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Citation

Starrenburg, S. H. (2023). The genealogy of 'universality' within cultural heritage law. In A. Strecker & J. Powderly (Eds.), *Heritage destruction, human rights and international law* (pp. 42-67). Leiden: Brill | Nijhoff. doi:10.1163/9789004434011_004

Version: Publisher's Version

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Downloaded from: <https://hdl.handle.net/1887/3718505>

Note: To cite this publication please use the final published version (if applicable).

The Genealogy of ‘Universality’ within Cultural Heritage Law

Sophie Starrenburg

1 Introduction

Universality has been intrinsic to the construction of the international legal project.¹ One particular manner in which universality is employed within international legal regimes is as a justification for engaging international protection: numerous international norms are formulated in a manner that explicitly suggests that their creation and enforcement is in the interest of the international community. Some have argued that the growth of such ‘common interest’ norms within international law suggests a shift from a state-centric body of law to a body of law focused on individual human beings.²

This chapter focuses on how universality is employed within the field of cultural heritage law. Whilst the concept of ‘heritage’ within international law has developed over the past century, the justification for its protection has remained rooted in the same goal which lay at the heart of the foundation of UNESCO in 1946: to “build peace in the minds of men” through culture.³ Over time, cultural heritage treaties have constructed the safeguarding of cultural heritage as a common interest of the international community, often in response to striking examples of the destruction of cultural heritage. These moments of loss provided a rallying point for the international community to

1 I Feichtner, ‘Community Interest’, *Max Planck Encyclopaedia of Public International Law* (OUP 2007) paras 8–9. H Lauterpacht, *The Function of Law in the International Community* (Clarendon Press 1933) illustrates an early emphasis of this thinking.

2 B van Beers, L Corrias and W Werner, ‘Introduction: Probing the Boundaries of Humanity’ in B van Beers, L Corrias and WG Werner (eds), *Humanity Across International Law and Biolaw* (CUP 2014) 1. This trend is also often described as the ‘humanisation’ of international law, a term popularised by Bruno Simma, Theodor Meron and Antônio Augusto Cançado Trindade; see VP Tzevelekos, ‘Revisiting the Humanisation of International Law: Limits and Potential’ (2013) 1 *Erasmus L Rev* 62.

3 Constitution of the United Nations Educational, Scientific and Cultural Organisation (adopted 16 November 1945, entered into force 4 November 1946) 4 UNTS 275, preamble.

constitute itself by envisioning a global heritage, the protection of which was a common concern of all states.⁴

However, several tensions have grown to accompany this humanist mission in the twenty-first century, showing that while international cultural heritage discourse might be universal, its practice is anything but.⁵ This chapter argues that the use of universality within the regime of cultural heritage law illustrates the – sometimes paradoxical – interdependence between the concepts of particularity and universality. The construction of the concept of 'universal' cultural heritage cannot be achieved without reference to the particularity of heritage: its value derives from it being specific to a particular time, place, or people.⁶ At the same time, in certain situations, this value is purported to be universal: not because of a shared history, but rather our shared humanity.

It can thus be argued that the current conceptualisation of cultural heritage is non-universalist at its core – through its dependence on fields such as archaeology and anthropology – yet continues to rely upon universalist justifications for the international legal regulation and protection of cultural heritage.⁷ The paradoxes embedded within the concept of universality accordingly provoke certain difficulties when employed in practice, in particular from a human rights perspective. Whilst international heritage protection can have immense benefits for local populations, heritage practice is simultaneously also rife with examples in which international protection has interfered with the wishes and rights of individuals and local communities.⁸ The constitution of the world community that lies at the heart of public international law is thus sometimes achieved at the expense of individuals and local communities.

In Section 2, the chapter briefly maps how universality is employed within international law, providing examples from humanitarian law, environmental law, criminal law, and human rights law. In Section 3, the chapter examines

4 See MS Weinert, 'Reading World Society Phenomenologically: An Illustration Drawing upon the Cultural Heritage of Mankind' (2018) 55 *International Politics* 26, 32.

5 See for example L Meskell *et al.*, 'Multilateralism and UNESCO World Heritage: Decision-Making, States Parties and Political Processes' (2015) 21 *Intl J of Heritage Studies* 423.

6 Convention for Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3 (*Intangible Cultural Heritage Convention*) art 2(1).

7 See A Omland, 'The Ethics of the World Heritage Concept' in C Scarre and G Scarre (eds), *The Ethics of Archaeology: Philosophical Perspectives on Archaeological Practice* (CUP 2006) 250–1.

8 See for example the contributions in PB Larsen (ed), *World Heritage and Human Rights: Lessons from the Asia-Pacific and Global Arena* (Routledge 2018). More generally, see L Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination* (OUP 2019).

the genealogy of universality in cultural heritage protection by examining the legal development of 'universal value' within a range of successful (and unsuccessful) international conventions from the 1920s to the present day, charting how cultural heritage protection was constructed as a common interest. For reasons of brevity, the chapter focuses specifically on three cultural heritage law instruments which epitomise cultural heritage law-making in recent history: the 1954 Hague Convention, and pre-war developments which drove its development; the 1972 World Heritage Convention; and the 2003 Intangible Heritage Convention, and its immediate precedent, the Masterpieces of Intangible and Oral Heritage programme. In Section 4 the chapter concludes by showing what might be obscured by the universalist approach adopted within cultural heritage law.

The goal of the chapter is twofold: on the one hand, by providing a concrete example of a regime which centres around the tensions that emerge from the juxtaposition of the universal and the particular, this chapter seeks to contribute to broader discussions concerning the manner in which universality is employed within the praxis of international law. In doing so, it attempts to flesh out the meaning of universality as a concept at the heart of international law. On the other hand, by representing the contours of the debates surrounding the reliance upon universality within cultural heritage law, the chapter seeks to pinpoint how cultural heritage law remains structurally ill-equipped to balance between the interests of the 'many' and the 'few' which are at stake in cultural heritage protection and to deal with damage resulting from an abuse of the system by states. How can we protect heritage which is perceived of as a common interest of the international community in a manner that pays sufficient respect to the human rights of those with not only universal claims to heritage (*qua* their position as human beings), but who also have a particular interest in its protection (*qua* their position as individuals whose identity is closely tied to the heritage in question)?

2 Universality in General Public International Law

It is almost a truism to state that international law has evolved from a body of law centred on regulating the coexistence of sovereign States to a body of law which seeks to facilitate the cooperation of States beyond purely bilateral or reciprocal interests.⁹ Part and parcel of this trend is the emergence of 'common

⁹ W Friedmann, *The Changing Structure of International Law* (Columbia University Press 1964).

interests' within international law,¹⁰ best described as "a consensus according to which the respect for certain fundamental values is not to be left to the free disposition of States individually or inter se but is recognized and sanctioned by international law as a matter of concern to all States".¹¹ The term 'universality' is employed here to denote the process whereby international legal instruments designate certain regulatory objects as being subject to the common interest of the international community.¹² In doing so, they transform these regulatory objects from objects within the sphere of a State's sovereign interest into objects subject to (universal) inter-State cooperation for the international community.¹³ Universality can thus be viewed as a paradigm which shapes the designation and legal treatment of common interests.¹⁴

André Nollkaemper notes that universality has been used in three main ways in international legal thought: firstly, to posit that international law is a legal system which has the potential to be binding on all States, given that (generally) any State can accede to a treaty and all States are in principle bound by customary international law. He distinguishes this formal understanding of universality from a substantive understanding of the term, in the sense that not only is international law theoretically universal in scope: in relation to certain obligations, all States are in fact bound, for example by *jus cogens* norms.¹⁵ This second understanding of international law is part of broader arguments on the nature of international law as a "coherent legal system" akin to a domestic constitutional order.¹⁶ The most radical form of universality posits that there are norms which bind humankind as a whole.¹⁷ It is this last understanding that has remained controversial; thus Wolfrum argues that it is more appropriate

10 JI Charney, 'Universal International Law' (1993) 87 AJIL 529, 529.

11 B Simma, 'From Bilateralism to Community Interest' (1997) 250 *Recueil des Cours de l'Académie de Droit International* 217, 233.

12 These regulatory objects do not necessarily need to be a single tangible object, but can also refer to a collectivity of tangible objects (such as a plant or animal species) or intangible objects (such as the atmosphere).

13 See Friedmann (n 9).

14 A von Bogdandy and S Dellavalle, 'Universalism and Particularism: A Dichotomy to Read Theories on International Order' in S Kadelbach, T Kleinlein and D Roth-Isigkeit (eds), *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel* (OUP 2017) 482; Simma (n 11) 233.

15 A Nollkaemper, 'Universality', *Max Planck Encyclopaedia of Public International Law* (OUP 2011) paras 1–7.

16 B Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 EJIL 265, 267.

17 *Ibid.*, 267–8.

to consider States as trustees or fiduciaries for humankind, rather than stating that humankind is an international legal person as such.¹⁸

Within contemporary international law, the notion of a ‘common interest’ gained a foothold with the creation of the United Nations: the preamble of the Charter notes “that armed force shall not be used, save in the common interest”.¹⁹ The development of *jus cogens* norms and obligations *erga omnes* by the International Court of Justice (ICJ) also evidences a growing recognition of the existence of common interests within international law.²⁰ The existence of *erga omnes* obligations presupposes the existence of an international community as such – thus giving rise to the question of what shared interests that community would have. Similarly, the existence of *jus cogens* norms presupposes that there is an international community which has created a minimum standard of conduct for States. However, the precise effect of the designation of a given norm as *jus cogens* or *erga omnes* has remained nebulous, indicating continued ambivalence of the role of these concepts within international legal practice.²¹

Examples of universality can nonetheless be found in a range of international treaties, across fields such as humanitarian law, environmental law and human rights law. In many situations, an appeal to universality – or, more commonly, ‘the interests of humanity’ – was relied upon in order to justify international legislation on the issue.²² In doing so, these instruments transform issues which had until then been considered only of interest from the perspective of morality into positive law.²³ Thus in the case of human rights, appeals to the common interest of the international community are most often made

18 R Wolfrum, ‘Common Heritage of Mankind’, *Max Planck Encyclopedia of Public International Law* (OUP 2009) paras 27–28; see E Hey, ‘Interdependencies, Conceptualizations of Humanity and Regulatory Regimes’ in B van Beers, L Corrias and WG Werner (eds), *Humanity Across International Law and Biolaw* (CUP 2014) 255.

19 See also art 1 of the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

20 Nollkaemper (n 15) paras 28–9. See for example: *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Preliminary Objections) [1970] ICJ Rep 3; *East Timor (Portugal v. Australia)* [1995] ICJ Rep 90, 102; *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda)* (Jurisdiction and Admissibility) [2005] ICJ Rep 6, paras 3–14.

21 D French, ‘Common Concern, Common Heritage and Other Global(-ising) Concepts: Rhetorical Devices, Legal Principles or a Fundamental Challenge?’ in M Bowman, P Davies and E Goodwin (eds), *Research Handbook on Biodiversity and Law* (Elgar 2016) 353.

22 Feichtner (n 1), para 5.

23 Hey (n 18), 244.

by recourse to ideals of the inherent dignity of human beings, such as can be found in the preambles of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁴ In the case of international humanitarian law, there are general provisions that stipulate that States must take into account considerations of humanity during war-time.²⁵ Similar considerations played a role in the creation of the International Military Tribunal at Nuremberg (and, most recently, the International Criminal Court (ICC)) and the emergence of crimes against humanity,²⁶ as well as in the ratification of the Genocide Convention, which explicitly stipulates in its preamble that “genocide has inflicted great losses on humanity”, and that “in order to liberate mankind from such an odious scourge, international co-operation is required”.²⁷ As the ICJ has famously held, “[i]n such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest”.²⁸ Some of the most far-reaching conceptualisations of universality within public international law can be found within the fields of environmental law and the law of the sea, where recourse to universality has concrete consequences for the form of protection employed, for example through the invocation of the principle of the common heritage of mankind,²⁹ and more recently, the principle of common concern.³⁰

24 van Beers, Corrias and Werner (n 2), 7–8.

25 See for example: Articles 4 and 15 of Hague Convention (IV) respecting the Laws and Customs of War on Land and Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 187 CTS 227 (Hague Regulations); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention), Common Article 3; Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I), preamble.

26 Stemming from the work of Lauterpacht (n 1). See C MacLeod, ‘Towards a Philosophical Account of Crimes Against Humanity’ (2010) 21 EJIL 281.

27 Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, preamble paras 2, 3.

28 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23.

29 See for example: UN Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, Article 136; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (adopted 27 January 1967, entry into force 10 October 1967) 610 UNTS 205, Article 1.

30 J Brunnée, ‘Common Areas, Common Heritage, and Common Concern’ in D Bodansky, J Brunnée and E Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2012) 564–5.

3 Universality in Cultural Heritage Law

How do these trends manifest themselves in relation to the protection of cultural heritage? The following section charts the invocation of universal interests in law-making related to cultural heritage protection over the course of the past century, focusing firstly on interwar efforts within the context of the League of Nations, and subsequently successful codification in UNESCO leading to the 1954 Hague Convention, the 1972 World Heritage Convention, and the 2003 Intangible Heritage Convention.

3.1 *Early Attempts at Codification: The International Committee on Intellectual Cooperation (1920–1946)*

The destruction of various forms of cultural heritage across Europe during World War I was decried by intellectuals as damage to the “artistic heritage” or “property” of mankind,³¹ with the destruction being seen as not only causing losses to private owners or territorial States, but to “humanity as a whole”.³² The codification of rules concerning the protection of cultural property was subsequently revived, chiefly within the context of the League of Nations’ technical organisations: the International Committee on Intellectual Cooperation (ICIC) and its sub-organ, the International Museums Office (*Office Internationale des Musées* or OIM).

The ICIC was driven by a particular set of universalising ideals; its Swiss Vice-President, Gonzague de Reynold, was able to note without irony that it was imperative that the ICIC “save the essentials of civilisation”.³³ One of the guiding principles of the ICIC’s work, according to de Reynold, was the principle of universality, defined as “a superior mental quality, a supreme form of culture”.³⁴ While the intermediate goal of the organisation was the preservation of a range of “national” cultures, its ultimate aim appeared to be to arrive at a superior form of civilisation.³⁵

31 R O’Keefe, *The Protection of Cultural Property in Armed Conflict* (CUP 2006) 40.

32 ‘Pays-Bas. La protection des monuments et objets historiques et artistiques contre les destructions de la guerre – Proposition de la Société néerlandaise d’archéologie’ (1919) 26 *Revue Générale de Droit International Public* 329, 334.

33 League of Nations ‘Report by MG de Reynold (Rapporteur), Submitted to the Council on September 10th, 1938’ (1938) 19 *League of Nations Official Journal* 918, 920.

34 *Ibid.*, 923.

35 *Ibid.*, 922–3; AF Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (CUP 2006) 109.

Events in the Spanish Civil War and the Second Sino-Japanese War spurred the League into action in relation to the matter of the protection of cultural property during armed conflicts, with proposals to safeguard cultural property being characterised as a “matter of importance to civilisation as a whole”.³⁶ These thoughts reverberated within the final version of the League’s Draft International Convention for the Protection of Historic Buildings and Works of Art in Time of War. The preamble of the Draft Convention notes that artistic preservation is a “concern of the community of States”, and “that the destruction of a masterpiece, whatever nation may have produced it, is a spiritual impoverishment for the entire international community”.³⁷ In its explanatory report, the OIM noted that the obligation contained in Article 1 of the Draft Convention to guarantee the material protection of monuments and works of art “implies recognition of the principle that the preservation of artistic and historical treasures is a matter that *concerns the world as a whole*. The countries possessing artistic treasures are merely their *custodians* and remain *accountable* for them *to the international community*”.³⁸

The Draft Convention was not adopted due to the outbreak of World War II.³⁹ However, despite its lack of success, the work of the ICIC is an illustration of early attempts within international law to position cultural heritage protection as a common interest of the international community; its efforts eventually bled over into the creation of UNESCO in 1946 and the subsequent adoption of the 1954 Hague Convention.⁴⁰ The League’s Draft Convention

36 O’Keefe (n 31) 53. See also League of Nations ‘Report of the Sixth Committee to the Assembly’ (A.51.1937.XII) (1937) 175 *League of Nations Official Journal*, Special Supplement 81, 83; J Toman, *The Protection of Cultural Property in the Event of Armed Conflict* (UNESCO Publishing 1996) 18–9.

37 League of Nations ‘Report by the Directors’ Committee of the International Museums Office to the International Committee on Intellectual Co-operation for the Year 1937/38, together with a Preliminary Draft International Convention on the Protection of Historic Buildings and Works of Art in Time of War’ (1938) 19 *League of Nations Official Journal* 936, 937.

38 League of Nations ‘Extracts from the General Report of the Director of the International Institute of Intellectual Co-operation to the International Committee and to the Governing Body’ (1938) 19 *League of Nations Official Journal* 943, 961 (emphasis added).

39 Cf. Treaty on the Protection of Artistic and Scientific Institutions and Historical Monuments (adopted 15 April 1935, entered into force 26 August 1935) 167 LNTS 279.

40 CA Pernet, ‘Twists, Turns and Dead Alleys: The League of Nations and Intellectual Cooperation in Times of War’ (2014) 12 *J of Modern Eur History* 342, 342.

invokes universality in ways that can still be seen in contemporary law-making; appeals to the interest of the international community provided the necessary impetus and legitimisation for international regulation. Simultaneously, these instruments sought to transform cultural property from a set of objects located (both physically and conceptually) within the sovereign sphere of the State into the cultural heritage of humankind.

3.2 *The 1954 Hague Convention*

The first concrete expression of these universalist principles emerged upon the adoption of the 1954 Hague Convention,⁴¹ in which a link is explicitly drawn between damage to cultural heritage and damage to the “heritage of all mankind”,⁴² driven by the destruction of cultural heritage during World War II.⁴³ The manner in which this link was initially expressed within the text of the Convention led to concerns from some States. Thus, the United Kingdom objected to the inclusion in the draft preamble of the statement that “the preservation of the cultural heritage is the concern of the community of States”.⁴⁴ By contrast, the USSR argued that cultural heritage was not the concern of the international community, but was instead “of great importance for all peoples of the world”,⁴⁵ an idea which was incorporated in the redrafting of the text. The view that damage to cultural property caused damage to the cultural heritage of humankind was also introduced by the USSR and was included in the preamble during the redrafting of the text.⁴⁶ Universal ideals thus formed the impetus for international protection of cultural heritage, although certainly not all states were of the view that the inclusion of such universal ideals was desirable in light of their potential challenge to state sovereignty.⁴⁷

However, where the 1954 Hague Convention truly distinguishes itself from earlier conventions is through its incorporation in the body of the text of

41 JH Merryman, ‘Two Ways of Thinking About Cultural Property’ (1986) 80 AJIL 831, 837; C Forrest, ‘Cultural Heritage as the Common Heritage’ (2007) 40 Comparative and Intl Legal J of South Africa 124, 129.

42 See M Frulli, ‘The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency’ (2011) 22 EJIL 203.

43 PJ O’Keefe, *Protecting Cultural Objects Before and After 1970* (Institute of Art & Law 2017) 27.

44 UNESCO ‘Records of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict convened by the United Nations Educational, Scientific and Cultural Organization’ (1961) CBC/3, 371.

45 Ibid.; UNESCO ‘Proposed Amendment by the USSR to the Draft Convention for the Protection of Cultural Property in the Event of Armed Conflict’ UN Doc CBC/DR/37, 372.

46 Ibid.

47 O’Keefe (n 31), 94–5.

notions of universality; Article 1(a) defines the treaty's scope of protection as covering "movable or immovable property of great importance to the cultural heritage of every people". The inclusion of the modifier "of great importance" was included at the behest of the United Kingdom and the United States of America;⁴⁸ according to the American delegate, " 'importance' gave the object's position in the cultural heritage of mankind", indicating the value of its protection.⁴⁹ This change was preferred in light of the underlying desire of the United States and the United Kingdom to produce a convention which would strike an appropriate balance between military exigencies through limiting the scope of heritage to be protected.⁵⁰

Ultimately, the majority of States preferred a definition that emphasised the universal value of the heritage protected.⁵¹ However, as O'Keefe argues, the phrase "of every people" does not imply that the heritage is part of a shared heritage of humankind as a whole: instead, it implies that the Convention protects the cultural heritage "of each respective people".⁵² This indicates that the cultural property protected by the Convention is constructed and valued at the national level, yet that its destruction diminishes the cultural heritage of all humankind. This interpretation is confirmed by an analysis of the implementation reports submitted by States pursuant to Article 26(2) of the Convention, in which States frequently equate their heritage with the cultural heritage of humanity.⁵³ In practice, the selection of cultural heritage protected by the Convention is left to the discretion of each State Party.⁵⁴ As such, it can be concluded that the goal of the Hague Convention embodies universality, but that its commitments are strikingly national. While the Convention's scope is established by recourse to universality, and universality gave the impetus for international protection, this does not ultimately appear to have shaped either its procedural or substantive rules.

48 UNESCO 'Proposed Amendment by the UK to the Draft Convention for the Protection of Cultural Property in the Event of Armed Conflict' UN Doc CBC/DR/31, 373; UNESCO, 'Proposed Amendment by the USA to the Draft Convention for the Protection of Cultural Property in the Event of Armed Conflict' UN Doc CBC/DR/22, 373.

49 CBC/DR/22, para 173.

50 *Ibid.*, para 151.

51 UNESCO 'Proposed Amendment to the Draft Convention for the Protection of Cultural Property in the Event of Armed Conflict' UN Doc CBC/DR/36, para 165, paras 199–200.

52 O'Keefe (n 31), 103–4.

53 *Ibid.*, 103–4.

54 *Ibid.*, 106.

3.3 *The 1972 World Heritage Convention*

In the 1970s, the World Heritage Convention was seen as a step on the path to creating a Global Village, with general optimism surrounding the possibility of “progressive unification of human interests”.⁵⁵ Attempts to create an international convention to support the protection of “world heritage” occasionally featured in the work of UNESCO throughout the 1950s and 1960s. These proposals employed a range of terms throughout the years, such as “monuments of world interest”, “artistic value”, “universal interest” or “universal value”.⁵⁶ It was not until a very late stage of the drafting process that the terminology adopted changed from “cultural property” to “cultural heritage” of “outstanding universal value”.⁵⁷ Nonetheless, despite the change in wording, one overriding element remained present throughout each of these proposals: the idea that cultural heritage is not merely local, but is often part of a cultural heritage of humankind and therefore worthy of protection.⁵⁸

The elements making up this notion of the cultural heritage of humankind tended to be “monuments of grand scale, dating from the great and/or ancient civilisations”: immediately recognizable sites such as Abu Simbel, Venice and Borobudur.⁵⁹ The pathway to an international convention was furthermore spurred on by the UNESCO-led campaigns for the protection of these emblematic sites from damage and destruction, such as Abu Simbel from the threat of human-induced flooding through the construction of the Aswan Dam, and Venice from the inundation of the 1966 *acqua alta*. The conventions regulating these campaigns also explicitly labelled these sites as the “cultural heritage of mankind”, outside the context of – and some being adopted in fact prior

55 Omland (n 7), 242.

56 S Labadi, *UNESCO, Cultural Heritage, and Outstanding Universal Value* (AltaMira Press 2013) 26–28. See for example: UNESCO ‘The Study of Measures for the Preservation of Monuments through the Establishment of an International Fund or by Any Other Appropriate Means’ (28 June 1963) UNESCO Doc 65 EX/9 (‘artistic value’); UNESCO ‘Report on Measures for the Preservation of Monuments of Historical or Artistic Value’ (16 June 1964) UNESCO Doc 13 C/PRG/15 (‘historical or artistic value’); UNESCO ‘Desirability of Adopting an International Instrument for the Protection of Monuments and Sites of Universal Value’ (31 July 1970) UNESCO Doc 16/C/19 (‘universal value’, ‘universal interest’, ‘cultural heritage of mankind’).

57 AA Yusuf, ‘Art. 1, Definition of Cultural Heritage’ in F Francioni and F Lenzerini (eds), *The 1972 World Heritage Convention: A Commentary* (OUP 2008).

58 See for example the claim by Mexico in 1950 that certain forms of heritage are part of the “cultural patrimony of mankind”: UNESCO ‘Project for an International Convention for the Protection of Historic Monuments and Art Treasures, submitted by the Delegation of Mexico’ (26 May 1950) UNESCO Doc 5C/22.

59 Labadi (n 56), 26–8.

to – the World Heritage Convention.⁶⁰ Similarly, early proposals from actors such as the United States and the International Union for the Conservation of Nature (IUCN) emphasised the universal nature of the proposed world heritage that the Convention was to protect, because of its “unique and irreplaceable” nature,⁶¹ which made its protection a “joint concern”.⁶²

There are several references to the concept of cultural heritage being the heritage of humankind within the preamble of the final text of the World Heritage Convention; thus the second paragraph of the preamble states “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*”;⁶³ further on, the preamble considers “that the existing international conventions, recommendations and resolutions concerning cultural and natural property demonstrate the *importance, for all the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong*”.⁶⁴ As such it is incumbent upon the international community to participate in the protection of this heritage. More importantly, the preamble states “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*”.⁶⁵ To this end, cultural heritage is defined in Article 1 as monuments, groups of buildings or sites “which are of outstanding universal value”. This positioning of cultural heritage as a common heritage was innovative for its time in light of the incursion it represented into the *domaine réservé* of States.⁶⁶

In the initial studies on the feasibility of the convention within UNESCO, experts took care to emphasise that the creation of an international convention did not in any way “imply the internationalization of such property or any form of extra-territorial status”.⁶⁷ International protection was a moral

60 See for example, Agreement Concerning the Voluntary Contributions to be Given for the Execution of the Project to Save the Abu Simbel Temples (adopted 9 November 1963, entered into force 9 November 1963) 489 UNTS 209.

61 IUCN, Proceedings of the Ninth General Assembly (25 June–2 July 1966) 73. See also C Cameron and M Rössler, *Many Voices, One Vision: The Early Years of the World Heritage Convention* (Ashgate 2013) 17–20.

62 IUCN, Proceedings of the Ninth General Assembly (25 June–2 July 1966) 73.

63 Emphasis added.

64 Emphasis added.

65 Emphasis added.

66 F Francioni, ‘The 1972 World Heritage Convention: An Introduction’ in F Francioni (ed), *The 1972 World Heritage Convention: A Commentary* (OUP 2008) 3; M Batisse and G Bolla, *The Invention of ‘World Heritage’* (Association of Former UNESCO Staff Members 2005) 14, 78.

67 Conclusions of the Meetings of Experts (1 March 1968) SHC/CS/27/7, 7.

question with chiefly technical consequences, “carried out by the international community for the benefit of all countries”.⁶⁸ Nonetheless, they also emphasised that “[i]nternational protection implies the existence of something more than the sum of all that is nationally important, i.e. the existence of certain items of universal importance” for which humankind was “collectively responsible”.⁶⁹ In this vein, the delimitation of national and international protection appears to have been adopted for reasons of feasibility: international protection, even in the most optimistic of circumstances, was unlikely to be able to cover items other than those “of universal importance and interest”.⁷⁰ Above all, uncertainty remained about the precise scope of “universal value”.⁷¹ The eventual consensus was that it was up to each individual State to consider which sites within its territory “should be considered – internationally, nationally and locally – as the most precious and most representative of its genius and its history, thus deserving to be protected”,⁷² a position in line with the end-result of the Hague Convention negotiations.

Ultimately, very little was changed between the various drafts of the World Heritage Convention with regards to the positioning of the heritage considered a universal good to be protected by the international community.⁷³ As such, states at least seemed willing to accept the principle that cultural and natural heritage was worthy of international protection in light of its position within the cultural and natural heritage of humankind – albeit with the proviso that this did not entail a wholesale removal of this protection from the realm of state sovereignty.⁷⁴

68 Ibid.

69 UNESCO ‘Final Report, Meeting of experts to co-ordinate, with a view to their international adoption, principles and scientific, technical and legal criteria applicable to the protection of cultural property, monuments and sites’ (31 December 1968) UNESCO Doc SHC/CS/27/8, paras 74, 78.

70 Ibid., para 82.

71 Ibid., para 84.

72 UNESCO ‘Final Report, Meeting of experts to establish an international system for the protection of monuments, groups of buildings and sites of universal interest’ (10 November 1969) UNESCO SHC/MD/4, para 70.

73 UNESCO ‘Preliminary Draft Convention Concerning the Protection of Monuments, Groups of Buildings and Sites of Universal Value’ (30 June 1971) UNESCO Doc SHC/MD/17/Ann. II, preamble, Articles 2(2), 5(1), 5(2); Revised Draft Convention Concerning the Protection of Monuments, Groups of Buildings and Sites of Universal Value (21 February 1972) SHC/MD/18/Ann. IV, Article 1; UNESCO ‘Records of the General Conference, Seventeenth Session vol 2’ (1972) UNESCO Doc 17 C/Reports, 148, para 288.

74 UNESCO ‘Address by Mr. René Maheu’ (4 April 1972) UNESCO Doc DG/72/4, 2.

Where do these developments leave the World Heritage Convention in relation to universality? The value of a World Heritage Site, according to the logic of the World Heritage Convention, is universal: in the current understanding of the Convention, sites of outstanding universal value should “be those which humankind collectively would wish to pass onto the next generation, and which are regarded as part of the world heritage of mankind”.⁷⁵ In this sense, universal value is explicitly placed against local or regional value. However, the term “outstanding universal value” has remained difficult to implement in practice, as has the precise scope of the “world heritage of mankind”. The operational criteria of the Convention have undergone a number of incarnations since 1978,⁷⁶ although these criteria are frequently self-referential, often using “equally undefined alternatives (‘masterpiece’, ‘important’, ‘unique’, ‘exceptional’, ‘superlative’, ‘significant’, etc.)”.⁷⁷ Early listing practices were decried for being overly Eurocentric and monumentalist.⁷⁸ Subsequent practice of the States Parties to the Convention suggests a certain tempering of this trend, with attempts by the World Heritage Committee to reach greater degrees of representativity, as marked by the 1994 Global Strategy.⁷⁹ Nonetheless, the practice of the World Heritage Committee in recent years suggests that national interests, rather than overarching ideals of universal heritage, are currently guiding States.⁸⁰

Nor can the substance of the Convention necessarily be compared to contemporaneous developments in areas such as environmental law and the law of the sea: both regimes embody more far-reaching embodiments of universality, in part through the development of concepts such as the common heritage of humankind.⁸¹ Furthermore, even though the Convention has enshrined the

75 UNESCO ‘Background Paper, Special Expert Meeting of the World Heritage Convention: The Concept of Outstanding Universal Value’ (6–9 April 2005) UNESCO Doc WHC-05/29.COM/INF.9B 15, 7–8.

76 See Labadi (n 56) and Yusuf (n 57) for an overview of developments throughout the years with regards to the criteria for OUV.

77 C Brumann, ‘The Best of the Best: Positing, Measuring and Sensing Value in the UNESCO World Heritage Arena’ in R Niezen and M Sapignoli (eds), *Palaces of Hope: The Anthropology of Global Organizations* (CUP 2017) 248–9.

78 Cameron and Rössler (n 61), 45ff.

79 F Francioni, ‘The Preamble’ in F Francioni and F Lenzerini (eds), *The 1972 World Heritage Convention: A Commentary* (OUP 2008) 18–22.

80 Meskell and others (n 5).

81 Forrest (n 41) 131, 135. Cf. arguments to the effect that the World Heritage Convention embodies the common concern principle: see for example 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

criteria of outstanding universal value as the scope of the Convention, it nonetheless does not seek to create rights or establish the existence of a shared cultural heritage of all humankind in a context beyond that of State sovereignty.⁸²

3.4 *The 2003 Intangible Heritage Convention*

Unlike earlier treaties established for the protection of cultural heritage, the Intangible Heritage Convention emphasises the importance of intangible heritage to local communities, rather than to the international community as a whole. However, the Convention remains a decidedly internationalist, if not necessarily universalist instrument: it explicitly draws upon the common concern principle as developed within international environmental law, and also establishes that safeguarding intangible heritage is of interest to humanity as a whole, encouraging States to cooperate to achieve this goal. In doing so, it once again seeks to strike a balance between universality and particularity.

The development of the Convention uncovers ambivalences amongst experts and State representatives on the role that universality should play in cultural heritage protection at the international level. In the 1970s and 1980s, UNESCO was initially preoccupied with the protection of “folklore”, predominantly through the adoption of model laws for national intellectual property protection.⁸³ “Folklore” was therefore defined and valorised from the perspective of the state.⁸⁴ UNESCO subsequently diverged from its initial focus on intellectual property protection in its adoption of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore.⁸⁵ In contrast to earlier documents, the Recommendation noted in its preamble that “folklore forms part of the universal heritage of humanity”,⁸⁶ although the definition of

Identification and Assessment of Cultural Places for Inclusion in the World Heritage List’ (DPhil thesis, Australian National University 1995) 2; Brunnée (n 30), 564–5.

82 Although the Convention has been used in this manner by (international) courts: see for example, the granting of symbolic reparations to the international community in the *Al Mahdi* case: *Prosecutor v Al Mahdi* (Reparations Order) ICC-01/12-01/15-236 (17 August 2017). Nonetheless, communities seeking to rely upon the World Heritage Convention before domestic courts have been rebuffed in light of the fact that the Convention does not enjoy direct effect: see *Buzzacott & Ors v Minister for the Environment* [1999] FCA 1192.

83 L Lixinski, *Intangible Cultural Heritage in International Law* (OUP 2013) 29–31.

84 See UNESCO/WIPO ‘Tunis Model Law on Copyright and Commentary’ (1976) x *Copyright Bulletin* 10, section 6; *Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions* preamble, section 2.

85 UNESCO ‘Records of the General Conference, Twenty-fifth Session’ (17 October – 16 November 1989) UNESCO Doc 25C/Resolutions, Annex 1, ‘Recommendation on the Safeguarding of Traditional Culture and Folklore’.

86 A proposal which had been introduced by France: UNESCO ‘Draft Recommendation to Member States on the Safeguarding of Folklore’ (5 June 1989) UNESCO Doc 25 C/33, Annex

folklore itself remained firmly rooted in the idea that it emerged from a given community.⁸⁷

The Recommendation remained largely unimplemented;⁸⁸ to this end, South Korea proposed the creation of a new system of “living cultural treasures” in 1993, an idea which UNESCO took to the international stage in 1997 with the institution of the ‘Masterpieces of Oral and Intangible Heritage of Humanity’ programme.⁸⁹ Within this new line of thinking, intangible cultural heritage was cemented as part of the heritage of humankind, in combination with a similar logic to the World Heritage Convention: the establishment of a list of heritage of “outstanding value”.⁹⁰ This approach was heavily critiqued by UNESCO Member States,⁹¹ whereupon the definition of “outstanding value” was tempered in light of the value to the local community and the particularity of the tradition.⁹² Similarly, the term “masterpieces” was stripped of any comparative value, defined as “defying any formal rules and not measurable by any external yardstick”.⁹³ In doing so, any element of universality in the

11, para 28. See also UNESCO ‘Report, Special Committee of Technical and Legal Experts on the Safeguarding of Folklore’ (5 June 1987) UNESCO/PRS/CLT/TPC/SPL/6, para 17.

87 Recommendation on the Safeguarding of Traditional Culture and Folklore (n 85), art A.

88 J Blake, *Commentary on the UNESCO 2003 Convention on the Safeguarding of the Intangible Cultural Heritage* (Institute of Art & Law 2006) 3.

89 UNESCO ‘The Oral Heritage of Humanity’ (12 November 1997) UNESCO Doc 29 C/Resolution 23; UNESCO ‘Decisions adopted by the Executive Board at its 154th Session’ (3 June 1998) UNESCO Doc 154 EX/Decisions, Decision 3.5.1; UNESCO ‘Decisions Adopted by the Executive Board at its 155th Session’ (3 December 1998) UNESCO Doc 155 EX/Decisions, Decision 3.5.5.

90 UNESCO ‘International Consultation on New Perspectives for UNESCO’s Programme: The Intangible Cultural Heritage’ (16–17 June 1993) UNESCO Doc CLT/ACL/93/1H/01, 20; UNESCO ‘Decisions Adopted by the Executive Board at its 155th Session’ (3 December 1998) UNESCO Doc 155 EX/Decisions, Decision 3.5.5, Annex, Regulations relating to the proclamation by UNESCO of masterpieces of the oral and intangible heritage of humanity’, paras 1(a), 6(a). See also UNESCO Doc 155 EX/15 (25 August 1998).

91 UNESCO ‘Proposal by the Director-General Concerning the Criteria for the Selection of Spaces or Forms of Popular and Traditional Cultural Expression that Deserve to be Proclaimed by UNESCO to be Masterpieces of the Oral Heritage of Humanity’ (24 March 1998) UNESCO Doc 154 EX/13, Annex III, para 6; UNESCO ‘Decisions adopted by the Executive Board at its 154th Session’ (3 June 1998) UNESCO Doc 154 EX/Decisions, Decision 3.5.1; UNESCO ‘Summary Records of the 157th Session of the Executive Board of UNESCO’ (1999) UNESCO Doc 157 EX/SR.1–11, 133–134. See N Aikawa-Faure, ‘From the Proclamation of Masterpieces to the Convention for the Safeguarding of Intangible Cultural Heritage’ in L Smith and N Akagawa (eds), *Intangible Heritage* (Routledge 2009) 19–20, 32.

92 *Ibid.*, 32. See also UNESCO ‘Final Report, International Jury for the Proclamation by UNESCO of Masterpieces of the Oral and Intangible Heritage of Humanity’ (18 January 2002) UNESCO Doc RIO/1TH/2002/INF/6.

93 *Ibid.*, 33.

implementation of the Masterpieces programme was defined away, yet the programme retained the veneer of universality in order to incentivise financial support.⁹⁴

Simultaneously, progress was underway on the adoption of a new convention on the protection of traditional culture and folklore, where this emphasis on universality was notably absent.⁹⁵ In an initial expert meeting on the preparation of a definition of intangible cultural heritage for a future convention, two ideas of intangible heritage circulated. On the one hand, several experts noted that the instrument needed to recognise heritage “that all world inhabitants have a stake in conserving”,⁹⁶ and that the definition of this heritage should include some reference to its “importance” and the fact that its loss or destruction damages the “cultural heritage of humanity”: the same rhetoric employed in the 1954 Hague Convention.⁹⁷ By contrast, others underlined that the definition should not present intangible heritage as part of the common heritage of humankind or as a “shared heritage”,⁹⁸ but instead “as a matter of universal *interest*”, an idea that was ultimately accepted.⁹⁹ These thoughts on the unsuitability of universalist language in the draft convention were to be echoed in the meetings that followed.¹⁰⁰

As the draft convention was modelled on the text of the World Heritage Convention, it was thus proposed that the notion of ‘outstanding universal value’ should be replaced by “outstanding *specific* value”, as intangible heritage does not have any universal elements in and of itself.¹⁰¹ Nonetheless, the

94 Ibid., 16, 19.

95 UNESCO ‘Report on the preliminary study on the advisability of regulating internationally, through a new standard-setting instrument, the protection of traditional culture and folklore’ (1999) UNESCO Doc 30 C/Resolution 25, para B.2(a)(iii).

96 UNESCO ‘Final Report, International Round Table on “Intangible Cultural Heritage – Working Definitions”’ (11 January 2002) UNESCO Doc Rio/ITH/2002/Inf/5, 2.

97 F Francioni, *Intangible Cultural Heritage – Working Definitions* (UNESCO 2001) 4.

98 UNESCO, ‘Outline Work Plan’ (20–22 March 2002) <<https://ich.unesco.org/doc/src/05352-EN.pdf>> last accessed 15 November 2021, 28; see also UNESCO ‘Final Report of the First Meeting of the Restricted Drafting Group’ (10 June 2002) UNESCO Doc GRR2/CH/2002/WD/6, para 4, p 5, 7–8.

99 Final Report Turin Round Table (n 96) 12, 14; J Blake, *Developing a New Standard-setting Instrument for the Safeguarding of Intangible Cultural Heritage: Elements for Consideration* (UNESCO 2001). See also Aikawa-Faure (n 91) 28.

100 UNESCO, ‘Meeting report of the second meeting of the select drafting group’ (13–15 June 2002) <<https://ich.unesco.org/doc/src/05152-EN.doc>> last accessed 15 March 2023, 15.

101 UNESCO ‘Outline Work Plan’ (n 98), 41; UNESCO ‘Final Report of the First Meeting of the Restricted Drafting Group’ (n 98), 5, 10; UNESCO ‘First Preliminary Draft of an International Convention for the Safeguarding of the Intangible Cultural Heritage’ (26 July 2002) UNESCO Doc CLT-2002/CONF.203/3, art 11(2).

preamble of the preliminary draft did note that the disappearance of intangible cultural heritage of one country is a loss for the cultural heritage of humanity, in light of the diminishing of cultural diversity that results from it.¹⁰² The participants noted that “le qualificatif universel ne doit pas s’appliquer au patrimoine immatériel lui-même, mais à la justification de sa sauvegarde”.¹⁰³ Even so, subsequent drafts continued to refer to the position of the intangible heritage protected by the convention as part of the “intangible cultural heritage of humanity”.¹⁰⁴

This preliminary draft was subsequently examined at the intergovernmental level, where doubts were immediately expressed about the utility of a list of intangible heritage and the nature thereof; a significant number of States were of the view that there should be no list at all, as this would imply ranking the “unrankable”.¹⁰⁵ By contrast, a small number of states emphasised the role that “significance” should play in the convention, as “it ensures that scarce resources are directed only at the preservation of heritage of outstanding local, national or international value”, once again driving home the point that significance and selection is often also a matter of available budget.¹⁰⁶ A number of other proposals were even made to emphasise the universal nature of the intangible heritage.¹⁰⁷

It was ultimately agreed that the convention should establish an international list,¹⁰⁸ although only after intense debates between those states which

102 UNESCO ‘Outline Work Plan’ (n 98) 41; UNESCO ‘Final Report of the First Meeting of the Restricted Drafting Group’ (n 98), 5.

103 “The ‘universal’ qualification should not apply to intangible heritage in and of itself, but should instead apply to the justification for its safeguarding”: UNESCO ‘Final Report of the First Meeting of the Restricted Drafting Group’ (n 98), 7–8.

104 UNESCO ‘First Preliminary Draft of an International Convention for the Safeguarding of the Intangible Cultural Heritage’ (n 101).

105 UNESCO ‘Report of the First Session of the Intergovernmental Meeting of Experts on the Preliminary Draft Convention for the Safeguarding of the Intangible Cultural Heritage’ (December 2002) UNESCO Doc CLT-2002/CONF.203/5, 3.

106 UNESCO ‘General Comments Received from Member States’ (April 2003) CLT-2003/CONF.205/5, 7 (Australia), 29 (France).

107 See for example the proposals by Benin and the Africa Group (at 4); Bolivia (at 9); Benin, Bolivia, Chile and the Africa Group (at 11), and Indonesia (at 51) in UNESCO ‘Compilation of Amendments from Member States Concerning the Convention for the Safeguarding of the Intangible Cultural Heritage’ (12 February 2003) UNESCO Doc CLT-2003/CONF.203/3 Rev.

108 UNESCO ‘Second Session of the Intergovernmental Meeting of Experts on the Preliminary Draft Convention for the Safeguarding of the Intangible Cultural Heritage’ (April 2003) UNESCO Doc CLT-2003/CONF.205/6, 5; UNESCO ‘Report of Third Session of the Intergovernmental Meeting of Experts on the Preliminary Draft Convention for the Safeguarding of the Intangible Cultural Heritage’ (31 July 2003) UNESCO Doc CLT-2003/

favoured a list of exceptional heritage (led by Japan), and those that preferred a list which did not seek to establish a ranking based on criteria of excellence (led by a group of small-island states: Grenada, Saint Lucia, Barbados and Saint-Vincent and the Grenadines).¹⁰⁹ The latter noted that “[t]he intangible cultural heritage of any group is valuable and precious to them, if only to them. The convention, therefore, should not just recognize intangible cultural heritage of ‘exceptional’ value”.¹¹⁰ By contrast, the members of the former group noted that “hierarchy is a fact of history”, calling for a distinction between an “anthropological view of heritage and a political view of heritage”.¹¹¹ A middle ground was ultimately found by creating a list which favoured representativeness, deferring the issue of selection criteria until after the adoption of the convention.

Ultimately, unlike earlier UNESCO heritage conventions, intangible cultural heritage is not defined by its ‘external’ value to the international community, but rather by its importance to a given community.¹¹² Rather than focusing on universal value, the only limitation imposed by the Intangible Heritage Convention is the compatibility of a given form of intangible heritage with existing human rights and sustainable development.¹¹³ However, safeguarding of the intangible cultural heritage of *humanity* still remains the goal of the Convention, as is evident from the reference thereto in the preamble and the position of the Representative List of the Intangible Cultural Heritage of Humanity at the heart of the Convention.¹¹⁴ Furthermore, the Intangible Heritage Convention also employs the common concern principle (chiefly developed, as noted above, in the area of environmental law), despite doubts being expressed as to the utility of doing so; this entails that there is in principle some common benefit in undertaking actions to protect intangible cultural heritage at the international level.¹¹⁵ While the use of the principle does not

CONF.206/4, 7. See also UNESCO ‘Consolidated Preliminary Draft Convention for the Safeguarding of the Intangible Cultural Heritage’ (May 2003) UNESCO Doc CLT-2003/CONF.206/2.

109 VT Hafstein, ‘Intangible Heritage as a List: From Masterpieces to Representation’ in A Smith and N Akagawa (eds), *Intangible Heritage* (Routledge 2009) 97–8.

110 *Ibid.*, 101.

111 *Ibid.*, 103–4.

112 Convention for Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3 (Intangible Cultural Heritage Convention) art 2(1).

113 *Ibid.*

114 *Ibid.*, art 16.

115 Brunnée (n 30), 564–5.

entail specific substantive obligations, it does indicate that the sovereignty of States is not unfettered,¹¹⁶ and that there is indeed a shared international interest in protection.¹¹⁷

4 Conclusion

4.1 *Taking Stock*

Universal language is a common thread in cultural heritage law-making,¹¹⁸ yet the question remains whether it is anything more than a rhetorical device.¹¹⁹ Similarly to other areas of international law, international conventions for the protection of cultural heritage facilitate a conceptual transformation of an area of national sovereignty into a common interest of the international community. Cultural heritage was historically seen as something within the sovereign sphere of the State; as such, any international regulation of the issue has required a sense of pragmatism. Such pragmatism, to a certain extent, lies at “the heart of heritage practices, which are always and inevitably selective ... [heritage] lists are ultimately designed to channel funds and attention to the task of safeguarding”, as well as to focus attention on the destruction of particularly emblematic heritage.¹²⁰ This pragmatism has expressed itself in the limitations imposed upon the types of heritage that the international community can and should seek to protect. As the discussions across each of the instruments surveyed above have shown, negotiations repeatedly show a gradual narrowing of the ambition and goals of the convention in question, towards a recognition that all cultural heritage is valuable, but that only a specific segment of this heritage can be protected by virtue of international law.¹²¹

Nonetheless, the starting point in cultural heritage law-making has remained a “recognition of the cultural heritage as the common concern of humankind”.¹²² Over the course of the past century, the idea that cultural heritage is a common interest of humankind has prevailed, across the waxing and waning of political investment in the international legal project. Similarly, it

116 *Ibid.*, 565–567.

117 T Cottier and others, ‘The Principle of Common Concern and Climate Change’ (2014) 52 *Archiv des Völkerrechts* 293, 307–8.

118 See for example Merryman (n 41).

119 French (n 21).

120 Hafstein (n 109), 93.

121 C Forrest, *International Law and the Protection of Cultural Heritage* (Routledge 2012) 389–90.

122 *Ibid.*, 405.

seems to have become almost commonplace to state that destruction or damage to cultural heritage causes concomitant damage to an undefined entity known as the ‘heritage of all mankind’ – a concept with unclear legal implications, but which has thus far avoided impinging upon the sovereignty of the territorial State.¹²³ In this sense, it could be argued that the idea of the ‘cultural heritage of humankind’ is a concept which operates at the boundaries of the law, indicating what the international community (broadly conceived beyond a purely inter-state context) would wish to protect, if funding and State sovereignty were not an issue. It remains to be seen whether in future there will be a solidification of the category of ‘cultural heritage of humankind’ beyond a purely contractual context, as well as the elaboration of customary norms for the protection thereof.

As such, the intentions of these treaties are certainly universal in design, but their implementation is often overwhelmingly national and State-focused in nature.¹²⁴ At the core of these conventions is a *delimitation* of State sovereignty, rather than a limitation thereof: within these boundaries, States are expected to cooperate, not only to represent their own interests, but the interests of the international community as a whole, and those of future generations.¹²⁵ In this sense, the territorial State becomes a trustee of the cultural heritage situated within its territory.¹²⁶ In particular, in the context of the Intangible Heritage Convention and the World Heritage Convention, this cooperation is paired with the provision of financial and technical support, albeit strictly within the context of a treaty-based regime.

Current developments do not necessarily suggest that the international community is moving away from its commitment to the universality of cultural heritage protection. In 2017, the UN Security Council established in Resolution 2347 that threats to cultural heritage pose a threat to international peace and security, potentially paving the way for greater clarity on the position of norms for the protection of cultural heritage as *erga omnes* norms, as well as providing body to the concept of the ‘common heritage of humankind’.¹²⁷ Similarly, the judgment of the ICC in the *Al Mahdi* case provided a hint of the potential

123 Ibid, 410.

124 Ibid.

125 Ibid, 412–3.

126 Ibid, 410–2.

127 On the significance of the resolution, see: K Hausler, ‘Cultural Heritage and the Security Council: Why Resolution 2347 Matters’ (2018) 48 *Questions of Intl L* 5; A Jakubowski, ‘Resolution 2347: Mainstreaming the Protection of Cultural Heritage at the Global Level’ (2018) 48 *Questions of Intl L* 21.

establishment of the international community as a beneficiary of international legal norms established for the protection of cultural heritage. The judgment and reparations order balance between the interests of the international community and the local community; most fascinatingly, the Court decided to award a symbolic one euro reparation to the “international community” for the harm done to it through the destruction of the mausoleums and mosques in Timbuktu by Al Mahdi.¹²⁸ It thereby concretised the interest of the international community in relation to cultural heritage protection as a *legal* interest. The question remains how to balance the interest of the international community with that of local and national communities, as well as whether the inclusion of heritage on an international list – such as the World Heritage List – is the most appropriate indicator of the concern of the international community with a particular act of cultural heritage destruction.¹²⁹

4.2 *What Universality Might Obscure*

One key area for further development in the immediate future is the clarification of how the universalist paradigm within cultural heritage protection interacts with human rights norms.¹³⁰ To do so is crucial, as (over)emphasising universality in international legal instruments can have unintended negative consequences.¹³¹ In the context of international heritage protection, the effect of this emphasis has been that those most closely intertwined with a given form of heritage are distanced from its international legal protection.¹³²

128 See: *Prosecutor v Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15-171 (27 September 2016) paras 76–82; *Prosecutor v Al Mahdi* (Reparations Order) ICC-01/12-01/15-236 (17 August 2017). See also: F Capone, ‘An Appraisal of the Al Mahdi Order on Reparations and Its Innovative Elements: Redress for Victims of Crimes against Cultural Heritage’ (2018) 16 *J of Intl Crim Justice* 645; O Ba, ‘Who are the Victims of Crimes Against Cultural Heritage?’ (2019) 41 *HRQ* 578. For further discussion of the *Al Mahdi* case, see chapters by Meskell, Jakubowski, and Vrdoljak in this volume.

129 I have previously critiqued the ICC’s reparations order on these grounds: see S Starrenburg, ‘Who is the Victim of Cultural Heritage Destruction? The Reparations Order in the Case of the Prosecutor v Ahmad Al Faqi Al Mahdi’ *EJIL: Talk!*, 25 August 2017, available at: <<https://www.ejiltalk.org/who-is-the-victim-of-cultural-heritage-destruction-the-reparations-order-in-the-case-of-the-prosecutor-v-ahmad-al-faqi-al-mahdi/>> last accessed 15 November 2021.

130 See for example the establishment in 2018 of an International Law Association committee on participation in cultural heritage governance.

131 M Koskeniemi, ‘Projects of World Community’ in A Cassese (ed), *Realizing Utopia* (OUP 2012); L Meskell, ‘Gridlock: UNESCO, Global Conflict and Failed Ambitions’ (2015) 47 *World Archaeology* 224, 230.

132 See for example: H Tucker and E Carnegie, ‘World Heritage and the Contradictions of “Universal Value”’ (2014) 47 *Annals of Tourism Research* 63; S Vigneron, ‘From Local to

Critically, heritage listing sometimes entails the forceful imposition of geographical distancing of residents from heritage sites through displacement, eviction or gentrification.¹³³ Thus local residents of the World Heritage Site of the Group of Monuments at Hampi in India were evicted, as the World Heritage Committee deemed that their dwellings were inauthentic modern additions to the 14th–16th century temples and palaces that had formed the heart of the site inscription.¹³⁴ By the same token, a 2007 UNESCO Reactive Monitoring Mission called upon the Indian government to demolish more recent additions to the site (although also calling for “effective and positive solutions” for relocation and “[a] realistic resettlement plan” for residents).¹³⁵ Residents were depicted by the Indian government as “illegally encroaching”, and were subsequently evicted, albeit without adequate compensation or the “realistic resettlement plan” recommended by UNESCO.¹³⁶

Similar examples can be found elsewhere, such as at the archaeological site of Carthage in Tunisia. The World Heritage Committee has repeatedly expressed its concern with illegal construction which has taken place at Carthage following the unrest surrounding the 2011 Arab Spring. In July 2019, the Committee requested Tunisia “to enforce ... outstanding demolition orders and issue new ones as required”; the standing of the residents of such illegal constructions once again received comparably little attention, with the Committee simply advising Tunisia “to address to the degree possible any socio-economic issues

World Heritage: A Comparative Analysis’ (2016) 7 *The Historic Environment: Policy & Practice* 15; Omland (n 7) 248.

133 See for example N Bloch, ‘Evicting Heritage: Spatial Cleansing and Cultural Legacy at the Hampi UNESCO Site in India’ (2016) 48 *Critical Asian Studies* 556. Similar trends have been well-documented in relation to environmental preservation: see D Brockington and J Igoe, ‘Eviction for Conservation: A Global Overview’ (2006) 4 *Conservation and Society* 424.

134 UNESCO ‘Statements of Outstanding Universal Value’ (17 May 2013) UNESCO Doc WHC-13/37.COM/8E, 105. See for example: G Chamberlain, ‘India’s Hampi Heritage Site Families Face Eviction from Historic Ruins’ *The Guardian*, 27 May 2012 <<https://www.theguardian.com/world/2012/may/27/hampi-india-heritage-temples-eviction>> last accessed 30 March 2023; M. Ahiraj, ‘Evicted Forest-Dwellers near Hampi Plead for Some Land’ *The Hindu*, 8 May 2016 <<https://www.thehindu.com/news/national/karnataka/evicted-forestdwellers-near-hampi-plead-for-some-land/article8571641.ece>> last accessed 30 March 2023.

135 UNESCO ‘Report on the Joint UNESCO-ICOMOS Reactive Monitoring Mission to the Group of Monuments at Hampi (Karnataka, India)’ (5 March 2007) UNESCO Doc 31 Com 38–40.

136 Bloch (n 133) 559–65.

that may underlie the recent expansion of uncontrolled constructions".¹³⁷ Once again, concrete guarantees for resettlement of residents remained wanting.

In many situations, heritage protection thus serves the interests of either the international community or national elites, instead of those individuals and communities most closely situated to the heritage in question.¹³⁸ The ability of UNESCO to challenge these problematic uses of heritage by its member States can be called into doubt, given that the politics of the organisation have in recent years been captured by states wishing to use inscription strategically. This dynamic is most evident within the flagship World Heritage programme,¹³⁹ where numerous sites which have been subject to a negative recommendation for inscription from the advisory bodies (such as referral or deferral, which respectively require a resubmission of the management plan of the site or a further demonstration by the member state of the outstanding universal value of the site) have nonetheless been inscribed on the list by the World Heritage Committee. The most notable example is the 2018 inscription of the Saudi Arabian Al Ahsa Oasis, which marked the first time in the Committee's history that it inscribed a site that the advisory bodies had not recommended for inscription due to a complete absence of outstanding universal value (OUV).¹⁴⁰ The decision was followed by the 2019 inscription of the Historic Centre of Sheki in Azerbaijan, which ICOMOS had also judged to lack OUV.¹⁴¹

There are therefore good reasons to interrogate the workings of universality in cultural heritage law. As Derek Gillman notes, the concept of 'universal' value frequently conflicts with the nature of heritage, which is often claimed

137 UNESCO 'Decisions adopted during the 43rd session of the World Heritage Committee' (23 July 2019) UNESCO Doc WHC/19/43.COM/18, decision 43 COM 7B.55. See also L Foroudi, 'Battle of Carthage: Tunisia Demolishes Homes to Protect Ancient Site' (*Thomson Reuters Foundation*, 14 August 2019) <<http://news.trust.org/item/2019081233753-ob555/>> last accessed 30 March 2023.

138 SM Dingli, 'Responsibility for the Heritage of Mankind' in C Scarre and G Scarre (eds), *The Ethics of Archaeology: Philosophical Perspectives on Archaeological Practice* (CUP 2006) 234.

139 E Bertacchini *et al.*, 'The Politicization of UNESCO World Heritage Decision Making' (2016) 167 *Public Choice* 95; Brumann (n 77), 251–2.

140 Decisions adopted during the 42nd session of the World Heritage Committee (4 July 2018) WHC/18/42.COM/18, Decision 42 COM 8B.16. See H Hølleland and M Wood, 'An Emotional Plea for Al-Ahsa: A Case Study on How Discourses of Representativeness, Climate and Discord are Strategized in the World Heritage Regime' (2019) *International Journal of Cultural Policy* 1.

141 UNESCO 'Decisions adopted during the 42nd session of the World Heritage Committee' (4 July 2018) UNESCO Doc WHC/18/42.COM/18, Decision 43 COM 8B.36.

by members of particular cultures; to argue that it is possible for universal heritage and local heritage to co-exist, he states, “satisfies symmetry but at the expense of the realities of possession and control”.¹⁴² There have moreover been critiques aimed more generally at the invocation of “humanity” within international legal instruments, that such acts are by their very nature exclusive,¹⁴³ and hegemonic.¹⁴⁴ Such observations do not necessarily need to undermine the clear evidence that destruction of or damage to cultural heritage is widely condemned by the international community – but they should, instead, draw our attention to the way in which universal interests have historically guided the development of cultural heritage law, at times to the detriment of certain groups.¹⁴⁵

Ultimately, the claims of individuals to heritage protection are more nuanced than the narrow scope of universality can allow, requiring a more flexible interpretation and implementation of the concept of cultural heritage value within public international law.¹⁴⁶ Precisely such an approach has been adopted in the context of the Intangible Heritage Convention, yet does not (as of yet) appear to have had much influence on the operationalisation of other international instruments safeguarding cultural heritage.¹⁴⁷ Given that human rights concerns have only relatively recently found their way into the heritage governance of UNESCO,¹⁴⁸ there is still much work which needs to be done in

142 D Gillman, *The Idea of Cultural Heritage* (CUP 2010) 15.

143 van Beers, Corrias and Werner (n 2), 3.

144 Koskenniemi (n 131) 3; E Jouanet, ‘Universalism and Imperialism: The True-False Paradox of International Law?’ (2007) 18 EJIL 379, 395–7.

145 Labadi (n 56 at 18) notes the strong condemnation of the destruction of the Buddhas of Bamiyan or the Mostar bridge as examples of such widespread international condemnation.

146 L Lixinski, ‘International Cultural Heritage Regimes, International Law, and the Politics of Expertise’ (2013) 20 Intl J of Cultural Property 407, 411. For an example, see AL Kraak, ‘Heritage Destruction and Cultural Rights: Insights from Bagan in Myanmar’ (2018) 9 Intl J of Heritage Studies 1.

147 PB Larsen, ‘Introduction: World Heritage and Human Rights in the Asia-Pacific and Global Arena’ in PB Larsen (ed), *World Heritage and Human Rights: Lessons from the Asia-Pacific and Global Arena* (Routledge 2018) 6. Issues even remain in the context of the Intangible Heritage Convention, particularly with regards to the operationalization of community participation – as there are a range of different understandings of the term. See Labadi (n 56), 133–6.

148 Omland (n 7), 248; AHE Morawa and G Zalazar, ‘The Inter-relationship of the World Heritage convention and International Human Rights Law: A Preliminary Assessment and Outlook’ in PB Larsen (ed), *World Heritage and Human Rights: Lessons from the Asia-Pacific and Global Arena* (Routledge 2018). See, more generally, A Durbach and L Lixinski, ‘Introduction’ in A Durbach and L Lixinski (eds), *Heritage, Culture and Rights: Challenging Legal Discourses* (Hart 2017).

order to meet the standards which operate elsewhere in international law with regard to free, prior and informed consent (in particular that of Indigenous Peoples), consultation and cooperation. In doing so, it is important to try and strike a balance between “the warm glow of ‘localism’ [and] bland ‘universal’ platitudes of globalisation”.¹⁴⁹ Local communities are of course not devoid of their own power dynamics;¹⁵⁰ however, this should not preclude a more serious consideration within the current international legal framework of community and individual interests in relation to cultural heritage.¹⁵¹

149 DC Harvey, ‘Heritage and Scale: Settings, Boundaries and Relations’ (2015) 21 *Intl J of Heritage Studies* 577, 579.

150 L Lixinski, ‘Introduction’, *Intangible Cultural Heritage in International Law* (OUP 2013) 10; AL Kraak, ‘Cultural and Participation Rights in Bagan, Myanmar’ in PB Larsen (ed), *World Heritage and Human Rights: Lessons from the Asia-Pacific and Global Arena* (Routledge 2018).

151 This work is supported by the research programme ‘The Foundations of Cultural Heritage Protection: Striking a Balance between the Local and the Global’ with project number 406.18.516, which is funded by the Dutch Research Council (NWO).