q. Wright, *The Cuban Quarantine*, in *American Journal of International Law*, 57, 1963, p. 551.

[73] As the ICCR stated in *A Guide to Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977*, 88 864 in *International Review of the Red Cross*, 2006, 88, p. 933. See also Liu, *Categorization and Legality of Autonomous and Remote Weapons Systems*, in *International Review of the Red Cross*, 2012, 94, p. 627.

[74] A. Sharkey, *Can Robots Be Responsible Moral Agents? And Why Should We Care?,* in *Connection Science*, 27, 2017, 3, p. 210. Article 36 of the Addition Protocol I to the Geneva Convention states that «in the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of International Law applicable to the High Contracting Party».

gests that is essential to retain human agency when deciding to use force in order «to preserve a direct link between the intention of the human and the eventual operation of the weapon system»[75]. The GGE insists on the necessity to ensure human-machine interaction to guarantee the compliance of LAWS with applicable international rules[76], specifically, but not exclusively, in two areas of International Law: the rules on the use of force and International Humanitarian Law[77], reminding that IL imposes obligations to states and not to machines. According to, GGE and the ICCR, the binary liability model makes the human (state) at fault[78].

However, as Wagner suggests, «the fact that humans are in the loop should not absolve […] systems from being scrutinized legally»[79]. For instance, data collection allows target identification because of the processing of the information by algorithms that scan human behavior. A non-lethal machine in charge of data recollection makes it possible for a lethal machine, once deployed, to execute its task, which can be the destruction of cultural heritage by direct action or as collateral damage. If both machines are autonomous, all the necessary steps leading to eventual destruction have been performed without human intervention. Therefore, the re-

[75] *Ethics and Autonomous Weapons Systems: An Ethical Basis for Human Control?*, submitted by the International Committee of the Red Cross, Doc. CCW/GGE.1/2018/WP.5, 29 March 2018, at 9.

[76] *Report of the 2019 Session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems*, Doc. CCW/GGE.1/2019/3, 25 September 2019.

[77] See *Report of the 2018 session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems*, Doc. CCW/GGE.1/2018/3, 23 October 2018.

[78] The official Reports for the 2020 and 2021 sessions of the GGE are not yet published. However, States' positions have not changed on the need to preserve human (state) responsibility. The documents, interventions, and national positions of the 2020 and 2021 sessions are available at *Convention on Certain Conventional Weapons – Group of Governmental Experts on Lethal Autonomous Weapons Systems, UNODA Meetings Place, United Nations*: *https://meetings.unoda.org/meeting/ccw-gge-2020/* and *https://meetings.unoda.org/meeting/ccw-gge-2021/*.

[79] B. Wagner, *Liable, but not in Control? Ensuring Meaningful Human Agency in Automated Decision-Making Systems*, in *Policy and Internet*, 2019, 11-1, p. 116.

sponsibility can be difficult to establish. If the non-lethal machine was deployed by a state, that state will be held responsible according to Article 4 of the 2001 Draft Articles on State Responsibility of Internationally Wrongful Acts (ARSIWA) because of the original decision to use the machine. If the destruction was a joint operation, both states A (that, for instance, deployed the non-lethal machine) and B (that deployed the lethal system) will be responsible under Article 16 ARSIWA, etc.

However, what happens if the data collection is incorrect and, as a result, cultural heritage is destroyed? International rules on responsibility apply only to subjects of International Law, and not to private companies. The manufacturer of the weapon or of the defective parts of the weapon – including the software – if it is not the state itself, could only *prima facie* be held accountable under domestic law. The same problem arises if non-state actors, such as a terrorist group, take control of LAWS. The acts of those private parties (individuals or groups of individuals) fail to fall within the scope of direct attribution as established in international customary law. Indeed, as pointed out above, the conduct of the agents or organs of a state entails direct attribution. However, non-state actors do not fall into the category of persons or entities empowered by the law of the state to exercise elements of the governmental authority (Article 5 ARSIWA) nor are they organs placed at the disposal of a state by another state (Article 6 ARSIWA). Armed groups such as Al-Qaeda, Hezbollah, Boko Haram or ISIS, merely use the territory of the state to establish training camps and the logistical infrastructures necessary to plan, organize and execute their actions. The relationship between these groups and the territorial state can be one of tolerance (such as in Afghanistan with Al-Qaeda or Lebanon with Hezbollah), fight (such as in Syria and Iraq with ISIS), or mere indifference, but the private armed groups never act as organs of the state in the sense of Article 4, 5 o 6 ARSIWA. Nor do the states on which territory these groups are located usually acknowledge and accept as their own the wrongful conduct of the non-state actor, which excludes the application of Article 11 ARSIWA.

Therefore, customary law as crystallized in ARSIWA determines that breaches of International Law (as unlawful use of LAWS) committed by non-state actors can only be attributed to a state in three situations: 1) the group is acting on the instructions or under the effective control of the state when carrying out the wrongful conduct (Article 8 ARSIWA and *Nicaragua case, 1986*)[80]; 2) the group is exercising elements of the governmental authority in the absence or default of the official authorities (Article 9 ARSIWA); or, 3) the group is an insurrectional movement that becomes the new government of the state or succeeds in establishing a new state (Article 10 ARSIWA).

Attribution under Article 9 is relatively infrequent since the exceptional circumstances the provision deals with (revolution, armed conflict, or foreign occupation that entails the absence, inoperability, or inexistence of official authorities) rarely occur, and Article 9 also includes a normative element as it requires for those specific circumstances to call for some exercise of governmental functions. Under Article 10 ARSIWA, the attribution of the conduct of an insurrectional movement to a state demands for the movement to have succeeded in establishing a new state or as the new government of a state. These two provisions have a limited, if none, operability when discussing the attribution of the conduct of non-state actors. In contrast, Article 8 has real significance when assessing the possibility to attribute an armed attack to a state. The provision states two alternate requirements that lead to its application: the individual breaches of an international obligation acting under the instructions of agents or organs of a state. As the ICJ declared in the *Nicaragua case*, those persons must be in the pay and acting on the instructions of the agent or organ, which can include supervision and/or logistic support. Effective control is the other ground of attribution. Effective control implies that the individual(s) had no real autonomy in relation to the state. Therefore, the person(s) would

[80] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America). Merits, Judgment. I.C.J. Reports 1986,* p. 14.

not have succeeded in the violation of International Law without the support, assistance, or aid provided by the agents or organs of the state. Nevertheless, states usually refuse to recognize and accept the attribution of wrongful acts committed by private parties, and the restrictive interpretation of the criterion of effective control by the International Court of Justice makes it quite impossible for a state victim of an unlawful LAWS action decided by an armed group to get reparation.

However, due to the situation of governance gap that exists when discussing the intentional destruction of cultural heritage by LAWS, shared responsibility might be a useful framework to better allocate international responsibility among multiple actors (state, manufacturer, armed group, etc.)[81]. Shared international responsibility refers to situations where multiple actors «contribute to a single harmful outcome, and legal responsibility for this harmful outcome is distributed among more than one of the contributing actors»[82]. The sum of the actions of the wrongdoers leads to an undesirable result. However, «the proportion of harm attributable to each contributing actor cannot be determined» even if their responsibility if distributed between them separately». Moreover, the different contributions to the harmful outcome must trigger the legal responsibility of the wrongdoers. The concept of shared responsibility is closely linked to the Law of state responsibility. It, therefore, entails the breach of an international obligation (Article 2 ARSIWA) by different actors. It is not essential for the obligation to be shared as long as all the obligations violated have overlapping content. The wrong behavior must also be attributed to each of the actors (Articles 4 and seq. ARSIWA). The advantage shared responsibility gives is that the attribution is individual to each of the actors

[81] A. Nollkaemper, *The Duality of Shared Responsibility,* in *Contemporary Politics*, 24, 2018, 5, p. 524. See also M. Karavias, *Shared Responsibility and Multinational Enterprises*, in *Netherlands International Law Review*, 91, 2015, p. 62.

[82] See A. Nollkaemper, I. Plakokefalos, *Principles of Shared Responsibility in International Law. An appraisal of the State of the Art*, Cambridge University Press, New York, 2014.

for each violation. However, when the actors involved are not subjects of International Law, the classic rules on international responsibility find their limit.

Even the due diligence principle would be quite unusual for LAWS concerning the destruction of cultural heritage. However, it must not be discarded due to the general obligation states have to prevent the intentional destruction of cultural heritage. As a general principle, due diligence is defined as an obligation of conduct on the part of a state. The state's failure to comply with the requested standard of conduct entails international responsibility. The state's duty of due diligence has historically had its main impact on the state's international responsibility for internationally wrongful acts committed by private persons (indirect attribution). However, due diligence requires 1) for the state, to have effective control over its territory (including the obligation the state has to take all necessary measures to ensure such control), 2) to make a balance of the interests the state had to protect, and 3) the assessment of the predictability of the damage, after having considered all the possible and reasonable efforts the state did to get enough knowledge of the risks and threats[83].

Applied to LAWS used by private actors, due diligence requires the territorial state 1) to have knowledge of the possession of LAWS by armed groups located on its territory, 2) of the intent of the group to use them against another state, and 3) to not have taken all the necessary measures to prevent the damaging wrongful act or, if the wrongdoing already happened, to not have taken action to avoid further wrongful actions and punish the wrongdoers.

It also seems doubtful that AI (and thus LAWS) can comply with the IHL principles of distinction, proportionality, and military necessity. Every state is under the obligation to distinguish be-

[83] See N. Mc Donald, *The role of Due Diligence in International Law*, in *International and Comparative Law Quaterly*, 68, 2019, 4, p. 1041; J. Kulesza, *Due diligence in International Law*, Brill, Boston, 2016; T. Koivurova, *Due diligence*, in *Max Planck Encyclopedia of International Law*, Oxford University Press, New York, 2010.

tween combatants and non-combatants (civilians, prisoners of war, the injured, etc.), and has a duty to refrain from targeting non-combatants and to prevent the destruction of cultural heritage. States would have to ensure that LAWS are able, in every circumstance, to make the difference between civilians and civilian objects and lawful military targets. In the same sense, attacks that may be expected to cause loss of civilian life, injury to civilians, and damage to civilian objects are prohibited. However, IHL defines the concept of civilian and civilian objects in a negative sense[84], which entails a high difficulty to translate this negative definition to a computer code: «civilian objects are all objects which are not military objectives» (Article 52(1) Protocol I to the 1949 Geneva Conventions). Moreover, the high complexity of the environment in an armed conflict, with unexpected circumstances and, sometimes, ambiguous situations, increase the range of error those weapons can make. Other concerns are the threat to human dignity LAWS are, as a machine will kill a human being or destroy cultural heritage that is essential for a group of people.

Those concerns need to be addressed by the international community. Some states and organizations[85] call for a ban on the development of those weapons. However, the clear dangers LAWS pose (and among them, specifically, the loss of human authority regarding the decision to attack) are minimized by some states that outline the benefits those weapons have. The call for a new international treaty to prohibit those weapons will probably not solve the problem if the states that develop, possess, and use them are not on board. In that sense, none of the Big Five is favorable to a ban being

[84] The definition of «civilian and civilian population» of Article 50 of the Additional Protocol I to the Geneva Conventions states as follows: «A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian. 2. The civilian population comprises all persons who are civilians».

[85] Such as the European Parliament, which repeatedly asked for a ban since 2014, see, for instance, its resolution of 12 September 2018, Doc. 2018/2752(RSP).

China the only country that called for a ban regarding the use but not the production and development of those weapons in 2018, a position not repeated since then.

5. *Conclusion*

Several international legal instruments protect cultural heritage although none of them addresses solely its intentional destruction. However, the existing international rules make the deliberate destruction of cultural heritage an international crime, a breach of Human Rights Law and International Humanitarian Law, and a threat to international peace and security. The challenge lies in the attribution of the wrongful action to a state when the act of destruction has been committed by a machine instead of by a human being. The rules on international responsibility require a human element that is *per se* non-existent when discussing LAWS. As the actual rules request some degree of human control over any weapon, even if only to abort the mission at the last moment, the limits of the existing human/state centered rules confirm the need to regulate the use of those weapons for a comprehensive International Law as an answer to the specific challenges those systems pose. The coming of an increasingly robust AI compels the international community to find positive legal solutions to avoid an erosion of the international system and to assure the protection of cultural heritage in time of peace and in the context of an armed conflict.

Elisa Baroncini

THE UNESCO WORLD HERITAGE CONVENTION IN INTERNATIONAL INVESTMENT ARBITRATION*

Abtract: Ratified by 194 countries, the World Heritage Convention is one of the best-known treaty instruments in the general culture and one with the greatest impact on local realities as well as a central element of international cultural heritage law. Increasingly the object of interpretation in national and international judgments, the 1972 UNESCO Convention does not fail to be a benchmark also in international investment arbitration, and it is to this jurisprudence that the present chapter is dedicated. The awards on the relation between investment protection and world heritage protection have been selected and considered. The analysis of such international investment arbitration jurisprudence reveals a constantly growing attention by the adjudicators to the respect of sites of outstanding universal value. This involves the duty, for the investor, before planning and starting his/her business, to get the necessary information on the national and international rules disciplining the land and assets where a UNESCO site is present. Only a diligent and responsible investor can thus be protected by the rules of international investment law when his/her investment also concerns a site having an exceptional value transcending national borders.

1. *Introduction*

With the definition of the heritage of the humankind, or 'world heritage', the 1972 UNESCO Convention[1] made a fundamental

* Double-blind peer reviewed content.

[1] *Convention Concerning the Protection of the World Cultural and Natural Heritage* (World Heritage Convention, WHC) adopted in Paris on 16 November 1972 and entered into force on 17 December 1975, in *United Nations Treaty Series,* 1977, Vol. 1037, p. 151. The literature devoted to the 1972 UNESCO Convention is extensive: see *ex multis La protezione del patrimonio mondiale culturale e naturale a venticinque anni dalla convenzione dell'UNESCO del 1972*, edited by M.C. Ciciriello, Napoli, 1997; P. Strasser, *"Putting Reform Into Action" - Thirty Years of the World Heritage Convention: How to Reform a Convention without Changing Its Regulations*, in *International Journal of Cultural Property*, 2002, pp.

contribution to the protection of cultural goods and natural and landscape beauties. When such properties and sites have an 'outstanding universal value' (OUV)[2], i.e. an exceptional value that transcends national borders, they no longer represent a wealth just for the country that expresses them and in which they are located. Due to their unique significance, going beyond State frontiers, and thus having universal relevance, the protection, preservation and transmission to future generations of UNESCO sites are no longer the sole responsibility of individual countries, but of the international community as a whole.

Ratified by 194 countries, the World Heritage Convention (WHC) is one of the best-known treaty instruments in the general

216-266; *The 1972 World Heritage Convention: A Commentary*, edited by F. Francioni, Oxford, 2008; A. Vigorito, *Nuove tendenze della tutela internazionale dei beni culturali*, Naples, 2013, pp. 15-46; *40 Years World Heritage Convention: Popularizing the Protection of Cultural and Natural Heritage*, edited by M.-T. Albert, B. Ringbeck, Berlin-Boston, 2015; F.P. Cunsolo, *La tutela del patrimonio culturale e naturale mondiale nella Convenzione UNESCO del 1972*, in *Tutela e valorizzazione del patrimonio culturale mondiale nel diritto internazionale*, edited by E. Baroncini, Bologna, 2021, pp. 213-241; M. Gestri, *Teoria e prassi di un accordo pionieristico nella gestione di beni d'interesse generale: la Convenzione del 1972 sul patrimonio mondiale*, in *Tutela e valorizzazione del patrimonio culturale - Realtà territoriale e contesto giuridico globale*, edited by M.C. Fregni, M. Gestri, M.C. Santini, Torino, 2021, pp. 113-150. On the notion of world heritage and the role of UNESCO see L. Casini, *Potere globale – Regole e decisioni oltre gli Stati*, Bologna, 2018, ch. 2, para. 5; F. Francioni, *World Cultural Heritage*, in *The Oxford Handbook of International Cultural Heritage Law*, edited by F. Francioni, A.F. Vrdoljak, Oxford, 2020, pp. 250-271.

[2] Cf. recitals 7 and 8 of the preamble to the WHC, which state that «in view of the magnitude and gravity of the new dangers threatening ... [parts of the cultural or natural heritage], *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*, by the granting of collective assistance which, although not taking the place of action by the State concerned, will serve as an efficient complement thereto», as well as that «it is essential for this purpose to adopt new provisions in the form of a convention establishing *an effective system of collective protection of the cultural and natural heritage of outstanding universal value*, organised on a permanent basis and in accordance with modern scientific methods» (emphasis added).

culture[3] and one with the greatest impact on local realities[4], as well as a central element of international cultural heritage law, the development of which has been prodigious over the last 50 years[5]. Increasingly the object of interpretation in national[6] and international

[3] Issues on heritage and the UNESCO system often go beyond the realms of scientific discussion to make headlines: with specific reference to Italy, cf., most recently, R. Staglianò, *Nei palazzi dell'Unesco: Who enters and who leaves*, in *La Repubblica*, 1 November 2017; M. Gabanelli, *UNESCO: quanto paghiamo per diventare patrimonio dell'umanità*, in *Corriere della sera*, 29 January 2019; *UNESCO, i 55 siti italiani patrimonio dell'umanità*, in *La Repubblica*, 7 July 2019; M. Thatcher, *L'equilibrio difficile tra tutela del patrimonio e turismo di massa*, in *Il sole 24 ore*, 25 October 2019; R. Capozucca, *Il patrimonio culturale sfida il cambiamento climatico*, in *Il sole 24 ore*, 9 December 2019; *La Grande Barriera Corallina rischia di perdere lo status di patrimonio mondiale dell'Unesco,* in *La Stampa*, 4 December 2020.

[4] The interest aroused first by the candidature as a UNESCO heritage site and then by the eventual official recognition of a site significantly involves local administrators and communities, both in terms of the candidature process, often engaging and identifying, and with reference to the commitment required to prepare and comply with the management plans required to achieve and maintain the prestigious World Heritage Committee recognition. Again with reference to the Italian situation, cf., *inter alia*, *inter alia*, L. Boretto, *Pronta la candidatura delle "Alpi del Mediterraneo" a patrimonio dell'umanità Unesco*, in *La Stampa*, 26 gennaio 2018; G. Ricci, *Quei siti Unesco che nessuno valorizza*, in *Corriere Torino*, 20 ottobre 2018; G. dell'Orefice, *Unesco: le colline del Prosecco sono patrimonio mondiale dell'umanità*, in *Il sole 24 ore*, 7 luglio 2019; *Unesco: mura veneziane patrimonio mondiale dell'umanità*, in *Il sole 24 ore*, 7 luglio 2019; *Padova. Palazzo della Ragione i dubbi dell'Unesco sugli affreschi. Ora "indaga" il Bo*, in *Il mattino di Padova*, 16 febbraio 2020; *Petizione per la candidatura del Tagliamento a patrimonio Unesco*, in *FriuliSera*, 6 agosto 2020; *I nuraghe candidati alla lista del Patrimonio dell'Umanità dell'Unesco - Avviato l'iter per il riconoscimento dei siti dell'intera civiltà nuragica*, in *Corriere della sera*, 6 novembre 2020; M. Carta, "*Via Appia patrimonio dell'umanità" - la Regina delle strade candidata ufficiale Unesco: il 10 gennaio la firma*, in *La Repubblica*, 9 gennaio 2023; P. Panza, *"Il Duomo di Milano diventi patrimonio dell'umanità": avviata la candidatura per l'Unesco*, in *Corriere della sera*, 8 febbraio 2023.

[5] In this sense see F. Francioni, *Custom and General Principles of International Cultural Heritage Law*, in *The Oxford Handbook of International Cultural Heritage Law*, cit., pp. 531-550.

[6] Among the various national rulings that consider the 1972 UNESCO Convention, see the recent Italian case on the construction of a fast food restaurant in an area adjacent to the Baths of Caracalla: TAR Lazio, *McDonald's Development Italy Llc v. Ministero per i Beni e le Attività Culturali*, judgment 5757/2020 of 29

judgments,[7] the 1972 UNESCO Convention does not fail to be a benchmark also in international investment arbitration, and it is to this jurisprudence that the present work is dedicated. The adhesion of a State to the WHC and the presence on the national territory of a cultural or natural heritage of outstanding universal value, as well as the declaration of a site as a UNESCO heritage site, are legally qualified acts and situations affecting the protection of foreign investments provided by the BITs (Bilateral Investment Treaties)[8] or

May 2020, and the commentary by M.R. Calamita, *L'influenza della Convenzione UNESCO per la tutela del patrimonio culturale e naturale su alcune recenti pronunce del giudice amministrativo: il caso del McDonald's alle Terme di Caracalla*, in *Giustamm - Rivista di diritto amministrativo*, no. 8/2020.

[7] Very famous are the recent cases *Al Mahdi*, on which the International Criminal Court ruled in 2016 (International Criminal Court, *Prosecutor v Al Mahdi*, Judgment of 27 September 2016, ICC-01/12-01/15-171); and *Temple of Preah Vihear*, on which the International Court of Justice intervened in 2013 (*Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)*, Judgment of 11 November 2013, I.C.J., 2013, Rep. 281). On the international criminal case law see R. Pavoni, *La protezione internazionale del patrimonio culturale nei conflitti armati: stato dell'arte e nuovi sviluppi*, in *Tutela e valorizzazione del patrimonio culturale*, cit., pp. 161-187; G. Roversi Monaco, *La tutela dei beni culturali nei conflitti armati - Evoluzione e sviluppi della tutela internazionale dei beni culturali*, in *Tutela e valorizzazione del patrimonio culturale mondiale*, cit., pp. 127-146; on the ICJ jurisprudence cf. A. Ciampi, *Identifying and Effectively Protecting Cultural Heritage*, in *Rivista di diritto internazionale*, 2014, pp. 699-724; A. Chechi, *The 2013 Judgment of the ICJ in the Temple of Preah Vihear Case and the Protection of World Cultural Heritage Sites in Wartime*, in *Asian Journal of International Law*, 2016, pp. 353-378; G. Gagliani, *The International Court of Justice and Cultural Heritage - International Cultural Heritage Law Through the Lens of World Court Jurisprudence*? in *Intersections in Cultural Heritage Law*, edited by A.-M. Carstens, E. Varner, Oxford, 2020, pp. 223-242. More generally on the international case law on cultural heritage, see A. Chechi, *The Settlement of International Cultural Heritage Disputes*, Oxford, 2014, and A.M. Tanzi, P.E. Mason, *The Potential of the Singapore Convention on Mediation for Art and Cultural Property Disputes*, in *Journal of International Dispute Settlement*, 2021, pp. 669-692.

[8] UNCTAD (*United Nations Conference on Trade and Development*) currently (December 2020) registers 2901 BITs of which 2342 are in force (see data available at https://investmentpolicy.unctad.org/international-investment-agreements). For a presentation of BITs and international investment law see F. Costamagna, *Promozione e protezione degli investimenti esteri nel diritto internazionale*, in *Neoliberismo internazionale e global economic governance. Sviluppi istituzionali*

the chapters dedicated to investments in the broader agreements of international economic law[9].

We thus intend here to analyse the evolutionary path of the relevant arbitral awards, in order to assess the growing relevance, in international investment law, of the protection of cultural and natural heritage originating from UNESCO[10]. At the same time, we

e nuovi strumenti, edited by A. Comba, Torino, 2013, pp. 131-170; *International Investment Law*, edited by M. Bungenberg, J. Griebel, S. Hobe, A. Reinisch, Y. Kim, München, Oxford, Baden-Baden, 2015; C.L. Lim, J. Ho, M. Paparinskis, *International Investment Law and Arbitration*, Cambridge, 2018; R. Dolzer, U. Kriebaum, C. Schreuer, *Principles of International Investment Law*, Oxford, 2022.

[9] As an example see for all Chapter 8 of the *Comprehensive Economic and* Trade Agreement (CETA) between the European Union and Canada: Council Decision (EU) 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, in OJEU L11/1, 14.1.2017. On the European Union's latest generation of agreements that also regulate the protection and promotion of foreign investment see *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations*, edited by S. Griller, W. Obwexer, E. Vrane, Oxford, 2017; *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)*, edited by M.M. Mbengue, S. Schacherer, Heidelberg, 2019; B. Cappiello, *Il diritto europeo degli investimenti. Prospettive per una politica europea sostenibile*, Torino, 2019. For a framing of the role of mega-regionals in International Economic Law see P.-T. Stoll, *Towards Mega-Regionalim in International Economic Law*, in *Elgar Encyclopedia of International Economic Law*, edited by T. Cottier, K. Nadakavukaren, Cheltenham UK, Northampton, MA, USA, 2017, pp. 37-38.

[10] On the relation between investment protection and cultural heritage protection see M. Hirsch, *Interactions Between Investment and Non-investment Obligations*, in *The Oxford Handbook of International Investment Law*, edited by P. Muchlinski, F. Ortino, C. Schreuer, Oxford, 2008, pp. 155-181; V.S. Vadi, *Cultural Heritage and International Investment Law: A Stormy Relationship*, in *International Journal of Cultural Property*, 2008, pp. 1-24; V.S. Vadi, *Fragmentation or Cohesion? Investment versus Cultural Protection Rules*, in *The Journal of World Investment & Trade*, 2009, pp. 573-600; L. de Germiny, *Considerations Before Investing Near a UNESCO World Heritage Site*, in *Transnational Dispute Management,* 2013, pp. 1-11; V.S. Vadi, *Culture Clash? World Heritage and Investors' Rights in International Investment Law and Arbitration*, in *ICSID Review*, 2013, pp. 123-143; V.S. Vadi, *Cultural Heritage in International Investment Law and Arbitration*, Cambridge, 2014, p. 93 ss.; G. Gagliani, *Pro Bono Pacis? Le interazio-*

will consider the emergence of the need for the investors to be familiar with the legal, international and domestic, framework for the preservation and management of monumental complexes and sites falling within the scope of the 1972 Convention, and, therefore, the implications that the presence of these assets has for the conduct of the business activities of the foreign economic operators.

2. *UNESCO heritage comes into the picture in international investment litigation: the* Pyramids *case*

For the first time, the 1972 UNESCO Convention and a UNESCO world heritage site were considered by an international arbitration tribunal in the case *Southern Pacific Properties (Middle East) Limited v. Egypt*[11]. The dispute arose from the impossibility for SPP(ME), a company registered in Hong Kong, to carry out the construction of a tourist village near the Pyramids of Giza, despite the fact that the proposed project had obtained all the authorisations required by the Egyptian State. In particular, on 23 September 1974, SPP(ME) signed a contract with the Egyptian Ministry of Tourism and the Egyptian General Organisation for Tourism and Hotels (EGOTH), establishing a joint venture for the development of the Pyramids Oasis Project[12]. Within a few months, this contract passed the formal inspection of the investment agency[13], and subsequently, on 2 May

ni tra diritto internazionale e degli investimenti e patrimonio culturale, in *Rivista di Diritto internazionale*, 2017, pp. 756-781; G. Gagliani, *The Controversial Definition of "Investment" on the Test of Culture and Cultural and Natural Heritage: Convergences, Divergences and Possible Integrations*, in *International Trade Law*, 2019, pp. 49-72.

[11] *Southern Pacific Properties v. Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992. On this decision see L. Lankarani El-Zein, *Quelques Remarques sur la Sentence SPP v. La République arabe d'Égypte*, in *Revue belge de droit international*, 1994, pp. 534-558.

[12] For the factual part of the *Pyramids* case see *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, paras. 42-72.

[13] This is the *General Organisation for Investment of Arab Capital and Tax-Free Areas* (GIA) and its Decree No. 30/16-75 (see *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, para. 54).

1975, the joint venture was approved by Decree No. 475 of the President of the Egyptian Republic. EGOTH then transferred to the joint venture its right of usufruct over the land involved in the investment «irrevocably» and «without restriction of any kind»[14]. This was followed by all the formal steps for the approval, by the Ministry of economy and economic cooperation and the Ministry of tourism, of the contracts with the local agencies, the legal form of the investor, and the general and detailed plan of the tourist facilities.

In July 1977, construction work began: roads were built, water and sewage pipes were installed, excavations for artificial lakes and a golf course were undertaken, and the main water basin was almost completed. In addition, the planning of two hotels was at an advanced stage; and as many as 386 plots, on which villas and multi-family dwellings were to be built, were sold at a total cost of ten million USD. Towards the end of 1977, however, the Pyramids Oasis Project started encountering strong political opposition in Egypt and became the subject of a parliamentary enquiry. Those who objected to the project considered it as a threat to the undiscovered antiquities in the places affected by the investment. Soon, the Egyptian Antiquities Authority confirmed the presence of archaeological-artistic finds in the western part of the Giza Pyramids region, and, on the basis of the technical report of this Authority, the Minister of Information and Culture adopted a decree on 27 May 1978 to declare the territory surrounding the Pyramids as «public property (Antiquities)»[15]. In a very rapid sequence, the authorisations for the project were revoked, and, on 11 July 1978, the Egyptian Prime Minister proclaimed that territory «d'utilité publique»[16].

The intricate affair – after having also seen the annulment on appeal of an arbitration award of the International Chamber of Commerce in Paris, confirmed by the French Court of Cassation –

[14] See *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, para. 56.

[15] *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, para. 63.

[16] See *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, para. 65.

landed before an ICSID arbitration procedure[17] following the complaint presented on 24 August 1984 by SPP(ME), in which the latter claimed that the deals it had reached with Egypt for the realisation of its project had been breached, consequently asking to be compensated for the direct expropriation suffered[18]. In response to these allegations, Egypt justified itself by pointing out that it was a contracting party to the 1972 UNESCO Convention. As of 17 December 1975, the date of entry into force of this Convention, in the defendant view it became «obligatory, on the international plane, to cancel the Pyramids Oasis Project»[19]. Moreover, in 1979, the areas of the Pyramids of Giza had been proclaimed a world heritage site, making the regulations for the management of the new UNESCO site[20] even more stringent. On the other hand, the Hong Kong investor argued that Egypt had authorised the construction of the tourist complex the year after the ratification of the WHC, which

[17] ICSID (*International Centre for Settlement of Investment Disputes*) is the intergovernmental institution created by the World Bank under the 1965 Washington Convention to promote the settlement of disputes between States and private investors. ICSID thus manages the conciliation commissions and arbitration tribunals set up from time to time to settle disputes involving private individuals and States. On the ICSID Convention and the functioning of its arbitration mechanism see. C. Schreuer, *International Centre for Settlement of Investment Disputes (ICSID)*, in *Max Planck Encyclopedia of International Law*, 2013; C. Schreuer, *Arbitration: International Centre for Settlement of Investment Disputes (ICSID)*, in *Max Planck Encyclopedia of International Law*, 2018; *Schreuer's Commentary on the ICSID Convention - A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, edited by S.W. Schill, L. Malintoppi, A. Reinisch, C.H. Schreuer, A. Sinclair, Cambridge, 2022. For the text of the Convention see *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID])*, in *United Nations Treaty Series*, 1966, Vol. 575, p. 159.

[18] On the discipline of expropriation, direct and indirect, in international investment law see R. Dolzer, U. Kriebaum, C. Schreuer, *Principles of International Investment Law*, cit., p. 146 ss.; A. de Nanteuil, *International Investment Law*, Cheltenham-Northampton, 2020, p. 307 ss.

[19] *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, para. 150.

[20] See the presentation of the Egyptian Pyramids in the UNESCO site *Memphis and its Necropolis - the Pyramid Fields from Giza to Dahshur*, *https://whc.unesco.org/en/list/86/*.

took place on 7 February 1974, and that the ultimate stages of the approval of the master plan were finalised in 1976, thus one year after the UNESCO Convention came into force, to signify that, at least at an early stage, the North African State did not seem to have considered the Pyramids Oasis Project as incompatible with the international obligations it had undertaken by concluding the WHC. Moreover, SPP(ME) emphasised that Egypt could have taken measures, other than the cancellation of the tourist complex, that were in any case consistent with its WHC obligations to protect antiquities. Similarly, the investor pointed out that the Egyptian authorities had not invoked the UNESCO Convention in the national measures banning the project, thus considering the invocation of the WHC only as «a post hoc rationalization for an act of expropriation», since Egypt had designated the site of the Pyramids from Giza to Dahshur for the inclusion in the tentative list under Article 11 of the WHC to be proclaimed world heritage only nine months after the cancellation of the project[21].

The arbitral tribunal qualified the 1972 Convention as «relevant»[22] for the purposes of resolving the dispute and held «as a matter of international law» that Egypt was justified in cancelling the tourism project to preserve its heritage of antiquities:

> «Clearly, *as a matter of international law*, the Respondent was entitled to cancel a tourist development project situated on its own territory for *the purpose of protecting antiquities*. This prerogative is an unquestionable attribute of sovereignty. The decision to cancel the project constituted a lawful exercise of the right of eminent domain. The right was

[21] *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, para. 153.

[22] «Nor is there any question that the UNESCO Convention is relevant: the Claimants themselves acknowledged during the proceedings before the French *Cour d'Appel* that the Convention obligated the Respondent to abstain from acts or contracts contrary to the Convention, stating "que les Etats étaient susceptibles d'engager leur responsabilité international envers les autres Etats signataires en persistant dans des actes ou contrats devenus contraires aux règles de la Convention"» (*Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, para. 78).

exercised for a public purpose, namely, the preservation of antiquities in the area»[23].

Additionally, the adjudicating panel observed that «a hypothetical continuation of the Claimants' activities interfering with antiquities in the area could be considered as unlawful from the international point of view»[24] precisely because the continuation of building activities would be disrespectful of UNESCO law, which, more than permitting, actually *requires* the Contracting Parties to preserve the properties and sites of exceptional universal value.

However, the arbitrators affirmed that the 1972 UNESCO Convention and the sovereign right to preserve antiquities did not imply the exclusion of the Claimant's right to be compensated, and thus, while considering the cancellation of the Pyramids Oasis Project legitimate because it was made in the public interest, they established Egypt's liability because the defendant State had not adequately compensated the Claimant[25].

In defining the *quantum* of compensation[26], the Arbitral Tribunal made a temporal distinction between the periods before and after the Pyramids were inscribed on the UNESCO World Heritage List. In fact, according to the Arbitrators, the international obligation deriving from the UNESCO system to prohibit the construction of the tourist village had arisen from the moment of the proclamation of the Pyramids as a world heritage site, i.e. from 1979, and not, instead, as Egypt claimed, from the entry into force of the Convention, i.e. from 1975. Consequently, the Arbitrators decided to

[23] *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, para. 158, emphasis added.

[24] *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, para. 154.

[25] *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, para. 154.

[26] On compensation and damages in international investment law see R.R. Babu, *Standard of Compensation for Expropriation of Foreign Investment*, in *Handbook of International Investment Law and Policy*, edited by J. Chaisse, L. Choukroune, S. Jusoh, Heidelberg, 2020, pp. 1-18; C.L. Beharry, E. Méndez Bräutiga, *Damages and Valuation in International Investment Arbitration*, *ivi*, pp. 1-32.

award SPP(ME) the payment of the value of the investment made, together with compensation for the loss of the opportunity to realise the commercial success of the Pyramids Oasis Project until the Pyramids area was declared a UNESCO world heritage site. On the other hand, the ICSID Tribunal did not recognise any loss of profit (*lucrum cessans*) after 1979, when the site concerned was inscribed on the World Heritage List. From that time, in fact, the construction and therefore the sale of real estate in the Pyramids' buffer zone had become unlawful under both international and Egyptian law, with the consequence that the loss of profit resulting from such activities could not be compensated:

> «lot sales in the area registered with the World Heritage Committee under the UNESCO Convention would have been *illegal under both international law and Egyptian law* after 1979, when the registration was made. Obviously, the allowance of *lucrum cessans* may only involve those profits which are legitimate ... From that date [1979] forward, the Claimants' activities on the Pyramids Plateau would have been *in conflict with the Convention* and therefore *in violation of international law*, and *any profits* that might have resulted from activities are *consequently non-compensable*»[27].

In synthesis, in the award adopted in 1992, the Arbitral Tribunal modulated the amount of compensation for the expropriation suffered by SPP(ME) according to whether or not the site affected by the expropriation measures was a site already on the World Heritage List. The buffer zones and restrictive rules for building development that characterise a UNESCO property prevent an intensive exploitation of the territories surrounding it; and this situation, the Arbitrators in the *Pyramids* case argued, has obviously to be reflected in the calculation of the compensation owed by the State, which cannot in-

[27] *Southern Pacific Properties (Middle East) Limited v. Egypt,* Award, paras. 190-191, emphasis added.

clude, by way of *lucrum cessans*, compensation for economic activities prohibited on UNESCO sites[28].

The doctrine has rightly observed that, according to Article 12 of the WHC, the protection of heritage of outstanding universal value does not depend on its inclusion in the World Heritage List but derives from signing the UNESCO Convention. The latter, in fact, as will be more fully considered when dealing with the *Glamis Gold* case[29], establishes the obligation to preserve world heritage independently of formal proclamations. Therefore, once a State has ratified the WHC, it has to protect the world heritage assets present on its territory, even if they have not already been officially declared a UNESCO world heritage site. From this WHC obligation arose the doctrine's criticism of the Arbitral Tribunal in the *Pyramids* case, insofar as the ICSID adjudicators made a distinction in the calculation of compensation for the expropriation suffered depending on whether or not the site concerned had already been included in the UNESCO World Heritage List[30].

3. *The dispute over compensation for expropriation to preserve the Guanacaste Conservation Area*

UNESCO law comes to the fore again, although not explicitly in the text of the arbitral award, in an investment dispute in *Compañía del desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*[31]. In 1970, CDSA, a Costa Rican company whose majority shareholders were of US nationality, acquired the property of Santa Elena, which stretched for about 30 km on the western Pacific coast of the Cen-

[28] Against the plaintiff's request for compensation of almost $140,000,000, the Arbitral Tribunal instead ordered compensation of $27,661,000. Cf. *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, paras. 33 and 257.

[29] See below paragraph 5 of this chapter.

[30] Cf. P.J. O'Keefe, *Foreign Investment and the World Heritage Convention*, in *International Journal of Cultural Property*, 1994, pp. 259-265.

[31] *Compañía de Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000.

tral American state, bordering the Santa Rosa National Park[32]. This is a particularly beautiful natural area, unique for the diversity of its geological features, home to pumas and jaguars and a wide variety of plants, and on whose beaches sea turtles go to lay their eggs. The CDSA intended to build a tourist resort and a residential complex on a significant part of the purchased property and proceeded to draw up a technical project and a financial plan to identify how its investment would be used. On 5 May 1978, however, Costa Rica, which in the meantime had deposited its instrument of ratification of the 1972 Convention[33], approved the decree of expropriation of Santa Elena. Indeed, the Central American government considered it indispensable to acquire the CDSA's property in order to unite it with the Santa Rosa National Park, creating an area large enough to preserve unspoilt the varied habitat and the many animal and plant species of that part of the Costa Rican province of Guanacaste, which reflects two per cent of the world's marine and terrestrial biodiversity[34]. The CDSA did not contest the State's right of expropriation, as the public utility of the Costa Rican measure, adopted to maintain the uniqueness of an ecosystem, was evident; the company objected instead to the amount of compensation offered by the Central American country, which it considered inadequate as it would not correspond to the fair market value of the expropriated property. After unsuccessfully waging a protracted court battle before the Costa Rican courts, the CDSA, relying on US legislation

[32] For a reconstruction of the factual part of the dispute see *Compañía de Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, paras. 15-26.

[33] The deposit, at UNESCO, took place on 23 August 1977. According to Article 33 of the World Heritage Convention, three months later, i.e. in November 1977, the Convention became binding for the Latin American country. On this information see the official UNESCO website *http://portal.unesco.org*.

[34] C.N. Brower, J. Wong, *General Valuation Principles: The Case of* Santa Elena, in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, edited by T. Weiler, London, 2005, pp. 747-775, at p. 747.

protecting investments of US citizens and companies abroad[35], submitted a request for arbitration to ICSID in 1995, which it finalised the following year. The central issue before the arbitrators was to determine the amount of compensation to be paid by the host State to the CDSA for the expropriation of Santa Elena. The Respondent agreed on the obligation to compensate the Claimant; however, in seeking to reduce the amount due, it added to the considerations already entrusted to the grounds of the 1978 decree the international obligations of protection arising from the 1972 Convention. Furthermore, Costa Rica, in July 1998, during the ICSID arbitration proceedings, submitted the dossier to propose the nomination of the Guanacaste area as a world heritage site, obtaining the prestigious recognition in December 1999[36]. The defendant State thus argued that the international obligation to also preserve the uniqueness of the ecosystem and natural landscape of Santa Elena resulting from the inscription in the UNESCO List inevitably implied a more limited compensation[37].

[35] This is the so-called *Helms Amendment*, the legislation adopted by the United States that conditioned the granting of North American aid to developing countries, as well as the US government's positive vote for financing projects prepared by international organisations also on the willingness of those countries to agree to settle disputes over expropriations suffered by US citizens, or companies with at least 50 % US capital, by resorting to international arbitration. See 22 USC sec. 2370a (*Helms Amendment*, 30 April 1994), and *Compañía de Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, para. 24.

[36] See the presentation of Guanacaste made by the UNESCO *Area de Conservación Guanacaste*, at *https://whc.unesco.org/en/list/928/*.

[37] Costa Rica, in its reply statement, cited a number of treaties on the protection of forests, wetlands and biodiversity in addition to the 1972 UNESCO Convention, from which it arose a large number of environmental protection requirements that limited large-scale commercial development on the Santa Elena property, as Brower and Wong report: «[a]dditional limitations were cited arising from the fact that Costa Rica is party to numerous treaties giving rise to obligations to protect the environment, including the Western Hemisphere Convention, the Convention Concerning the Protection of the World Cultural and Natural Heritage, the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, the 1992 Convention on Biological Diversity and the Central American Regional Convention for the Management and Conservation of the Natural Forest Ecosystems ... Costa Rica also very meticulously document-

In the arbitral award of June 2000, the Tribunal held that Costa Rica's international obligations should not come into play in the recognition of the right to compensation, consisting of the fair market value of the investment made, for the expropriation of Santa Elena. Indeed, the arbitrators affirmed:

> «While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the property was taken for this reason does not affect either the nature or the measure of compensation to be paid for the taking. That is, the purpose of protecting the environment for which the property was taken does not alter the legal character of the taking for which *adequate compensation must be paid*. The international source of the obligation to protect the environment makes no difference. Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: *where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains*»[38].

It should be noted here that the Arbitral Tribunal calculated the fair market value of Santa Elena by identifying the date of the 1978 decree as the moment of expropriation, because «[a]s of that date, the practical and economic use of the Property by the Claimant was irretrievably lost»[39]. The ICSID arbitrators observed that if they had

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ed the Government's longstanding and comprehensive commitment to international and national environmental conservation and demonstrated how this policy had led to the creation of the Santa Rosa Park and to efforts undertaken ... to add the Guanacaste Conservation Area, embracing the Santa Rosa National Park, including Santa Elena, to the World Heritage List under the World Heritage Convention» (C.N. Brower, J. Wong, *General Valuation Principles: The Case of* Santa Elena, cit., at p. 761).

[38] *Compañía de Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, paras. 71-72, emphasis added.

[39] *Compañía de Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, para. 81.

set the time to calculate the compensation as that of the issuance of the arbitral award, i.e. the year 2000, they would have had to take into account that the strict environmental preservation policy defined by Costa Rica since 1978 «would very likely exclude the kind of tourist, hotel and commercial development that CDSE contemplated when it first acquired the Property»[40]. In doing so, however, the Arbitral Tribunal failed to take into account the fact that Costa Rica was still required to preserve the heritage of outstanding universal value present on its territory as of the entry into force of the WHC for the Respondent, i.e. from November 1977[41].

It can, however, be noted that the Tribunal, while incurring the shortcoming noted above, nevertheless identified the amount of compensation by striking an acceptable balance between the needs of Costa Rica and those of the private plaintiff. The ICSID Arbitrators, in fact, chose the mid-point between the valuation proposed by Costa Rica (USD 1.9 million) and that of the CDSA (USD 6.4 million). The sum thus recognised as compensation (USD 4.15 million), together with interest, has, on the one hand, allowed Costa Rica to be able to sustain the payment, avoiding the return of Santa Elena to the CDSE, with the risk of finding itself a 'Disney-fied' tourist complex in the UNESCO site of Guanacaste; on the other hand, the amount of the indemnity was sufficient to avert the continuation of the arbitration dispute[42], i.e. the CDSE's challenge of the arbitral award to request its annulment on the basis of Article 52 of the ICSID Convention[43].

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[40] *Compañía de Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, para. 84.

[41] See *supra* note 33.

[42] For these considerations see C.N. Brower, J. Wong, *General Valuation Principles: The Case of* Santa Elena, cit., at p. 775, and K.I. Juster, *The Santa Elena Case: Two Steps Forward, Three Steps Back*, in *American Review of International Arbitration*, 1999, pp. 371-388.

[43] Article 52(1) of the ICSID Convention provides that any party to an arbitration proceeding may request the annulment of the award «on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure

4. *Foreign investment made subsequent to the proclamation of a site as a UNESCO heritage: the Arbitral Tribunal dismisses the complaint in the* Parkerings *case*

With the *Parkerings* case[44], the interaction between heritage protection and investment protection lands on the European continent. However, more than because of its geographical location, this dispute is distinguished by the fact that it arises over how to preserve the integrity and authenticity of a site declared UNESCO heritage not only before the arbitration procedure was requested, but also prior to the plaintiff entrepreneur's decision to invest in the construction of an infrastructure near a monumental complex already inscribed on the World Heritage List. Indeed, in 1994, the Old Town of Vilnius, characterised by an urban structure dating back to the Middle Ages and architecture ranging from Gothic to Classical style, with very well-preserved buildings, was proclaimed a world heritage site[45]. In 1997, the municipality of Vilnius published a call for tenders for the construction of a multi-storey car park in the historic centre of the Lithuanian capital[46]. In 1999, at the end of the intricate procedure, Parkerings, a Norwegian company, concluded an agreement with the Vilnius Municipality for the construction of this infrastructure. Shortly afterwards, however, in addition to a strong popular aversion, it followed a series of reports from national and

from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based».

[44] *Parkerings-Companiet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007. On this case see L. Johnson, *Parkerings-Companiet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8 (Parkerings v. Lithuania)*, in *International Investment Law and Sustainable Development - Key cases from 2000-2010*, edited by N. Bernasconi-Osterwalder, L. Johnson, IISD, 2011, pp. 97-104; C. Martini, *Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting*, in *The International Lawyer*, 2017, pp. 529-583.

[45] See the presentation of the Vilnius Historic Centre by UNESCO *Vilnius Historic Centre*, at *https://whc.unesco.org/en/list/541/*.

[46] On the reconstruction of the facts of the dispute see *Parkerings-Companiet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, paras. 51-193.

local bodies for the preservation of state monuments that evaluated the Parkerings project negatively. The proposed car park, large in size and partly underground in Vilnius Old Town, was considered to have an excessive impact on the historic centre of the Lithuanian capital, destroying – due to the excavations and the part to be built underground – unexplored cultural layers rich in evidence of past civilisations, and damaging to the environment and for the increase in traffic. Such consequences would have also worsened the lifestyle of the population living in and around the area and weakened the Lithuanian capital's tourist appeal. Therefore, the municipality of Vilnius ran for cover, it did not go ahead with the agreement with Parkerings and chose instead the more restrained and UNESCO site-friendly project proposed by Pinus Proprius, a company with Dutch capital.

Hence, in 2005, the Norwegian investor filed its request for arbitration with the ICSID, complaining of the violation of several provisions of the Bilateral Investment Agreement between Lithuania and Norway signed in Vilnius on 16 August 1992[47]. In particular, Parkerings accused the respondent State of failing to comply with Article IV of the Norway/Lithuania BIT concerning the most-favoured-nation clause[48]. According to the Claimant, Pinus Proprius and Parkerings were in «similar circumstances»[49], and, therefore, Lithuania, by preferring Pinus Proprius' project, violated the principle of non-discrimination. The Arbitral Tribunal, comparing the two proposals of the Norwegian enterprise and the Dutch compa-

[47] *Agreement between the Government of the Republic of Lithuania and the Government of the Kingdom of Norway on the Promotion and Mutual Protection of Investments*, 16 August 1992, text available on the website of the Permanent Court of Arbitration *https://files.pca-cpa.org/pcadocs/bi-c/1.%20Investors/4.%20Legal%20Authorities/CA198.pdf*.

[48] «Investments made by Investors of one Contracting Party in the Territory of the other Contracting Party, as well as the Returns therefrom, shall be accorded treatment no less favourable than that accorded to investments made by Investors of any third state» (Article IV, para. 1 of the Lithuania / Norway BIT).

[49] *Parkerings-Companiet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, para. 364.

ny, came to the conclusion that those projects could not be considered similar: apart from its smaller size, the plan of Pinus Proprius was more respectful of the Old Town, in particular because it did not extend close to the Cathedral area. Therefore, the two investors were not «in like circumstances»[50], with the consequence that Lithuania had not violated the principle of non-discrimination, i.e. Article IV, para. 1 of the Lithuania/Norway BIT.

In the reasoning prepared to support its decision, the Court clearly relied on the UNESCO heritage status of Vilnius Old Town. The ICSID Arbitrators emphasised that «[t]he territory of the Old Town as defined by UNESCO is a protected area which requires the approval of various administrative Commissions in order, notably, to make any construction»[51] and recalled the negative opinions of the several Lithuanian administrative departments in charge of the protection of cultural heritage on the appropriateness of the Parkerings' project. In particular, the Tribunal highlighted the report of the National Commission for the Protection of State Monuments[52]. Such report asserted that the construction of under-

[50] *Parkerings-Companiet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, para. 396.

[51] *Parkerings-Companiet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, para. 382.

[52] «Another feature does ... call the Tribunal attention: the MSCP planned by BP extends significantly in the Old Town as defined by UNESCO and especially near the historical site of the Cathedral. The record shows that various administrative Departments and Commissions in Lithuania were opposed to the MSCP as planned by BP. On 20 October 2000, the State Monument Protection Commission of the Republic of Lithuania objected to the parking plan for the following reason: *Projects of such type and scale like the project of the construction of planned underground garages in the Old Town of Vilnius should be developed concurrently taking into consideration the possible direct and indirect environmental impact of planned works and also the impact on cultural properties. In the opinion of the State Monumental Protection Commission, the planned garages [...] would change the character of the Old Town of global value; destroy large areas of unexplored cultural layer. Also, the intensity of traffic and air pollution in the Old Town is likely to increase. The Old Town might become less attractive in terms of tourism and to the residents and visitor, and this would be a great loss. [The State Monumental Protection Commission] resolves: to object the project of construction of the underground garages in the Old Town of Vil-*

ground garages on the UNESCO site would affect «the authenticity of the old city of Vilnius»[53], a central requirement for the recognition and maintenance of a property on the World Heritage List, and it would also undermine Lithuania's compliance with the international obligations it undertook by ratifying the Convention for the Protection of the Architectural Heritage of Europe[54], and the European Convention for the Protection of the Archaeological Heritage[55]. Thus, the ICSID arbitrators concluded that:

> «the fact that BP's MSCP project[56] in Gedimino extended significantly more into the *Old Town as defined by the UNESCO*, is *decisive*. Indeed, the record shows that the opposition raised against the BP projected MSCP were important and contributed to the Municipality decision to refuse such a controversial project. *The historical and archaeological preservation and environmental protection could be and in this case were a justification for the refusal of the project*. The potential negative impact of the BP project in the Old Town was increased by its considerable size and its proximity with the culturally sensitive area of the Cathedral. Consequently, BP's MSCP in Gedimino was not similar with the MSCP constructed by Pinus Proprius ... the City of Vilnius did have legitimate grounds to distinguish between the two projects. Indeed, the refusal by the Municipality of Vilnius to authorise BP's project in Gedimino was justified by various concerns, espe-

nius [...] ...» (*Parkerings-Companiet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, para. 385, emphasis in the original).

[53] *Parkerings-Companiet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, para. 388.

[54] *Convention for the Protection of the Architectural Heritage of Europe*, adopted in Granada on 3 October 1985 (*The Granada Convention*, ETS No. 121), text available on the Council of Europe website at *www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=121*.

[55] *European Convention on the Protection of the Archaeological Heritage (Revised)*, adopted in Valletta on 16 January 1992 (*The Valletta Convention*, ETS No. 143), text available on the Council of Europe website at *https://rm.coe.int/168007bd25*.

[56] The Parkerings multi-storey car park.

cially in terms of historical and archaeological preservation and environmental protection»[57].

On 11 September 2007, Parkerings' request was thus dismissed in its entirety, with each party having to bear its own legal costs and share the expenses of the arbitration panel and the ICSID secretariat[58].

5. *World heritage protection beyond the World Heritage List: the* Glamis Gold *case*

Two years later, the dispute that has arisen over the complex legal framework set up by the US authorities to preserve the sacred sites of the Quechan Indian tribe shows an increasingly attentive and sensitive approach to the protection of cultural and natural heritage promoted by the 1972 UNESCO Convention – which, as it will be highlighted in this paragraph, requires the preservation of what has outstanding universal value regardless of its inclusion on the World Heritage List. The dispute over the Quechan ancestral lands stems from the dense series of administrative and regulatory interventions by the State of California, some federal agencies and the US Government, on the Imperial Project, the plan for the opening of an extensive gold and silver mine by the Canadian company Glamis Gold[59]. This activity was, in fact, to take place in the

[57] *Parkerings-Companiet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, parr. 392-396.

[58] *Parkerings-Companiet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, para. 465.

[59] Our reconstruction of the facts is mainly based on the findings of the arbitration award: see *Glamis Gold Ltd. v. United States of America*, ICSID Award, 8 June 2009, paras. 27-90. On this award see J.C. Kahn, *Striking NAFTA Gold: Glamis Advances Investor-State Arbitration*, in *Fordham International Law Journal*, 2009, pp. 101-155; E. Obadia, *Introductory Note to NAFTA/UNCITRAL: Glamis Gold Ltd. v. United States,* in *International Legal Materials*, 2009, pp. 1035-1037; E. Whitsitt, D. Vis-Dunbar, *Glamis Gold Ltd. v. United States of America: Tri-*

southern sector of the California Desert Conservation Area, an area considered sacred by Native Americans, and therefore protected by US law. In particular, after a prolonged interlocution with State and federal offices, which began in 1994, the Imperial Project was authorised in April 2003 on the condition, *inter alia*, that Glamis Gold would systematically and promptly fill in all mine voids to recreate the contours of the land that existed before mining. The part of the Californian desert on which Glamis Gold intended to operate was the site of the *Trail of Dreams*, a route of spiritual value for the Quechan, traversed to perform ceremonial rites, whose cultural importance for Native Americans is similar to that of Mecca or Jerusalem for the faithful of monotheistic religions.

A few months later, in July 2003, the Canadian company decided to request arbitration against the United States under the NAFTA Agreement[60]. For Glamis Gold, the series of Californian

bunal sets a high bar for establishing breach of 'Fair and Equitable Treatment' under NAFTA, in *Investment Treaty News*, 14 July 2009; S.W. Schill, *Glamis Gold Ltd. v. United States, NAFTA Chapter 11 Arbitral Tribunal, June 8, 2009,* in *American Journal of International Law*, 2010, pp. 253-259; M.C. Ryan, *Glamis Gold Ltd. v The United States and the Fair and Equitable Treatment Standard*, in *McGill Law Journal*, 2011, pp. 919-958.

[60] *North American Free Trade Agreement between Canada, Mexico and the United States* signed on 17 December 1992 and entered into force on 1 January 1994 (in *International Legal Materials*, 1993, p. 289 ss.). NAFTA was renegotiated during the Trump administration and is now replaced by the *United States-Mexico-Canada Agreement* (USMCA), which entered into force on 1 July 2020. The USMCA does not only liberalise trade and protect investments, but also protects workers' rights, it is more attentive to the needs of agri-food trade, preserves intellectual property rights, regulates digital trade, provides for rules to combat corruption and disciplines specifically dedicated to small and medium-sized enterprises. The text can be found on the official website created by the three contracting parties of the USMCA *https://can-mex-usa-sec.org/secretariat/agreement-accord-acuerdo/index.aspx?lang=eng*. With specific reference to the investment discipline in NAFTA see *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects*, edited by T. Weiler, Ardsley, N.Y., 2004. On the same issues regarding the USMCA see D. Garcia-Barragan, A. Mitretodis, A. Tuck, *The New NAFTA: Scaled-Back Arbitration in the USMCA*, in *Journal of International Arbitration*, 2019, pp. 739-754.

and federal measures constituted a «continuum of acts»[61] that deprived the investment of its value, amounting to an indirect expropriation and thus a violation of Article 1110 of the NAFTA Agreement[62]. Moreover, in the applicant's view, the obligation to backfill the mine voids made mining uneconomic and was not «rationally related to its stated purpose of protecting cultural resources and [was] thus ... arbitrary»[63] , in contravention of Article 1105 of the NAFTA Agreement, which also requires respect for the fair and equitable treatment (FET) of foreign investments[64].

[61] *Glamis Gold Ltd. v. United States of America*, ICSID Award, para. 358.

[62] This is the provision devoted by the NAFTA Agreement to the discipline of expropriation, which established the prohibition of nationalisation or direct and indirect expropriation, unless the national measures were taken for reasons of public interest, on a non-discriminatory basis, respecting due process of law, and providing for equitable compensation based on the criteria set forth in paras. 2-6 of the provision.

[63] *Glamis Gold Ltd. v. United States of America*, ICSID Award, para. 867.

[64] The article referred to, in fact, stated that «[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security». The FET clause is the most frequently invoked provision in international investment arbitration litigation because it provides a basic standard of protection for the investor even where there is no violation of the prohibitions of discrimination or expropriation. This 'catch-all provision' protects the investor's legitimate expectations created by the conduct of the host State. On this point, see V. Vadi, *Gravity and Grace: Foreign Investments and Cultural Heritage in International Investment Law*, in *Vanderbilt Journal of Transnational Law*, 2022, pp. 1007-1050, at pp. 1032-1033, who recalls the effective considerations of the *Unglaube* case on the circumstances that investors must prove in order to invoke a reasonable expectation with regard to the defendant State: «claimants must demonstrate reliance on specific and unambiguous State conduct, through definitive, unambiguous and repeated assurances, and targeted at a specific person or identifiable group» (*Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012, para. 270). On fair and equitable treatment and, more generally, on investment treaty standards see also, *ex multis,* M. Valenti, *The Protection of General Interests of Host States in the Application of the Fair and Equitable Treatment* Standard, in *General Interests of Host States in International Investment Law*, edited by G. Sacerdoti, with P. Acconci, A. De Luca, M. Valenti, Cambridge, 2014, pp. 26-57; F. Ortino, *The Origin and Evolution of Investment Treaty Standards: Stability, Value, and Reasonableness*, Oxford, 2019.

The Arbitral Tribunal, in its award of 8 June 2009, dismissed Glamis Gold's claims in their entirety. The Arbitrators found that the attacked measures did not have a sufficient economic impact to result in an expropriation of the plaintiff's investment («the California backfilling measures did not result in *a radical diminution in the value of* the Imperial Project»[65]), and therefore the mining activity carried out according to the local regulations remained profitable. The Canadian company complained that the FET standard was violated also because the national measures, far from preserving cultural resources, actually destroyed them – «[o]nce you take the material out [of] the ground and if there are cultural resources on the surface, they're destroyed. Putting the dirt back in the pit actually doesn't protect those resources»[66]. The Tribunal responded by endorsing the respondent State's considerations, which pointed out that, in the absence of the contested regulations, pits and rubbish heaps would have compromised the traditional landscape and its cultural value[67]. The Arbitrators hence considered the US regulation as rationally related to the stated aims of preserving cultural heritage and avoiding environmental degradation, emphasising that «governments must compromise between the interests of competing parties»[68]. Aware of the public nature of the investment protection system under Chapter 11 of the NAFTA Agreement, the Tribunal accentuated the need for detailed reasoning to induce compliance with the arbitral award and thus strengthen its legitima-

[65] *Glamis Gold Ltd. v. United States of America*, ICSID Award, para. 366, emphasis added.

[66] *Glamis Gold Ltd. v. United States of America*, ICSID Award, para. 387.

[67] «[I]t appears to the Tribunal that the government had a sufficient good faith belief that there was a reasonable connection between the harm and the proposed remedy and that Claimant is using too narrow a definition of artifacts. Respondent points out that there are, in addition to pot shards, spirit circles, and the like, sight lines, teaching areas and viewsheds that must be protected and would be harmed by significant pits and waste piles in the near vicinity» (*Glamis Gold Ltd. v. United States of America*, ICSID Award, para. 805).

[68] *Glamis Gold Ltd. v. United States of America*, ICSID Award, para. 804. For the findings of the Arbitral Tribunal, see paras. 534-536 and 830, as well as the executive summary of the arbitral award at paras. 10-26.

cy[69]. In support of their conclusions, the Arbitrators thus referred also to the 1972 UNESCO Convention, in the parts where it provides that damage to or destruction of a cultural and natural heritage asset is a deleterious impoverishment of the heritage of all peoples[70], and in particular its Article 12. In fact, the latter establishes that States Parties are obliged to preserve heritage regardless of whether it is included in the World Heritage List, since exceptional universal value is not created by the formal recognition of the UNESCO Committee but is inherent in the property to be protected[71].

[69] «[I]t is important that a NAFTA tribunal provide particularly detailed reasons for its decisions. All tribunals are to provide reasons for their awards and this requirement is owed to private and public authorities alike. In the Tribunal's view, however, it is particularly important that the State Parties receive reasons that are detailed and persuasive for three reasons. First, States are complex organisations composed of multiple branches of government that interact with the people of the State. An award adverse to a State requires compliance with the particular award and such compliance politically may require both governmental and public faith in the integrity of the process of arbitration. Second, while a corporate participant in arbitration may withdraw from utilising arbitration in the future or from doing business in a particular country, the three NAFTA State Parties have made an indefinite commitment to the deepening of their economic relations. In this sense, not only compliance with a particular award, but the long-term maintenance of this commitment requires both governmental and public faith in the integrity of the process of arbitration. Third, a minimum level of faith in the system is maintained by the mechanism for the possible annulment of awards. However, the time and expense of such annulments are to be avoided. The detailing of reasons may not avoid the initiation of an annulment procedure, but it is hoped that such reasons will aid the reviewing body in a prompt resolution of such motions» (*Glamis Gold Ltd. v. United States of America*, ICSID Award, para. 8).

[70] «[D]eterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world» (second recital of the Preamble to the 1972 UNESCO Convention).

[71] See *Glamis Gold Ltd. v. United States of America*, ICSID Award, paras. 83-84, and footnote 194 of para. 84, where the Tribunal emphasised that «[*t*]*he Convention makes special note* that the fact of a site's non-inclusion on the register does not signify its failure to possess "outstanding universal value"» (emphasis added). In fact, according to Article 12 WHC «[t]he fact that a property belonging to the cultural or natural heritage has not been included in either of the two lists mentioned in paragraphs 2 and 4 of Article 11 [i.e. the *World Heritage List* and *the List of World Heritage in Danger*] shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from

6. *The Le Morne UNESCO site: the dispute between the British entrepreneur Gosling and the Republic of Mauritius*

Last but not least, international investment arbitration proceedings, in the recent *Gosling* case[72], made a further contribution to defining the relation between UNESCO sites and investment protection. The dispute at issue arose between Thomas Gosling, a British citizen, several companies controlled by him, registered both in Great Britain and Mauritius, and the African island State[73]. The Claimants, in the request for arbitration submitted to ICSID on 13 September 2016, alleged that the Government of Port Louis had prevented the construction of luxury tourist complexes in the region of Le Morne in violation of the UK-Mauritius Bilateral Agreement on Investment Promotion and Protection of 1986[74]. In

inclusion in these lists». The attention paid to this provision by the Arbitral Tribunal in the *Glamis Gold* case recalls an important Australian case law that, as early as the 1990s, noted the duty of States to identify heritage of outstanding universal value and to protect it, regardless of its inclusion on the World Heritage List. For references to this case law and an analysis of it, see P.J. O'Keefe, *Case Note - Foreign Investment and the World Heritage Convention*, in *International Journal of Cultural Property*, 1994, pp. 259-265. On Article 12 of the 1972 UNESCO Convention see F. Lenzerini, *Article 12 - Protection Not Inscribed on the World Heritage List*, in *The 1972 World Heritage Convention: A Commentary*, edited by F. Francioni, Oxford, 2008, pp. 201-218.

[72] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award of 18 February 2020. On this controversy see T. Jones, *Mauritius Faces Claim over UNESCO-Influenced Planning Policy*, in *Global Arbitration Review*, 28 September 2016; C. Sanderson, *Mauritius Defeats Treaty Claim over UNESCO Site*, in *Global Arbitration Review*, 19 February 2020; L. Bohmer, *Analysis: In Gosling v. Mauritius, Majority Saw No Treaty Violation, Stressing the Absence of a Right to Build a Real Estate Development on UNESCO World Heritage Site; Stanimir Alexandrov Disagreed*, in *Investment Arbitration Reporter*, 24 February 2020; *Win for Mauritius in World Heritage Development Dispute*, in *Bilaterals.org*, 19 March 2020.

[73] On the factual part of this litigation see *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, paras. 41-84.

[74] See *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Mauritius for the Promotion and Protection of Investments*, signed in Port Louis on 20 May 1986 and entered into

2003, in fact, just as the African government was hiring two consultants to obtain Le Morne's inclusion on the Tentative List, initiating the institutional path to inscribe that site on the UNESCO World Heritage List, Gosling began exploring the possibility of investing in Mauritius, without, however, giving due consideration to the restrictions that the conferment of the UNESCO title might imply for the management of the land within the buffer zone of Le Morne, a peninsula of exceptional beauty and profound cultural and historical significance for Mauritian identity – it was there that those who, in past centuries, managed to escape the slave trade took refuge, preferring to throw themselves off the cliff of Le Morne Brabant rather than be recaptured[75]. Thus, the British entrepreneur, in compliance with domestic regulations, acquired and made arrangements with local companies to purchase a property in Le Morne, and then established the necessary contacts with the various public offices to obtain authorisations for the realisation of his tourist property investment.

However, while Gosling presented his project to the government of Mauritius on 7 May 2004, the Parliament of the island Republic adopted the *Le Morne Heritage Trust Fund Act* on 4 May 2004[76]. With this legislation, a trust fund was established to collect

force on 13 October 1986 following the exchange of instruments of ratification, in *United Nations Treaty Series*, 1988, Vol. 1505, p. 63 ss.

[75] In particular, it is sadly well known what happened in 1835: following the abolition of slavery by the United Kingdom with the *Slavery Abolition Act* of 28 August 1833, which came into force on 1 August 1834, a group of British soldiers was sent to Le Morne to announce freedom to the escaped slaves, but the latter did not understand what was happening and, fearing to return to captivity, threw themselves off the promontory of Le Morne. More extensively on these aspects, see the dossier prepared by the Republic of Mauritius to apply for inscription on the UNESCO World Heritage *List*: *The Le Morne Cultural Landscape - Application for Inscription on the World Heritage List*, Republic of Mauritius, 2007, p. 13 ss. (available at *https://whc.unesco.org/uploads/nominations/1259.pdf*).

[76] The Parliament of Mauritius, *An Act to Provide for the Establishment and Management of Le Morne Heritage Trust Fund (Le Morne Heritage Trust Fund Act 2004)*, Act No. 10 of 2004, 28 May 2004, text available at *www.ecolex.org/details/legislation/le-morne-heritage-trust-fund-act-2004-no-10-of-2004-lex-faoc061973/*.

the necessary resources to preserve and promote the Mauritian region, both as a natural heritage and as a symbol of the repudiation of slavery, also observing the prescriptions gradually defined in the interaction between the African Government and the bodies of the UN specialised institution in order to obtain the prestigious UNESCO heritage recognition. Following the rejection, in the period between March and May 2006, of several versions of the dossier prepared by the first group of consultants for the inscription of Le Morne, Mauritius hired two new experts, indicated by UNESCO. In March 2007, the report and the management plan formulated by these experts were deemed satisfactory by the headquarters in Paris, thus paving the way for the proclamation, on 8 July 2008, of Le Morne's cultural landscape as a UNESCO heritage site[77].

The various steps towards the long-standing political objective pursued by the African island State had progressively eroded the possibilities for substantial building development in the buffer zone of the Le Morne site, culminating in the total ban on building any tourist facilities on the very land Gosling invested in, a measure adopted by Mauritius on 8 October 2007.

According to the applicants, the conduct of the African island State violated three provisions of the BIT between the United Kingdom and Mauritius: Article 5 on indirect expropriation[78], Article 2

[77] See the UNESCO presentation of the *Le Morne* site *Le Morne Cultural Landscape*, *https://whc.unesco.org/en/list/1259/*.

[78] «Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated *or subjected to measures having effect equivalent to nationalisation or expropriation* (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party and against prompt, adequate and effective compensation» (Article 5, para. 1 of the United Kingdom/Mauritius BIT, emphasis added).

on fair and equitable treatment[79], and Article 3 on the principle of non-discrimination[80].

In particular, on 8 October 2007, by adopting the *Revised Planning Policy Guidance-2* ('Revised PPG2'), Port Louis would have substantially deprived the investors of the «contractual development rights» that the applicants claimed to have acquired thanks to the Letter of Intent (LOI) issued on 30 December 2005 by the Mauritian Board of Investments (BOI) and the subsequent letter of 2 June 2006 of the latter, in which the BOI urged investors to submit the documents required in the Letter of Intent in order to issue the investment certificate. However, Gosling and the companies controlled by him, despite the BOI's reminder, had not complied with the six-month deadline set by the LOI to deliver all the necessary attestations, and, as a result, no certificate had ever been issued. Moreover, the tenor of the Letter of Intent did not reveal any grant of contractual development rights. On the contrary, the author of the LOI, the Mauritian Investment Office, emphasised in its text that the submission of all listed documents by no means entailed the automatic issuance of the investment certificate: «after the requested "documents are submitted, the issue of an Investment Certificate under the Integrated Resort Scheme will be considered"»[81]. Even more precisely, the Letter of Intent concluded by clarifying

[79] «Investments of nationals or companies of either Contracting Party shall at all times be accorded *fair and equitable treatment* and shall enjoy full protection and security in the territory of the other Contracting Party» (Article 2, para. 2 of the United Kingdom/Mauritius BIT, emphasis added).

[80] «Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to *treatment less favourable* than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State. Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, use, enjoyment or disposal of their investments, to *treatment less favourable* than that which it accords to its own nationals or companies or to nationals or companies of any third State» (Article 3 of the United Kingdom/Mauritius BIT, emphasis added).

[81] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 229.

that it did not create any «contractual relation» between the BOI and the investors, and that the Mauritian Office «will not be liable to any claim for compensation for any expenditure incurred by the company in the event that the project is not implemented as a consequence of the non-obtention of any permits and clearances required in furtherance of the realisation of the project or for any other reason not within the control of the Board of Investment»[82].

Analysing this documentation, the majority of the Arbitral Tribunal observed that this last paragraph alone «should be sufficient to show that the LOI did not confer any development rights to the Claimants»[83]. It then reported that the inscription of Le Morne on the UNESCO World Heritage List was an «overriding policy objective»[84], indeed «the paramount interest»[85] of the Mauritian government. Of this strong political will, the ICSID Tribunal further emphasised, the Claimants were well aware, not least because the Mauritian Prime Minister himself, already at the meeting with the investors on 30 September 2004, had informed them and recorded in the minutes that the Government had decided to present Le Morne's candidature to UNESCO, with the consequence that the proposed investment projects «may not be compatible with this nomination and the recommendations of the UNESCO report»[86]. In such a context

> «[i]t is doubtful that the LOI and the letter of June 2, 2006 by themselves would have been sufficient to generate, in a *prudent* businessman,

[82] *Ibidem*.

[83] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 230.

[84] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 226.

[85] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 238.

[86] *Ibidem*.

> expectations to proceed with an investment such as the Claimants had planned to carry out»[87].

Therefore, the Tribunal concluded, «[t]he reliance of the Claimants seems misplaced»[88] since the Letter of Intent cannot be considered equivalent to obtaining all necessary governmental authorisations. The documentation produced in the arbitration dispute did not hence reveal the existence of any «contractual development right»[89] for the Claimants, with the consequence that the State conduct cannot be qualified as an indirect expropriation, thus as a violation of Article 5 of the Anglo-Mauritian BIT[90].

Gosling and the other investors also attempted to argue that Mauritius's conduct would infringe Article 2 of the BIT dedicated to the fair and equitable treatment. By changing the building parameters of the land near Le Morne to comply with the requirements of the UNESCO experts, the Government of Port Louis would have acted inconsistently and unpredictably, so that the shift of policy in the development prospects for the buffer zone would not have respected the principle of good faith. The Arbitral Tribunal rejected these allegations as well:

> «[t]he Respondent's objective had always been to inscribe Le Morne as a heritage site. The Claimants were aware of this objective ... The Respondent was entitled to change its policy in respect of development in Le Morne and had never given any assurance that it would not change it»[91].

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[87] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 236, emphasis added.

[88] *Ibidem*.

[89] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, paras 226 and 255.

[90] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 242.

[91] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 249. It is to be pointed out that even the dissenting arbitrator Alexandrov acknowledged that the inscription of Le Morne on the *World Heritage List* was in the public interest of the State of Mauritius and its population:

In particular, with regard to the argument of the failure to respect good faith in reviewing the buffer zone planning regulations, as the African island State would have been opaque and lacking in its dealings with investors, the Arbitral Tribunal observed, on the contrary, that the local government had always acted transparently, asking one of the experts, chosen on UNESCO's instructions, to organise meetings with investors to inform them and inform himself about each other's projects. Therefore, the standard of fair and equitable treatment set forth in Article 2 of the BIT was also considered to be met[92].

The last argument raised by the Claimants was that of discriminatory treatment in relation to other investors in the Le Morne buffer zone. In fact, other landowners in the buffer zone had accepted compensation from the Mauritian government, compensation that Gosling and his partners considered fair, while that proposed to them was not considered adequate. Again, the Arbitral Tribunal did not accept the grievances of the Claimants, concluding that Mauritius' compensation policy was fair. Indeed, that policy was commensurate with the development opportunities of the various areas of Le Morne that were possible under UNESCO's requirements. The consideration of the absence of discrimination in the quantification of the value of the land is, therefore, anchored to the moment after the adoption of the stricter criteria set forth by the UNESCO experts, who distinguished between buildable and non-build-

«[i]t is undisputed that the inscription of *Le Morne* as a UNESCO World Heritage Site was in the public interest of Mauritius and its people, and that it was a noble goal consistent with the objective of preserving the history of the place, honouring the dignity of the slaves who lived and died there, creating a symbol of freedom and human dignity, and – last but not least – preserving the physical beauty of Le Morne. In sum, [the] Respondent was fully entitled to prohibit any development at *Le Morne*, including in the buffer zone, in the interests of the people of Mauritius – and it did so» (*Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, *Dissenting Opinion of Arbitrator Stanimir Alexandrov*, para. 27).

[92] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 250.

able parts of the buffer zone[93]. The applicants were not, therefore, in «like circumstances»[94] compared to other landowners: the prohibition to build on their property «was justified by objective criteria of fauna, flora, and visual integrity *on the basis of the recommendations of the UNESCO's experts*»[95], with the consequent absence of a breach of Article 3 of the BIT between the United Kingdom and Mauritius.

Having dismissed all applicants' claims on the merits, the Tribunal did not award any damages to Gosling and his companies, who, instead, had claimed EUR 18 million in compensation. With regard to court costs, in light of the fact that the Arbitrators rejected most of the objections on jurisdiction raised by the defendant State, as well as the substantive issues raised by the investors, it was deemed appropriate to have each party pay its own legal costs, together with half of the costs of the arbitration proceedings[96].

7. *Conclusions*

The analysis of the arbitral jurisprudence proposed here indicates a clear, constant and growing focus on the protection of world cultural and natural heritage also in international investment litigation.

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[93] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 256.

[94] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 169.

[95] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 254, emphasis added.

[96] The Arbitral Tribunal decided on the allocation of the costs of the proceedings by applying the discretion provided for in Article 61(2) ICSID, according to which «[i]n the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award». Cf. *Thomas Gosling et al. v. Mauritius*, ICSID Case No. ARB/16/32, Award, para. 286.

This dynamic reflects and contributes to the affirmation of the consideration of world heritage protection as an important public interest objective and duty on the part of the international community, given also the almost unanimous adhesion of the States to the 1972 Convention. The WHC, in fact, recognised the universal character of the assets that can be qualified as world heritage, placing the duty to contribute to their preservation on all States, and, more generally, on the international community as a whole, thus overcoming the traditional assumption that cultural goods fell only «within the domain of domestic jurisdiction»[97]. The interpretation of the provisions of the investment agreements – which, according to Article 31(3)(c) of the Vienna Convention on the Law of Treaties, must take into account any relevant rule of international law applicable to the relations between the parties[98] – has therefore to be carried out also in the light of the principles of the 1972 Convention, considering as well that «some elements of cultural heritage protection already belong to customary international law»[99].

[97] V. Vadi, *Culture Clash? World Heritage and Investors' Rights in International Investment Law and Arbitration*, cit., at p. 126.

[98] «A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose ... There shall be taken into account, together with the context ... (c) any relevant rules of international law applicable in the relations between the parties» (Article 31, *Vienna Convention on the Law of Treaties*, in *United Nations Treaty Series,* vol. 1155, 1980, p. 331). On the systemic interpretation of international agreements see C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, in *The International and Comparative Law Quarterly*, 2005, pp. 279-318; D. Kalderimis, C. Tripp, *Systemic Integration and International Investment Law - Some Practical Reflections*, SIEL Working Paper No. 2012/46; P. Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration - Normative Shadows in Plato's Cave*, Leiden-Boston, 2015; D. Rosentreter, *Article 31(3)(c) of the Vienna Convention on the Law of Treaties and the Principle of Systemic Integration in International Investment Law and Arbitration*, Baden-Baden, 2015.

[99] V. Vadi, *Cultural Heritage in International Investment Law and Arbitration*, cit., p. 268. See also V. Vadi, Jus Cogens *in International Investment Law and Arbitration*, in *Netherlands Yearbook of International Law*, 2015, pp. 357-388; T. Voon, *National Treasures at the Intersection between Cultural Heritage and In-*

Moreover, the awards examined on the relation between investment protection and the 1972 Convention show the contribution of international arbitration jurisprudence to the definition of the duty of due diligence on the part of investors, who, under this obligation, are required to make investments that are 'responsible'. This means that an investor must also carry out a proper analysis of the domestic and international legal framework both before making his investment in the host country and after starting his/her business activity[100]. The lack of due diligence attributable to the investor, in fact, implies the impossibility for the latter to avail himself/herself of the protection of the BITs, or, in any case, of the chapters dedicated to investments in the free trade agreements[101], since the expectations of entrepreneurs, in order to fall under the protection of international investment law, must be legitimate and reasonable[102], a connotation denied by the investor's lack of diligent

ternational Trade Law, in *The Oxford Handbook of International Cultural Heritage Law*, cit., pp. 507-528.

[100] See A. Tanzi, *On Balancing Foreign Investment Interests with Public Interests in Recent Arbitration Case Law in the Public Utilities Sector*, in *The Law and Practice of International Court and Tribunals*, 2012, pp. 65-73; J.E. Viñuales, *Investor Diligence in Investment Arbitration: Sources and Arguments*, in *ICSID Review*, 2017, pp. 346-370; A. Rajput, *Due Diligence in International Investment Law - From the Law of Aliens to Responsible Investment*, in *Diligence in the International Legal Order*, edited by H. Krieger, A. Peters, L. Kreuzer, *Due* Oxford, 2020, pp. 273-287; M.A.J. Levine, *Emerging Practice on Investor Diligence: Jurisdiction, Admissibility, and Merit*, in *Handbook of International Investment Law and Policy*, edited by J. Chaisse, L. Choukroune, S. Jusoh, Heidelberg, 2020, pp. 1-24; M. Burgstaller, G. Risso, *Due Diligence in International Investment Law*, in *Journal of International Arbitration*, 2021, pp. 697-722.

[101] Consider, for example, *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award of 6 December 2016, where the Tribunal, *inter alia*, stated: «one would expect an investor aware of the risks of investing in a certain environment to be particularly diligent in investigating the circumstances of its investment. Yet, the Claimants did not engage in proper due diligence in their dealings with their partners ... The inadmissibility applies to all the claims raised in this arbitration ... This is further supported by the Claimants' lack of diligence in carrying out their investment» (paras. 508 and 529).

[102] «The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment,

factual and legal assessment of the conditions in which his/her investment takes place.

The obligation of due diligence, moreover, is further affirmed and acquires depth thanks to the ever-widening body of international soft law dealing with the conduct of entrepreneurs in the exercise of their economic activity. The *Ruggie Principles,* in fact, call for «[b]usiness enterprises ... [to] respect human rights»[103], taking care to indicate that «[i]n order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out *human rights due diligence*»[104]. More generally, voluntary codes on corporate social responsibility are increasingly referred to in the most recent and innovative international economic law agreements. For example, the CETA Agreement between the European Union and Canada, in the Preamble and in the provisions in which it affirms the commitment of the parties to the promotion of sustainable development, i.e. the dignity of labour (or decent work), the protection of the environment and the optimal use of raw materials, urges them «to pursue best practices in responsible business conduct» and encourage «enterprises operating within their territory or subject to their jurisdiction to respect internationally recognised guidelines and principles

but also the political, socioeconomic, cultural and historical conditions prevailing in the host State». *Duke Energy Electroquil Partners et Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award of 18 August 2008, para. 340. For these aspects see E.T. Laryea, *Legitimate Expectations in Investment Treaty Law: Concept and Scope of Application*, in *Handbook of International Investment Law and Policy*, cit., pp. 1-24.

[103] Article 11 of the *Ruggie Principles*. Cf. UNHRC Res. 17/4, *Guiding Principles on Business and Human Rights*, 16 June 2011.

[104] Article 17 of the *Ruggie Principles*. On the *due diligence* expressed in international law regarding business activity see. L. Chiussi, *General Principles for Business and Human Rights in International Law,* Leiden-Boston, 2020, p. 240 ss.; L. Chiussi, *Corporate Human Rights Due Diligence: from the Process to the Principle*, in M. Buscemi, N. Lazzerini, L. Magi, D. Russo, *Legal Sources in Business and Human Rights*, Leiden-Boston, 2020, pp. 11-30; L. Chiussi, C. Malafosse, *A Public International Law Outlook on Business and Human Rights*, in *International Community Law Review*, 2022, pp. 11-35.

of corporate social responsibility»[105] – including the OECD Guidelines for Multinational Enterprises[106] and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas[107].

Such a referral certainly has an impact on defining the scope of the diligence that an investor must have when deciding to operate in a third country: this economic operator must adequately inform himself/herself and comply with the national legislation and the international obligations undertaken by the host State on the respect for the environment, fundamental rights, and also for the protection of cultural and natural heritage. Another paradigmatic element of the latest generation of investment agreements and mega-regionals is, in fact, the codification of the entitlement of States to maintain their right to regulate[108] also to protect cultural assets where this may affect the protection of foreign investments, provided that the regulations for the protection of heritage are not arbitrary or unjustifiably discriminatory. Consider, for example, the draft agreement on investment protection between the European Union and Singapore, which in Article 2(3)(d) provides for the possibility for each contracting party to disregard the principle of national treatment of investments if this is «necessary for

[105] Recital 10 of the Preamble and Article 25.4(2)(c) of the CETA Agreement. See also Articles 22.3 and 24.12 of the CETA Agreement. On corporate social responsibility in international investment law see, most recently, L. Dubin, *RSE et droit des investissements, les prémisses d'une rencontre*, in *Revue Générale de Droit International Public*, 2018, pp. 867-891; N. Longo, *La Responsabilità Sociale d'impresa nei trattati internazionali in materia di investimenti: verso obblighi diretti in capo agli investitori*, in *Ordine Internazionale e Diritti Umani*, 2020, pp. 1134-1145.

[106] OECD, *OECD Guidelines for Multinational Enterprises,* Paris, 2011.

[107] *OECD, OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas,* Paris, 2016[3].

[108] On this topic see, *ex multis*, OECD, *L'"expropriation indirecte" et le "droit de réglementer" dans le droit international de l'investissement,* Paris, 2004; A. Titi, *The Right to Regulate in International Investment Law*, Oxford, 2014; L. Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective*, London, 2016.

the protection of national treasures of artistic, historic or archaeological value»[109]. Arbitral tribunals called upon to settle disputes on the application of the most modern treaty instruments will thus have clear additional prescriptions set by the State Parties[110] – prescriptions confirming the approach of the awards analysed in this chapter and their positive evolution in favour of the protection of cultural heritage.

It should also not be overlooked that the absence of due diligence can expose investors to counterclaims by defendant States in arbitration disputes. This, for example, happened in the *Urbaser* case, in which the Arbitral Tribunal ruled that Argentina could bring a counterclaim to support the investor's violation of the South American population's fundamental right of access to water[111]. Addition-

[109] Cf. COM(2018) 194 final, *Proposal for a Council Decision on the conclusion of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore of the other part*, Brussels, 18.4.2018.

[110] On this point see B. Saverio, *Legal Models of Exception and Integration of Non-Commercial Values: from the Experience of GATT/WTO Law to Foreign Investment Protection Regimes*, in *International Trade Law*, 2013, pp. 405-436; R. Claros, *Striking a Balance between the Protection of Foreign Investment and the Safeguard of Cultural Heritage in International Investment Agreements: Can General Exceptions Make a Difference*? in *Intergenerational Equity - Environmental and Cultural Concerns*, edited by T. Cottier, S. Lalani, C. Siziba, Leiden-Boston, 2019, pp. 192-207; E. Sardinha, *Protecting Cultural Heritage in International Investment Law: Tracing the Evolution and Treatment of Cultural Considerations in Recent FTAs and Investor-State Jurisprudence*, in *Handbook of International Investment Law and Policy*, cit., pp. 1-25.

[111] See *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, paras 1182-1221. On that case see P. Abel, *Counterclaims Based on International Human Rights Obligations of Investors in International Investment Arbitration - Fallacies and Potentials of the 2016 ICSID Urbaser v. Argentina Award*, in *Brill Open Law*, 2018, pp. 61-90; L. Chiussi, *ICSID Case No. ARB/07/26, Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, Award of 8 December 2016*, in *Il diritto internazionale come strumento di risoluzione delle controversie*, edited by E. Baroncini, Bologna, 2018, pp. 212-223; N. Longo, *Considerazioni a margine del caso ICSID Urbaser: tra responsabilità sociale d'impresa ed "International Corporate Human Rights Obligations"?*, in *Diritto comunitario e degli scambi internazionali*, 2018, pp. 117-227.

ally, in the panorama of the regulation of the economy, significant projects are emerging to articulate the obligation of due diligence, and in this context it is relevant the debate within the European Union to provide itself with a binding discipline on the due diligence of companies[112].

An investor, therefore, in order to show to be prudent[113] and act in due diligence, must also verify the impact that his/her investment is likely to have on the place chosen for his/her activity from the point of view of the respect for the world heritage protected and valorised by the 1972 UNESCO Convention, rightly considered «the jewel of UNESCO treaties»[114]. Only in this way can his/her investment be considered diligent and responsible, and therefore fully preserved by international investment law.

More generally, on the topic of the relationship between international investment law and human rights see A. Tanzi, *Reducing the Gap Between International Investment Law and Human Rights Law in International Investment Arbitration*? in *Latin American Journal of International Trade Law*, 2013, pp. 299-311; with specific reference to the right to water see A. Tanzi, *Bridging the Gap between International Investment Law and the Right of Access to Water*, in *Bridging the Gap between International Investment Law and the Environment*, edited by Y. Levashova, T. Lamboy, I. Dekker, The Hague, 2016, pp. 187-214.

[112] Cf. COM(2022)71 final, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, Brussels, 23.2.2022, and European Parliament Research Service, *Towards A Mandatory EU System of Due Diligence for Supply Chains*, 2020.

[113] See paragraph 6 above, in correspondence with footnote 87, where the ICSID Tribunal requires the presence of the status of 'prudent investor' before recognising that the regulatory interventions of the host State violated the protection of the foreign economic operator. Cf. *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, para. 236.

[114] S. von Schorlemer, *Compliance with the UNESCO World Heritage Convention: Reflections on the Elbe Valley and the Dresden Waldschliisschen Bridge*, in *German Yearbook of International Law*, 2008, pp. 321-390, at p. 322.

Paloma Almodóvar

THE RELEVANCE OF THE UNESCO WORLD HERITAGE LIST AS A COUNTRY-SPECIFIC ADVANTAGE FOR TOURISM COMPETITIVENESS: AN INTERNATIONAL BUSINESS PERSPECTIVE*

Abstract: After a review of the literature on the Web of Science, we observe that a large number of studies focus on UNESCO's archaeological, artistic and environmental aspects; however, research is lacking on the strategic implications derived from the UNESCO World Heritage List that firms in sectors such as tourism must be aware of to boost their economic performance. Therefore, this study aims to pioneer the study of UNESCO world heritage properties through an international business lens. To do so, we justify how a touristic firm's competitiveness depends on the linkages between its unique set of capabilities (firm-specific advantages [FSAs]) and its home country assets (country-specific advantages [CSAs]). In this paper, we present a modified FSA/CSA matrix where UNESCO world heritage properties are key location-bound CSAs, and we show how firms in the tourism sector need to confront both for decision-making.

1. *Introduction*

In November 1972, the General Conference of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) signed an international treaty for the national and international identification, protection and preservation of monuments, architectural ensembles, natural formations and sites of outstanding universal value. From that date onwards, UNESCO began to work to protect the cultural and natural heritage of humanity to ensure its survival over time.

* Double-blind peer reviewed content.

According to UNESCO[1], 1,154 properties are currently listed (897 as cultural heritage, 218 as natural heritage and 39 as a mixture of both). The geographical distribution of these properties is thus not homogeneous, as almost half of them are concentrated in Europe and North America (47.23%), while Africa and the Arab States present the lowest number of listed properties (8.49% and 7.63%, respectively). UNESCO's role in the World Heritage listing process is therefore vital, and the implications of this recognition extend across different areas, not only at the individual level (protecting the present and future enjoyment of those areas considered to be of outstanding universal value in terms of their scenic beauty or cultural content) but also at the firm level (as firms located in these territories are directly affected in different manners).

On the 50th anniversary of the signing of the aforementioned agreement, it is particularly relevant to review academia's contributions concerning this historic milestone and its repercussions. Our work focuses on firm-level implications, and our aim is threefold. First, we seek to determine the degree of maturity of this line of research in the fields of management and business. In other words, we aim to determine whether the academic world has paid sufficient attention to the business implications of world heritage and whether it is being developed in depth. Second, we aim to identify the areas that have attracted the most research. In addition, within each area, we seek to refine the specific aspects that have been researched. Third, we aim to approach UNESCO world heritage studies through an international business lens. In doing so, we seek to identify the most promising gaps and possible lines of research for the immediate future.

It is expected that these three purposes will clarify the topic of study and help both scholars (for their research) and managers (for the governance of their firms). This paper is organised as follows. First, we describe the methodology used and some bibliometric in-

[1] UNESCO, *World Heritage List Statistics*, available at: *https://whc.unesco.org/en/list/stat*, 2022.

dicators. Second, we present a scientific map of the research carried out, followed by an analysis of the contents. Third, we explore the potential contribution that would be made to the literature if an international business approach were applied. To this end, we present the usefulness of the firm-specific advantage (FSA) and country-specific advantage (CSA) matrix tool. Finally, we compile the main conclusions drawn from this study as well as the limitations.

2. *Methodology*

To conduct a systematic and rigorous literature review, two main approaches can be followed. The primary goal of the first approach is to study the main empirical results obtained in the literature; meta-analyses fall under this approach. The main goal of the second approach is to present a state of the art, where the main topics covered by academia are usually identified (optionally commenting on the results obtained). In this second approach, authors follow different methods: (a) 'artisanal' literature reviews[2], where the researcher's criteria guide the selection of papers included in the study – these reviews are usually accompanied by a content analysis – this approach has evolved to a systematic literature review approach where the author's criteria are clearly specified to ensure a high degree of objectivity[3]; (b) bibliometric and science mapping techniques[4], where software helps the researcher to select the rele-

[2] M. Carvajal-Camperos, P. Almodóvar, R. Vassolo, *Análisis del Concepto y Alcance de las Alianzas Estratégicas: Un Enfoque Longitudinal (1972-2020)*, in *Revista Venezolana de Gerencia*, 26, 2021, pp. 290-314; M. Jakubik, P. Müürsepp, *From Knowledge to Wisdom: Will Wisdom Management Replace Knowledge Management?*, in *European Journal of Management and Business Economics*, 31, 2022, pp. 367-389.

[3] M. Sharma, Z. Rahman, *Anthropomorphic Brand Management: An Integrated Review and Research Agenda*, in *Journal of Business Research*, 149, 2022, pp. 463-475.

[4] M.J. Cobo, F. Chiclana, A. Collop, J. de Ona, E. Herrera-Viedma, *A Bibliometric Analysis of the Intelligent Transportation Systems Research Based on Sci-*

vant papers, and various techniques are applied to cluster the main areas covered in these studies; and (c) hybrid techniques[5], where the researcher uses both bibliometric and science mapping techniques, to provide the greatest possible objectivity and coverage to the review, but complements it with a content analysis to enrich the results obtained. In our case, we follow this hybrid approach.

To carry out our bibliometric and content analyses, we followed the methodology of Cobo and colleagues[6] and used the SciMAT software. Our research design involved the following steps:

2.1. *Step 1: Data collection*

To ascertain an initial state of the art of literature on UNESCO heritage sites, we used the Web of Science (WoS) Core Collection. We coded a broad search where we identified the words 'heritage' and 'UNESCO' in the topic field (this focused the search on titles, abstracts and keywords). In addition, we refined this search by publication type (we selected articles, review articles, early access, books, book chapters and editorial materials). This query delivered 4,408 results (search date: 13 May 2022). The first publica-

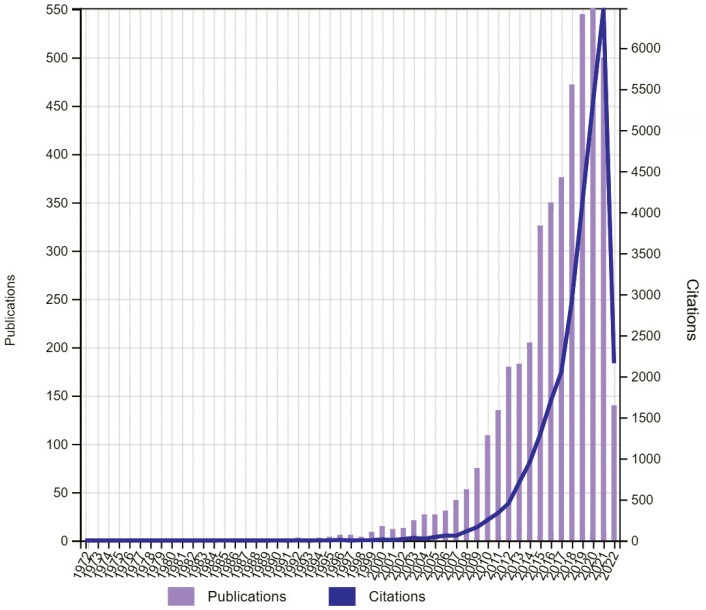
ence Mapping, in *IEEE transactions on intelligent transportation systems*, 15, 2013, pp. 901-908; M. Glinyanova, R.B. Bouncken, V. Tiberius, A.C. Cuenca Ballester, *Five Decades of Corporate Entrepreneurship Research: Measuring and Mapping the Field*, in *International Entrepreneurship and Management Journal*, 17, 2021, pp. 1731-1757.

[5] F. Rodríguez-Ruiz, P. Almodóvar, Q.T.K. Nguyen, *Intellectual Structure of International New Venture Research: A Bibliometric Analysis and Suggestions for A Future Research Agenda*, in *Multinational Business Review*, 27, 2019, pp. 285-316; S. Secinaro, V. Brescia, F. Lanzalonga, G. Santoro, *Smart City Reporting: A Bibliometric and Structured Literature Review Analysis to Identify Technological Opportunities and Challenges for Sustainable Development*, in *Journal of Business Research*, 149, 2022, pp. 296-313.

[6] M.J. Cobo, A.G. López-Herrera, E. Herrera-Viedma, F. Herrera, *An Approach for Detecting, Quantifying, and Visualizing the Evolution of a Research Field: A Practical Application to the Fuzzy Sets Theory Field*, in *Journal of Informetrics*, 5, 2011, pp. 146-166.

tion we found was in the institution's own journal *UNESCO Courier* and dates to 1977. Thereafter, the first academic publication outside UNESCO appeared only in 1983, in the *International Journal of Nautical Archaeology*.

Figure 1. Citations and publications over time (general publications)



Source: WoS (2022)[7]

Figure 1 illustrates the evolution of publications and citations on this subject over the years. Here, we observe an increasing trend with respect to publications and citations on world heritage and UNESCO-related topics. For example, there were 500 publications

[7] WoS, Times Cited and Publications Over Time, FECYT Innovación, available at: *www.webofscience.com/wos/woscc/citation-report/98d1fba1-ebd0-4e0e-be16-f64fc-4ccc69d-3b21be68*, 2022.

and 6,485 citations in 2021. This kind of evolution over time usually indicates that the topic is in a growth phase and has not yet entered the maturity phase[8].

Table 1. Web of Science categories with the highest number of UNESCO World Heritage publications

	Web of Science Categories	Record Count	% of 4,408
1	Geosciences Multidisciplinary	473	10.73
2	Environmental Sciences	421	9.55
3	Archaeology	369	8.37
4	Humanities Multidisciplinary	362	8.21
5	Environmental Studies	314	7.12
6	Architecture	308	6.99
7	Hospitality Leisure Sport Tourism	291	6.60
8	Engineering Civil	227	5.15
9	Green Sustainable Science Technology	219	4.97
10	Geography	202	4.58

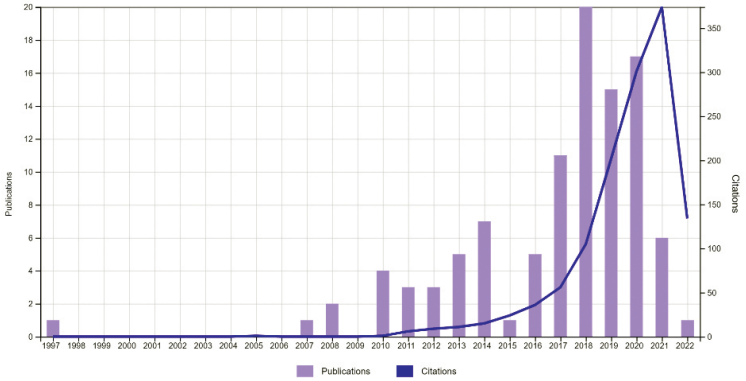
Table 1 lists the top 10 categories that account for most of the publications. The category of 'Geosciences' contains the most publications. By contrast, publications focused on the area of 'Management' appear at position 30, and those catalogued in 'Business' are at position 49. This significant difference in positions indicates a clear research gap, as the implications of UNESCO's preservation of natural and cultural heritage in these areas have remained overlooked. Thus, to gain an insight into the research topics that have been addressed in these fields of knowledge, we refined the search and carried out a comprehensive bibliometric analysis.

After narrowing the search to publications categorised under 'Management' or 'Business', we obtained a total of 102 publica-

[8] E. de Diego, P. Almodóvar, *Mapping Research Trends on Strategic Agility over the Past 25 Years: Insights from a Bibliometric Approach*, in *European Journal of Management and Business Economics*, 31, 2022, pp. 219-238.

tions. Figure 2 shows its evolution over time. Compared to Figure 1, Figure 2 depicts a sharp reversal of the trend. The first publication dates back to 1997 (in the journal *Tourism Management*). Both the number of publications and the number of citations are much lower than in Figure 1 (e.g., in 2021 there were six publications and 374 citations). Thus, a large gap exists in the literature, and we consider it a prime research opportunity.

Figure 2. Citations and publications over time (specific publications: management and business categories)



Source: Updated from WoS (2022)[9]

2.2. *Step 2: Type of analysis and data refinement*

We selected 'keywords' for a co-word analysis. We chose this metric because it is one of the most widely used[10]. For the keywords

[9] WoS, *Times Cited and Publications Over Time*, FECYT Innovación, available at: *www.webofscience.com/wos/woscc/citation-report/98d1fba1-ebd0-4e0e-be16-f64fc4ccc69d-3b21be68*, 2022.

[10] K. Börner, C. Chen, K.W. Boyack, *Visualizing Knowledge Domains*, in *Annual review of information science and technology*, 37, 2003, pp. 179-255; E. de Diego, P. Almodóvar, *Mapping Research Trends on Strategic Agility over the Past 25 Years: Insights from a Bibliometric Approach*, cit.

to be useful, we performed a rigorous manual review. SciMAT software downloads two types of keywords: the words identified by the author and those identified by the WoS through artificial intelligence. In addition, SciMAT allows keywords to be added manually. In our case, we first undertook a deduplication process, where we grouped words referring to the same concept (e.g., the singulars and plurals of a word). Then, we read each of the 102 documents and manually reviewed all the keywords downloaded in the software, marked the keywords referring to topics and manually added highly significant keywords that had not been entered into the system. Finally, we eliminated all words that were not relevant because they were too generic and broad[11], such as 'UNESCO' or 'heritage'.

Finally, the SciMAT software allows analysis by time periods. The literature can hence be analysed for the whole period and for different periods, to observe how the topics covered have evolved over time. Because the volume of documents is significantly reduced and most of the publications are concentrated in recent years, we chose to analyse the entire period: from 1997 to 2022.

2.3. *Step 3: Specifications for constructing the science map*

We had to make several decisions to implement a co-word analysis with the keywords of the 102 documents for the period 1997–2022. As a normalisation and similarity measure of the co-occurrence of keywords, we chose the equivalence index[12]. Then, as a clustering algorithm over the normalised co-word network, we se-

[11] M.J. Cobo, F. Chiclana, A. Collop, J. de Ona, E. Herrera-Viedma, *A Bibliometric Analysis of the Intelligent Transportation Systems Research Based on Science Mapping*, cit.

[12] M. Callon, J.P. Courtial, F. Laville, *Co-Word Analysis as a Tool for Describing the Network of Interactions Between Basic and Technological Research: The Case of Polymer Chemsitry*, in *Scientometrics*, 22, 1991, pp. 155-205.

lected the single-centre algorithm[13], with a minimum network size of three and a maximum of 12. In this way, we identified groups of keywords that are strongly related and that make up the research themes.

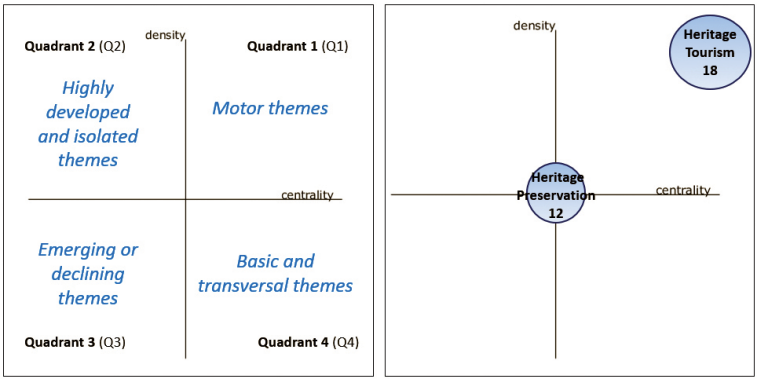
3. *Science mapping analysis of UNESCO World Heritage*

Following the analyses explained above, we assessed the main research topics that have been addressed in the 'Management' and 'Business' categories based on two fundamental values: (a) centrality values, a measure used to represent the importance of a theme with respect to the state of the art of that line of research – specifically, it is measured through the degree of interaction of a network with other networks or topics (i.e., the strength of external ties) – and (b) density values, a measure of the internal strength of a network (i.e., the strength of internal ties); it is used to represent the degree of development of the topic. With these two values, a two-dimensional representation can be created where the abscissa axis represents centrality, and the ordinate axis represents density.

Figure 3 presents a strategic diagram for the period analysed (1997–2022) and indicates that the literature has mainly focused on two themes or topics of study: heritage tourism and heritage preservation. Below, we explain each topic in detail.

[13] N. Coulter, I. Monarch, S. Konda, *Software Engineering as Seen through Its Research Literature: A Study in Co-Word Analysis*, in *Journal of the American society for information science*, 49, 1998, pp. 1206-1223.

Figure 3. Explicative and applied strategic diagram for UNESCO World Heritage publications in management and business



Source: López-Robles and colleagues[14] and output from SciMAT

3.1. *Approaches to heritage tourism in the literature*

According to Figure 3, heritage tourism is located in the upper-right corner of Q1 (centrality range = 1; density range = 1). Heritage tourism is a specific type of tourism that focuses on visiting natural landscapes and promoting the intrinsic culture of an area based on historical events or personalities, as well as on its heritage buildings, urban landscapes and preserved morphological patterns[15]. Our results indicate that heritage tourism is a motor theme (i.e., a topic of high relevance to UNESCO's world heritage re-

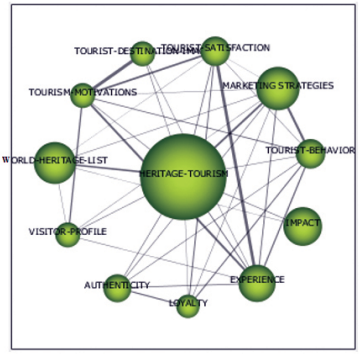
[14] J.R. López-Robles, M.J. Cobo, M. Gutiérrez-Salcedo, M.A. Martínez-Sánchez, N.K. Gamboa-Rosales, E. Herrera-Viedma, *30th Anniversary of Applied Intelligence: A Combination of Bibliometrics and Thematic Analysis using SciMAT*, in *Applied Intelligence*, 51, 2021, pp. 6547-6568.

[15] D.B. Weaver, *Ecotourism as Mass Tourism: Contradiction or Reality?*, in *Cornell Hotel and Restaurant Administration Quarterly*, 42, 2001, pp. 104-112; J. Priskin, *Assessment of Natural Resources for Nature-Based Tourism: The Case of the Central Coast Region of Western Australia*, in *Tourism Management*, 22, 2001, pp. 637-648; S.S. Mousavi, N. Doratli, S.N. Mousavi, F. Moradiahari, *Defining*

search line and with a high level of development). Sixty-five of the 102 documents that form part of this literature review reflect on this matter, and its *h*-index is equal to 18.

Regarding this motor theme, we generated a thematic network to visualise all the sub-themes that are frequently analysed together. Figure 4 shows the network constructed with the keywords associated with the theme of heritage tourism (marketing strategies, World Heritage List, impact, experience, tourist satisfaction, tourist behaviour, authenticity, visitor profile, tourism motivations, tourist destination image and loyalty). This figure visualises the connection between the most significant nodes through the thickness of the lines that connect them. The strongest internal relationships are as follows.

Figure 4. Thematic network of the topic 'heritage tourism'



	Documents
HERITAGE-TOURISM	45
MARKETING STRATEGIES	17
WORLD-HERITAGE-LIST	16
IMPACT	14
EXPERIENCE	13
TOURIST-SATISFACTION	8
TOURIST-BEHAVIOR	8
AUTHENTICITY	7
VISITOR-PROFILE	5
TOURISM-MOTIVATIONS	5
TOURIST-DESTINATION-IMAGE	5
LOYALTY	4

3.1.1. *Tourism Heritage: Tourism Motivations, Tourist Satisfaction, Experience and Tourist Destination Image*

With regard to the documents covering heritage tourism, Figure 4 illustrates a strong relationship between the sub-topics of tour-

Cultural Tourism. International Conference on Civil, Architecture and Sustainable Development, London, UK, 2016, pp. 70-75.

ism motivations, tourist satisfaction, experience and tourist destination image. This is the case, for example, in Su et al. (2020)[16] manuscript published in the journal *Tourism Management Perspectives* and Zhang et al. (2020)[17] paper published in the *Journal of Hospitality and Tourism Management*. Su et al. (2020) presented an integrative model in which they analyse tourists' motivation and satisfaction with respect to a UNESCO heritage destination. In addition, they included elements such as destination image and experience. Their research explains, inter alia, that motivation positively influences several matters such as engagement, experience and the tourist's own image of the heritage destination, all of which increase heritage tourists' satisfaction. Analysing a Chinese location registered as a UNESCO World Cultural Heritage Site, Zhang et al. (2020) also established an integrative model that links different elements affecting tourists' loyalty. For example, they explored cultural motivation, as they expected it to affect destination image. They also considered interest in cultural hospitality itself, tourists' experiences, visitor satisfaction and loyalty to luxury hotels, among other things.

3.1.2. *Tourism Heritage: Marketing Strategies and Tourist Behaviour*

Figure 4 also shows another combination of keywords that frequently appear together: marketing strategies and tourist behaviour. For example, papers published by Prayag et al. (2013)[18] and Fu

[16] D.N. Su, N.A.N. Nguyen, Q.N.T. Nguyen, T.P. Tran, *The Link between Travel Motivation and Satisfaction Towards a Heritage Destination: The Role of Visitor Engagement, Visitor Experience and Heritage Destination Image*, in *Tourism Management Perspectives*, 34, 2020, p. 100634.

[17] Y. Zhang, Y. Xiong, T.J. Lee, *A Culture-Oriented Model of Consumers' Hedonic Experiences in Luxury Hotels*, in *Journal of Hospitality and Tourism Management*, 45, 2020, pp. 399-409.

[18] G. Prayag, S. Hosany, K. Odeh, *The Role of Tourists' Emotional Experiences and Satisfaction in Understanding Behavioral Intentions*, in *Journal of Destination Marketing & Management*, 2013, 2, pp. 118-127.

(2019)[19], both in the *Journal of Destination Marketing & Management*, deal with these sub-topics. Prayag et al. (2013) proposed marketing strategies that are useful for improving the experiences of international tourists. They focused on tourist behavioural intentions in Petra, a UNESCO World Heritage destination, and demonstrated their strong relationship with emotional experiences and with the visitor's own satisfaction. Fu (2019) highlighted the importance of understanding how tourists experience authenticity in order to create effective marketing strategies that encourage visitation to heritage attractions. The author demonstrated that authenticity is a precursor to tourists' loyalty to UNESCO heritage sites.

3.1.3. *Tourism Heritage: World Heritage List, Tourism Motivations and Visitor Profile*

The last sub-topic combination with significantly strong internal ties is visitors' profiles and their motivations for tourism. As in previous cases, several documents deal with these elements together, for example, González Santa-Cruz and López-Guzmán (2017)[20] in the journal *Tourism Management Perspectives* and Ramires et al. (2018)[21] in the *Journal of Destination Marketing & Management*. González Santa-Cruz and López-Guzmán (2017) explained that the inclusion of a site on the UNESCO World Heritage List is important in terms of attracting tourists. They identified the socio-demographic profile of visitors and analysed their levels of loyalty and satisfaction. Their study proved that the profile of the tourists in

[19] X. Fu, *Existential Authenticity and Destination Loyalty: Evidence from Heritage Tourists*, in *Journal of Destination Marketing & Management*, 12, 2019, pp. 84-94.

[20] F. González Santa-Cruz, T. López-Guzmán, *Culture, Tourism and World Heritage Sites*, in *Tourism Management Perspectives*, 24, 2017, pp. 111-116.

[21] A. Ramires, F. Brandão, A.C. Sousa, *Motivation-Based Cluster Analysis of International Tourists Visiting a World Heritage City: The Case of Porto, Portugal*, in *Journal of Destination Marketing & Management*, 2018, 8, pp. 49-60.

question was strongly marked by a high level of education and that these tourists' main motivation was to learn about the heritage roots of the destination. Ramires et al. (2018) also highlighted the relevance of a site's inclusion on the UNESCO list, as it influences the influx of tourists to the destination and their profile. Among the most notable findings of their study are the following attributes that most motivate tourists and increase their satisfaction: the accommodation facilities, tourist offers, locals' hospitality, gastronomic options and cultural entertainment.

3.2. *Approaches to heritage preservation in the literature*

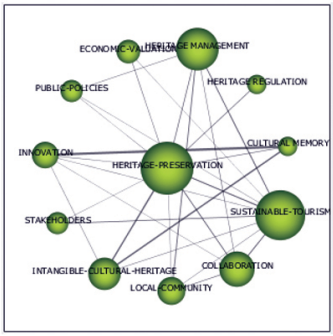
According to Figure 3, heritage preservation is located at the intersection of the graph's x and y axes (centrality range = 0.5; density range = 0.5). This topic reflects the importance of UNESCO's own mission in the literature, as the main objective of UNESCO's heritage listing is the protection, preservation and conservation of natural and cultural heritage sites. The positioning denotes a moderate relevance in UNESCO's World Heritage research line, but with the potential to become a driving theme in the future. We find 57 of the 102 documents on heritage preservation, and the *h*-index is equal to 12.

Regarding this secondary theme of heritage preservation, we generated a thematic network, where we found the main aspects developed within this theme. The complete list of aspects addressed is as follows: sustainable tourism, heritage management, collaboration, intangible cultural heritage, local community, innovation, economic valuation, stakeholders, public policies, heritage regulation and cultural memory.

As in the previous case, Figure 5 presents a thematic network to visualise the main aspects discussed in the literature regarding UNESCO's preservation and protection of natural and cultural heritage.

Figure 5. Thematic network of the topic 'heritage preservation'

3.2.1. *Heritage Preservation: Innovation, Intangible Cultural Heri-*



	Documents
HERITAGE-PRESERVATION	25
SUSTAINABLE-TOURISM	23
HERITAGE MANAGEMENT	18
COLLABORATION	13
INTANGIBLE-CULTURAL-HERITAGE	11
LOCAL-COMMUNITY	8
INNOVATION	7
ECONOMIC-VALUATION	5
STAKEHOLDERS	4
PUBLIC-POLICIES	4
HERITAGE REGULATION	2
CULTURAL MEMORY	2

tage and Cultural Memory

Figure 5 illustrates the thematic network of the sub-topics addressed together with UNESCO's preservation of world heritage. The sub-topics that most often appear together are those of innovation and intangible cultural heritage, and on two occasions, they appear together with cultural memory. These three sub-topics confirm the main contribution of the documents published in the book *Advances in Intelligent Systems Research*[22]. These works explore the role of global cultural memory in the preservation and protection of humanity's intangible heritage. These two studies propose specific ways for university students to use innovative formulas that lead to the preservation of intangible cultural heritage over time.

[22] L. Lei, *A Study on the Legalization of Local Intangible Cultural Heritage Protection*, *Proceedings of the 2018 8th International Conference on Management, Education and Information. Advances in Intelligent Systems Research, volume 163*, edited by MEICI, Atlantis Press, Shenyang, China, 2018a, pp. 1013-1020; L. Lei, *Research on Local Intangible Cultural Heritage Education and Inheritance from the Perspective of Legalization*, *Proceedings of the 2018 8th International Conference on Management, Education and Information. Advances in Intelligent Systems Research, volume 163*, edited by MEICI, Atlantis Press, Shenyang, China, 2018b, pp. 193-199.

3.2.2. *Heritage Preservation: Sustainable Tourism, Heritage Management and Collaboration*

Finally, we identified three other sub-topics that frequently appear when researching heritage preservation: sustainable tourism, heritage management and collaboration. They appear together in several documents, for example in Ribašauskienė and Šumylė (2016)[23] paper in the journal *Management Theory and Studies for Rural Business and Infrastructure Development* and in Tay et al. (2016)[24] paper in the journal *Tourism Management Perspectives*. Ribašauskienė and Šumylė (2016) conducted a study to test whether traditional craft centres are an efficient means of preserving cultural heritage and thus promoting sustainability and development in rural areas. The results of their study highlight the need to improve the management of resources in craft centres and to encourage collaboration between centres in the same area. Additionally, Tay et al. (2016) focused on a UNESCO national park's management and on promoting responsible tourism practices to ensure the preservation of this heritage site. They proposed that responsible tourism encompasses the principles of ecological and socio-cultural friendliness, the promotion of sustainability and economic viability. Among other practices, their paper underlines the importance of heritage managers cooperating with tour operators to develop responsible tourism, in particular by encouraging collaboration to convey the 'leave no trace' message.

[23] E. Ribašauskienė, D. Šumylė, *The Role of Traditional Craft Centers in Safeguarding Cultural Heritage*, in *Management Theory and Studies for Rural Business and Infrastructure Development*, 38, 2016, pp. 412-424.

[24] K.X. Tay, J.K.L. Chan, C.A. Vogt, B. Mohamed, *Comprehending the Responsible Tourism Practices through Principles of Sustainability: A Case of Kinabalu Park*, in *Tourism Management Perspectives*, 18, 2016, pp. 34-41.

4. *Considerations for future research in the are of international business: the FSA/CSA matrix*

Following the analysis of the evolution of the research conducted on the world's cultural and natural heritage, the impact of UNESCO's work in the tourism sector can be clearly established. Nevertheless, its approach from an international business perspective is completely overlooked in the literature. Thus, it is highly relevant for the literature to consider analytical tools that can guide strategic decision-making in the tourism sector.

Research on international business focuses on analysing the factors that encourage firms to expand abroad. The internalisation theory is one of the most relevant theories on the international academic scene[25]. This theory was expanded[26] through a debate on the relevance of FSAs and how crucial they are before moving overseas. FSAs are a broad set of benefits specific to a firm[27]. FSAs have their own terminology in theories such as the resource-based view, which refers to a firm's 'unique' resources and capabilities[28], and Dunning's eclectic paradigm, which specifies the concept of 'own-

[25] P.J. Buckley, M.C. Casson, *The Future of the Multinational Enterprise*, Macmillan, London, 1976; M. Casson, *Alternatives to the Multinational Enterprise*, Macmillan, London, UK, 1979.

[26] A.M. Rugman, *Inside the Multinationals: The Economics of Internal Markets*, Columbia University Press, New York, 1981.

[27] A.M. Rugman, *Inside the Multinationals: The Economics of Internal Markets*, cit.; A.M. Rugman, R.M. Hodgetts, *International Business: A Strategic Management Approach*, Prentice Hall, EEUU, 2000; A.M. Rugman, A. Verbeke, *Internalization Theory and its Impact on the Field of International Business*, *International Business Scholarship: AIB Fellows on the First 50 Years and Beyond*, edited by J.J. Boddewyn, Emerald Group Publishing Limited, Bingley, U.K., 2008, pp. 155-174; A.M. Rugman, A. Verbeke, Q.T.K. Nguyen, *Fifty Years of International Business Theory and Beyond*, in *Management International Review*, 51, 2011, pp. 755-786.

[28] J.B. Barney, *Firm Resources and Sustained Competitive Advantage*, in *Journal of Management*, 17, 1991, pp. 99-120; J.B. Barney, P.M. Wright, D.J. Ketchen, *The Resource-Based View of the Firm: Ten Years after 1991*, in *Journal of Management*, 27, 2001, pp. 625-641.

ership advantages'[29]. FSAs are owned by the firm and constitute a strength over competitors, thus constituting a source of competitive advantage. Thus, there are three typologies of FSAs[30]: (a) stand-alone FSAs, which are a firm's unique resources (e.g., physical resources, financial resources, reputational resources, etc.); (b) routines, which are higher-order FSAs because they are the combination of stand-alone FSAs in stable patterns that generate value for the stakeholders; and (c) recombination capabilities, which are the highest-order FSAs because they are a dynamic capability involving recombining resources and routines in novel ways. Finally, FSAs can be location bound (i.e., they are not transferable across borders) or non-location bound (i.e., they are easily mobile from one country to another[31].

To this extent, the resource-based view (RBV) would have the same explanatory power as the internalisation theory. However, the RBV suffers from a lack of theorisation regarding a firm's international dimension. Thus, the internalisation theory was extended[32] to incorporate the relevance of CSAs into the debate. CSAs are a broad set of benefits that are specific to a country[33], and firms can benefit from these CSAs as a result of their location in that country. Two types of CSAs are relevant in international business: on the one hand, home CSAs, which are summarised in Porter's dia-

[29] J.H. Dunning, *Towards an Eclectic Theory of International Production: Some Empirical Tests*, in *Journal of International Business Studies*, 11, 1980, pp. 9-31; J.H. Dunning, *The Eclectic Paradigm of International Production: The Restatement and some Possible Extensions*, in *Journal of International Business Studies*, 19, 1988, pp. 1-31.

[30] A. Verbeke, *International Business Strategy*, Cambridge University Press, Cambridge, UK, 2009.

[31] A.M. Rugman, A. Verbeke, *Subsidiary-Specific Advantages in Multinational Enterprises*, in *Strategic Management Journal*, 22, 2001, pp. 237-250.

[32] A.M. Rugman, *Inside the Multinationals: The Economics of Internal Markets*, cit.

[33] A.M. Rugman, A. Verbeke, *A Note on the Transnational Solution and the Transaction Cost Theory of Multinational Strategic Management*, in *Journal of International Business Studies*, 1992, 23, pp. 761-771.

mond model[34] and which refer to the characteristics of the country in which the parent firm is located, and on the other hand, host CSAs, which are also included in Porter's double diamond extension[35], where a firm decides to locate itself in another country to access its specific CSAs. Host CSAs also have their own nomenclature in the eclectic paradigm, which highlights the importance of 'location advantages'[36]. To guide firms' strategic decisions in the context of UNESCO World Heritage Sites, the FSA/CSA matrix is a particularly relevant tool for the tourism sector.

4.1. *The UNESCO World Heritage List as a relevant country-specific advantage (CSA)*

Despite the relevance of the FSA/CSA matrix, the literature has superficially treated the relevance of CSAs in analyses of firms' international activity[37]. CSAs have been described in theoretical models[38] or considered as a booster of FSAs[39] but their intrinsic relevance has hardly been specified and quantified. These findings could be extrapolated to the present, as the literature has not responded to the call to explore in depth the important role that CSAs play in the national and international arena.

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[34] M.E. Porter, *Competitive Advantage of Nations*, Free Press, New York, 1990.

[35] A.M. Rugman, J.R. D'Cruz, *The "Double Diamond" Model of International Competitiveness: The Canadian Experience*, in *Management International Review*, 33, 1993, pp. 17-39.

[36] A.M. Rugman, A. Verbeke, *Subsidiary-specific Advantages in Multinational Enterprises*, cit.

[37] G. Masiero, F. Urdinez, M.H. Ogasavara, *The Vagueness of the "Country-Specific Advantage" Construct: Which Host-CSAs Matter for Chinese OFDI?*, edited by A. Verbeke, R. Van Tulder, S. Lundan, *Multinational Enterprises, Markets and Institutional Diversity*, Emerald Group Publishing Limited, Bingley, UK, 2014, pp. 323-345.

[38] M.E. Porter, *Competitive Advantage of Nations*, cit.

[39] A.M. Rugman, *Inside the Multinationals: The Economics of Internal Markets*, cit.

International institutions have developed various indices to assess general CSAs in order to rank countries' levels of competitiveness. For example, the IMD World Competitiveness Ranking evaluates government efficiency, economic performance, infrastructure and business efficiency[40]; the Doing Business report analyses the ease of conducting business, starting a business, dealing with construction permits, obtaining electricity, registering property, receiving credit, protecting minority investors, paying taxes, trading across borders, enforcing contracts and resolving insolvency[41]; and the Global Competitiveness Index evaluates the enabling environment, human capital, markets and the innovation ecosystem[42]. All of these rankings attempt to provide a generic assessment of a country's competitiveness. Accordingly, we observed that none of them pays special attention to countries' endowment in terms of cultural or natural heritage. However, one specific report focuses on the tourism sector, namely the Travel and Tourism Competitiveness Index. It encompasses (a) the Enabling Environment sub-index, which focuses on the assessment of conditions that characterise countries in terms of operations; (b) the Travel and Tourism Policy and Enabling Conditions sub-index, which analyses strategic issues and specific policies that directly affect this sector; (c) the Infrastructure sub-index, which focuses on assessing the quality and availability of physical infrastructure; and (d) the Natural and Cultural Resources sub-index, which captures natural capital and cultural resources as the main drivers for travelling to a country[43].

[40] IMD, *The IMD World Competitiveness Ranking*, available at: *https://worldcompetitiveness.imd.org/rankings/wcy*, 2018.

[41] The World Bank, *Business Enabling Environment (BEE)*, available at: *www.worldbank.org/en/programs/business-enabling-environment/doing-business-legacy*, 2022.

[42] World Economic Forum, *Reports*, available at: *www.weforum.org/reports*, 2010.

[43] World Economic Forum, *Travel & Tourism Competitiveness Index*, available at: *https://reports.weforum.org/travel-and-tourism-competitiveness-report-2019/rankings/*, 2019.

In identifying relevant CSAs, the Natural and Cultural Resources sub-index is particularly relevant for our study, as it includes, among other elements, the number of UNESCO natural and cultural World Heritage Sites. This metric explicitly states that (a) 'countries with natural assets clearly have a competitive advantage in attracting tourists', (b) 'a country's cultural resources are another critical driver of travel and tourism competitiveness'[44], and (c) 'assets like natural and cultural resources have the potential to attract capital investment'[45]. Furthermore, in academic publications, several authors have highlighted the importance of natural and cultural heritage for the tourism sector[46].

From the perspectives of both institutions and academics, natural and cultural assets are crucial for the development of the tourism sector. Thus, we can affirm the relevance of UNESCO's work in identifying, protecting and preserving countries' cultural and natural heritage. According to the 2019[47] list of countries with the highest number of properties listed by UNESCO, the top five places belong to China (54 properties), Italy (49 properties), Spain (44 properties), France (41 properties) and Germany (39 properties). Based on the ranking of international tourist arrivals for the same year, four of these countries (France, Spain, China and Italy) are in the top five positions[48]. Therefore, we suspect a relationship between the number of world heritage properties and the number of international tourists.

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[44] L.U. Calderwood, M. Soshkin, *The Travel & Tourism Competitiveness Report 2019: Travel and Tourism at a Tipping Point*, World Economic Forum, Geneva, 2019.

[45] L.U. Calderwood, M. Soshkin, *The Travel & Tourism Competitiveness Report 2019: Travel and Tourism at a Tipping Point*, cit.

[46] G. Richards, *Culture and Tourism: Natural Partners or Reluctant Bedfellows? A Perspective Paper*, in *Tourism Review*, 75, 2019, pp. 232-234; H.M. Almuhrzi, H.I. Al-Azri, *Conference Report: Second UNWTO/UNESCO World Conference on Tourism and Culture: Fostering Sustainable Development*, in *International Journal of Culture, Tourism and Hospitality Research*, 13, 2019, pp. 144-150.

[47] We selected 2019 data to avoid the effects of the COVID-19 pandemic.

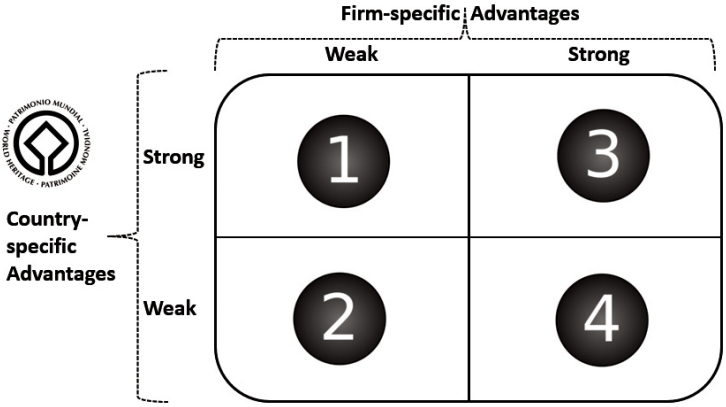
[48] UNWTO, *UNWTO World Tourism Barometer and Statistical Annex*, in *UNWTO World Tourism Barometer*, 20, 2022, pp. 1-36.

For the above-mentioned reasons, we conclude that UNESCO natural and cultural World Heritage Sites, where a principle of 'outstanding universal value' applies for entry to the list, are significant CSAs for firms in the tourism sector.

4.2. *The application of the FSA/CSA matrix in the tourism sector*

In terms of the tourism sector, and focusing on the role played by the UNESCO World Heritage List as a critical CSA, Figure 6 shows four possible situations in which a firm may be located.

Figure 6. The FSA/CSA matrix for the tourism sector.



Source: Rugman and Collinson (2012)[49]

Quadrant 3 contains firms possessing strong FSAs (e.g., in managerial, marketing or innovation skills) and located in a place with UNESCO-listed World Heritage Sites. This position is optimal, as firms have a range of alternatives on which to build their strate-

[49] A.M. Rugman, S.C. Collinson, *International Business*, Pearson, Harlow, Essex, 2012[6].

gic position. Here, firms are free to choose between a product differentiation or cost leadership strategy[50] or a hybrid/dual strategy[51]. Moreover, firms in this quadrant can not only choose to specialise in their home country, but also have the necessary background to consider entering international markets with a real chance of success. Thus, they could opt for a transnational strategy[52] where they attempt to transfer their non-location FSAs to other countries that also have UNESCO heritage sites. In this way, they could use all their knowledge of the tourism sector to position themselves in other countries with cultural richness, similar to that of their country of origin. The safest alternative for these firms would be to expand internationally within their home country's region, such that the transfer of FSAs becomes more successful than moving to host regions, and the liabilities of foreignness are lessened. Finally, after developing specific FSAs to manage international tourism businesses, firms could expand to locations outside their home region.

Quadrant 1 corresponds to firms in a location rich in UNESCO cultural heritage sites; however, they present weak FSAs. These firms take advantage of their location, but their lack of specific skills superior to those of their competitors often leads them to opt for cost leadership strategies in order to survive. The best alternative for these firms is to improve their FSAs (e.g., by enhancing their marketing skills to create an enriching experience for tourists and create a brand image that helps them differentiate from their competitors). If firms develop their marketing, innovation and/or managerial skills, they will move into Quadrant 3, but they are discouraged from entering international markets before making this move.

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[50] M.E. Porter, *Competitive Strategy*, Free Press, New York, 1980; M.E. Porter, *Competitive Advantage: Creating and Sustaining Superior Performance*, Free Press, New York, 1985.

[51] G. Johnson, K. Scholes, R. Whittington, *Fundamentals of Strategy*, Prentice Hall, Essex, UK, 2009.

[52] C.A. Bartlett, S. Ghoshal, *Managing Across Borders: The Transnational Solution*, Harvard Business Press, Boston, MA, 2002.

Quadrant 4 contains firms with strong FSAs but whose location does not have any UNESCO-listed World Heritage Sites. These firms focus on tourism-related aspects other than cultural heritage. As their country does not offer an attraction per se for tourists, they tend to be firms with strong marketing skills that try to attract tourists based on other claims (such as sun and beach tourism; sports tourism or relaxation tourism). Thus, these firms usually opt for product differentiation strategies[53]. In addition, an internationalisation strategy is an ideal alternative for them: they could look for countries with, among host CSAs, properties listed by UNESCO; in this way, they could be positioned in Quadrant 3 in the destination country.

Finally, Quadrant 2 encompasses firms in a compromised situation with regard to tourism: they have weak FSAs, and the country has no UNESCO-listed properties. Therefore, the profile of these firms tends to be small and medium-sized and without exposure to international markets. These types of firms must take steps to survive in the long term, as they are highly likely to be driven out of the market. The recommended next steps would be to first develop their FSAs to move into Quadrant 4 and, once in this quadrant, to then consider internationalisation to a country that will allow them to position themselves into Quadrant 3.

5. *Conclusion*

This work reviewed the literature to assess future lines of research in the area of international business. Using SciMAT software, we reviewed all the literature published by the WoS Core Collection concerning the cultural and natural heritage included on the UNESCO list. The first paper dates back to 1972, and since then, hundreds of papers have been published in the areas of geosciences, archaeology and environment. However, few studies have been conducted in the

[53] A.M. Rugman, S.C. Collinson, *International Business*, cit.

areas of management and business. Therefore, this paper reviewed the 102 papers published in these areas and presented a scientific map that visualises the main topics covered.

The main theme is heritage tourism, and we observed that the tourism sector is the main beneficiary of UNESCO's work. The literature has focused on studying aspects such as marketing strategies, the World Heritage List, impact, experience, tourist satisfaction, tourist behaviour, authenticity, visitor profile, tourism motivations, tourist destination image and loyalty.

The next topic analysed is heritage preservation, whereby business studies have focused on UNESCO's core mission. Aspects such as sustainable tourism, heritage management, collaboration, intangible cultural heritage, local community, innovation, economic valuation, stakeholders, public policies, heritage regulation and cultural memory have been addressed in this field.

Through this review, we found a major gap in the literature, namely the study of the international dimension of tourism firms that are closely linked to the cultural and natural heritage of humanity. We subsequently presented a line of research of great potential and relevance for both academia and managers: the application of the FSA/CSA matrix to the tourism sector.

In the application of this analysis and decision-making tool, we found four quadrants. The most attractive quadrant is Quadrant 3, where firms with strong FSAs are located in a place with UNESCO-listed World Heritage Sites. Quadrants 1 and 4 show firms with various strengths and weaknesses, and Quadrant 2 shows firms whose survival is under threat. We proposed different development paths for firms in Quadrant 3 and alternatives for firms in Quadrants 1, 2 and 4 to advance to the optimal position in Quadrant 3.

The present study is not without limitations. First, although our initial sample size of 4,408 documents is common in studies of this type[54], the final sample, central to our study, had only 102 docu-

[54] G. Rogers, M. Szomszor, J.L. Adams, *Sample Size in Bibliometric Analysis*, in *Scientometrics*, 125, 2020, pp. 777-794.

ments. This number is low, and the papers are highly concentrated in recent years. While this fact indicates the high potential of research in this field for academics, it did not allow us to analyse the evolution of the most relevant topics over time. Further bibliometric analyses and scientific mapping are hence highly recommended in the future.

Another limitation is the source chosen for the identification of the documents analysed. In our case, we chose WoS, but we are aware that other scholars use the Scopus source for this type of study. Although WoS is widely advocated, it would be interesting to replicate this study using Scopus to identify whether the results coincide or whether there are divergences.

Finally, this paper focused on a specific proposal, the FSA/CSA matrix. However, the possible lines of research within the field of international business are almost unlimited. Therefore, researchers should not interpret this paper as presenting a single avenue of study, but rather as presenting one of many paths that can be chosen to further study the relevant implications of UNESCO in the business world.

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This open access publication gathers young and senior scholars of the Una Europa Universities to celebrate the first fifty years of the UNESCO 1972 World Heritage Convention (WHC). Financed as a Seed Funding Grant of the Una Europa Alliance, the WHC@50 project offers an interdisciplinary analysis of the WHC, the jewel of the UNESCO Conventions. By introducing the (r)evolutionary concept of World Heritage and involving the International Community as a whole in the preservation, valorization and transmission to future generations of cultural and natural sites and landscapes of outstanding universal value, the WHC is indeed one of the major treaty instruments of our age. We therefore hope, through the final results of the WHC@50 research cooperation activity, to contribute to the dissemination of the WHC knowledge, attracting the attention of academics, politicians, experts, officials and civil society, and contributing to the debate for strengthening the 1972 UNESCO Convention, suggesting solutions to overcome the problematic aspects of its implementation and activities.

Elisa Baroncini, Bert Demarsin, Ana Gemma López Martín, Raquel Regueiro Dubra, Ruxandra-Iulia Stoica

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