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**Striking a balance between local and global interests:
communities and cultural heritage protection in
public international law**

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Striking a balance between local and global interests

Communities and cultural heritage protection
in public international law

S.H. STARRENBURG

Striking a balance between local and global interests

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Communities and cultural heritage protection in public international law

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Provincialism? Not at all. I am not burying myself in a narrow particularism. But neither do I want to lose myself in an emaciated universalism. There are two ways to lose oneself: walled segregation in the particular or dilution in the "universal."

My conception of the universal is that of a universal enriched by all that is particular, a universal enriched by every particular: the deepening and coexistence of all particulars.

And so? So we need to have the patience to take up the task anew [.]

Aimé Césaire (tr. Chike Jeffers)

(‘Letter to Maurice Thorez’ (2010) 28 Social Text 145)

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Sophie Starrenburg
August 2023

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Abbreviations

ACmHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
ARSIWA	ILC Articles on the Responsibility of States for Internationally Wrongful Acts
CBD	Convention on Biological Diversity
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CGIs	Communities, groups and individuals
CHH	common heritage of humankind
CITES	Convention on International Trade in Endangered Species
COP	Conference of the Parties
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention of Human Rights
ECTHR	European Court of Human Rights
ECLAC	UN Commission for Latin America and the Caribbean
EEZ	Exclusive Economic Zone
EIA	environmental impact assessment
FPIC	free, prior and informed consent
HIA	heritage impact assessment
HRBA	human rights-based approach
HRC	Human Rights Committee
HRIA	human rights impact assessment
IACHR	American Convention on Human Rights
IACmHR	Inter-American Commission of Human Right
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICCROM	International Centre for the Study of the Preservation and Restoration of Cultural Property
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICH	intangible cultural heritage
ICIC	International Committee on Intellectual Cooperation
ICJ	International Court of Justice
ICOMOS	International Council on Monuments and Sites

ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IIIC	International Institute of Intellectual Cooperation
ILA	International Law Association
IUCN	International Union for Conservation of Nature
MEA	multilateral environmental agreement
MOP	Meeting of the Parties
NIEO	New International Economic Order
OHCHR	Office of the High Commissioner for Human Rights
OIM	<i>Office International des Musées</i>
OUV	Outstanding Universal Value
SEA	strategic environmental assessment
STAB	Scientific and Technical Advisory Body
TWAIL	Third World Approaches to International Law
UCH	underwater cultural heritage
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCLOS	UN Convention on the Law of the Sea
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNECE	UN Economic Commission for Europe
UNESCO	UN Educational, Scientific and Cultural Organization
UNFCCC	UN Framework Convention on Climate Change
VCLT	Vienna Convention on the Law of Treaties

In July 2021, the World Heritage Committee – the intergovernmental body tasked with the implementation of UNESCO’s World Heritage Convention – received a communication from several UN Special Rapporteurs on Kaeng Krachan national park in Thailand; the site was due to be inscribed on the World Heritage List later that month.¹ The Special Rapporteurs drew attention to the fact that the Karen, an Indigenous people who resided in the park, faced forced evictions, often paired with violence, their homes being burnt down and numerous community members being arrested and harassed by national authorities. They deplored the lack of consultation of the Karen in the nomination process, and called upon the members of the World Heritage Committee to not inscribe the site until the situation could be independently assessed.

In their response to the Special Rapporteurs, Thailand denied these claims, simply noting that it was the state’s view that human rights mechanisms should be considered separately from World Heritage mechanisms.² The World Heritage Committee, for its part, ultimately took little notice of the letter from the Special Rapporteurs. Kaeng Krachan was inscribed on the World Heritage List; the decision took note of the critically endangered Siamese crocodile, the Sunda pangolin, and the Asian giant tortoise – but the Karen were nowhere to be found. The Resolution adopting the inscription even noted ‘with appreciation the commitment and continued efforts by the State Party in working with local authorities and communities in safeguarding the property’.³ The moment of inscription – usually a festive occasion – was followed by statements of condemnation from Francisco Calí Tzay, the Special Rapporteur on the Rights of Indigenous Peoples, and Chrissy Grant, representative of the International Indigenous Peoples’ Forum on World Heritage.⁴

1 ‘Thailand: UN experts warn against heritage status for Kaeng Krachan national park’ (OHCHR, 23 July 2021) <<https://www.ohchr.org/en/press-releases/2021/07/thailand-un-experts-warn-against-heritage-status-kaeng-krachan-national-park>>.

2 Permanent Mission of Thailand to Geneva, Communication No. 52101/249 (6 July 2021) <<https://whc.unesco.org/en/documents/188262>>.

3 World Heritage Committee, Decision 44 COM 8B.7 (2021).

4 World Heritage Committee, Summary Record of the Extended 44th Session (16-31 July 2021) WHC/21/44.COM/INF.19, 368-9.

The inscription of Kaeng Krachan has been widely decried as a low point in the history of the World Heritage Convention,⁵ a barometer of the increasing politicisation of the World Heritage Committee and the decline of expert-based decision-making processes within international heritage governance.⁶ However, in many ways the inscription can be seen as ‘business as usual’.⁷ Scholars and civil society organisations have repeatedly charted how the inscription of natural World Heritage sites has led to the exclusion of local communities, sometimes paired with violence and displacement – a model known as ‘fortress conservation’.⁸ This is particularly evident in the problematic relationship between the World Heritage Convention and Indigenous peoples.⁹ As such, there have been increasing calls for the adoption of (human) rights-based approaches within the World Heritage Convention.¹⁰ Similar dynamics are at play within international law at large, as protected areas regimes established to combat climate change,¹¹ protect the environment and

-
- 5 Peter Bille Larsen, ‘The Lightness of Human Rights in World Heritage: A Critical View of Rights-Based Approaches, Vernaculars, and Action Opportunities’ (2023) 41 *Nordic Journal of Human Rights* 70, 71.
 - 6 A state of affairs which has been increasingly signalled: see e.g. Enrico Bertacchini and others, ‘The Politicization of UNESCO World Heritage Decision Making’ (2016) 167 *Public Choice* 95.
 - 7 Larsen (n 5) 72.
 - 8 For examples drawn from the World Heritage Convention, see e.g. Stefan Disko and Helen Tugendhat (eds), *World Heritage Sites and Indigenous Peoples’ Rights* (IWGIA 2014). More broadly, see e.g. Daniel Brockington and James Igoe, ‘Eviction for Conservation: A Global Overview’ (2006) 4 *Conservation and Society* 424.
 - 9 See e.g. Stefan Disko, ‘Indigenous Cultural Heritage in the Implementation of UNESCO’s World Heritage Convention: Opportunities, Obstacles and Challenges’ in Alexandra Xanthaki and others (eds), *Indigenous Peoples’ Cultural Heritage: Rights, Debates and Challenges* (Brill 2017); Ana Filipa Vrdoljak, ‘Indigenous Peoples, Intangible Cultural Heritage and Participation in the United Nations’ in Christoph Antons and William Logan (eds), *Intellectual Property, Cultural Property and Intangible Heritage* (Routledge 2018).
 - 10 See e.g. the contributions in Stener Ekern and others, ‘Human Rights and World Heritage: Preserving Our Common Dignity through Rights-based Approaches to Site Management’ (2012) 18 *International Journal of Heritage Studies* 213; the contributions in Anne-Laura Kraak and Bahar Aykan, ‘The Possibilities and Limitations of Rights-Based Approaches to Heritage Practice’ (2018) 25 *International Journal of Cultural Property* 1; William Logan, ‘Heritage Rights – Avoidance and Reinforcement’ (2014) 7 *Heritage & Society* 156; Francesco Francioni and Lucas Lixinski, ‘Opening the Toolbox of International Human Rights Law in the Safeguarding of Cultural Heritage’ in Andrea Durbach and Lucas Lixinski (eds), *Heritage, Culture and Rights: Challenging Legal Discourses* (Hart 2017); Stefan Disko and Dalee Sambo Dorough, ‘“We Are Not in Geneva on the Human Rights Council”: Indigenous Peoples’ Experiences with the World Heritage Convention’ (2022) 29 *International Journal of Cultural Property* 487; Ana Filipa Vrdoljak, ‘UNESCO, World Heritage and Human Rights’ (2022) 29 *International Journal of Cultural Property* 459; Larsen (n 5).
 - 11 See e.g. the chapters by Jodoin and Savaresi in Christina Voigt (ed) *Research Handbook on REDD+ and International Law* (Elgar 2016); and the chapters by Delgado Pugley and Oluboro Jegede in Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018).

safeguard biodiversity,¹² and facilitate international development¹³ have faced increasing criticism in light of their negative impact upon the human rights of individuals and communities.

However, what is less well-explored in this tale is the impact of international heritage inscription in the case of cultural, not natural heritage.¹⁴ Whereas human activity has historically been conceptualised as in conflict with nature conservation,¹⁵ the reverse is often held to be true for cultural heritage preservation. As cultural heritage is constructed as a uniquely human endeavour in the minds of many heritage experts,¹⁶ its preservation is often presented as intrinsically in harmony with a continuation of prior human activity.¹⁷ While not denying that this dichotomy between ‘nature’ and ‘culture’ is ultimately artificial,¹⁸ this dissertation nonetheless specifically focuses on the impact of international inscriptions on individuals and local communities ‘living in, with or around’¹⁹ cultural heritage,²⁰ in order to unsettle this presumption and shed light on an underexplored facet of international heritage governance.

12 See e.g. Federica Cittadino, *Incorporating Indigenous Rights in the International Regime on Biodiversity Protection* (Brill Nijhoff 2019); Marie-Catherine Petersmann, *When Environmental Protection and Human Rights Collide* (Cambridge University Press 2022), in particular Chapter 4.

13 See e.g. Chris de Wet (ed) *Development-induced Displacement: Problems, Policies and People* (Berghahn Books 2006); Henrietta Zeffert, ‘The Lake Home: International Law and the Global Land Grab’ (2018) 8 *Asian JIL* 432.

14 In the sense that debates on the impact of natural heritage inscriptions have often demanded the lion’s share of attention. However, on cultural inscriptions, see *inter alia* Regina F Bendix, Aditya Eggert and Arnika Peselmann (eds), *Heritage Regimes and the State* (Universitätsverlag Göttingen 2012); Michael Dylan Foster, ‘UNESCO on the Ground’ (2015) 52 *Journal of Folklore Research* 143; Christoph Brumann and David Berliner (eds), *World Heritage on the Ground: Ethnographic Perspectives* (Berghahn 2016); Kraak and Aykan (n 10). See Chapter 5.

15 See Petersmann (n 12) 17-51, on the shift within environmentalism to protecting nature ‘for’, rather than ‘from’, humans.

16 Ana Filipa Vrdoljak, ‘Human Rights and Cultural Heritage in International Law’ in Federico Lenzerini and Ana Filipa Vrdoljak (eds), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature* (Hart Publishing 2014) 139-40.

17 With an emphasis on *prior* (i.e. historically grounded or otherwise ‘authentic’) human activity.

18 Rodney Harrison, ‘Beyond “Natural” and “Cultural” Heritage: Toward an Ontological Politics of Heritage in the Age of Anthropocene’ (2015) 8 *Heritage & Society* 24.

19 I draw this phrase from the work of Lucas Lixinski: Lucas Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination* (Oxford University Press 2019) 23.

20 That is to say, the concept of ‘cultural heritage’ as constructed by cultural heritage law.

1.1 RESEARCH QUESTION

States continue to be the main driving force behind the development and implementation of international cultural heritage law.²¹ However, the statist focus of UNESCO's cultural instruments has an unintended consequence: the marginalisation of the individuals and local communities living in, with or around internationalised cultural heritage,²² who are frequently subject to actions taken in the name of the 'common interest' of the international community to safeguard certain forms of cultural heritage. The result of these international interventions is often the erasure of the local, human context that maintains cultural heritage, and damage to the living heritage value of a cultural site or practice.²³

Simultaneously, the decision-making processes within international heritage instruments remain largely opaque to those most affected by them. Whereas at the domestic level the balancing act made by domestic decision-makers between heritage protection (or other comparable public interests) and the competing interests of individuals or certain communities within society will usually take place within a framework guided by the rule of law,²⁴ such safeguards do not necessarily always exist at the international level. This produces an accountability deficit in which international decisions are often weighted heavily in favour of cultural heritage protection – albeit a very narrow, expert-driven view of what such protection should entail – whereas the impact of these decisions upon individuals and local communities is marginalised.²⁵

Although cultural heritage law is often seen as being largely ineffective due to the normative softness of its treaty provisions²⁶ and a paucity of inter-

21 Alexandra Xanthaki and others, 'Colonial Loot and its Restitution - the Role of Human Rights' (2022) 2 *Santander Art and Culture Law Review* 21, 23. In relation to UNESCO more broadly, see Nico Schrijver, 'UNESCO's Role in the Development and Application of International Law: An Assessment', in Abdulqawi A. Yusuf (ed), *Standard-setting in UNESCO: Normative Action in Education, Science and Culture* (Martinus Nijhoff 2007); Lixinski (n 19). See further Chapter 3 and 4.

22 Taken here to mean cultural heritage which has been subjected to protection as a result of international legal processes, such as inscription on the World Heritage List.

23 Lixinski (n 19). On the notion of living heritage value, see Section 1.3.3 below. See further Chapter 5.

24 On the concept of public interest more broadly, see Luboš Tichý and Michael Potacs (eds), *Public Interest in Law* (Intersentia 2021).

25 Stefano Battini, 'The Procedural Side of Legal Globalization: the Case of the World Heritage Convention' (2011) 9 *International Journal of Constitutional Law* 340, 359-61; Natasha Affolder, 'Democratising or Demonising the World Heritage Convention?' (2007) 38 *Victoria University of Wellington Law Review* 341, 342.

26 On the notion of 'normative softness', see Prosper Weil, 'Towards Relative Normativity in International Law' (1983) 77 *AJIL* 413; Jean d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19 *EJIL* 1075.

national dispute settlement mechanisms,²⁷ it is thus arguably much more powerful than is usually assumed, at least when viewed from the perspective of individuals and communities whose lives are affected by decisions taken at the international level.²⁸ While the ultimate decision-making power remains in the hand of domestic authorities – precisely due to the absence of non-compliance mechanisms within cultural heritage law and the wide margin of discretion granted by its norms – these decisions are deeply influenced by procedures which take place at the international level within bodies such as UNESCO's World Heritage Committee.²⁹

While these international bodies have responded to critiques from civil society by stating that they do not 'ask' states to undertake actions with a negative impact upon local communities, such as forced evictions,³⁰ this stance underplays the broader effect of their recommendations,³¹ and conveniently elides responsibility for the consequences of past decisions in which they *have* requested states to displace local communities.³² It furthermore minimises the pervasive influence of both international and domestic 'authorised heritage discourses'³³ which naturalise the assumption that it is communities which must adapt to cultural heritage law – for example by demonstrating that they, and their ways of life, are sufficiently 'authentic' in order to merit their continued residence within a heritage site – rather than the other way around.³⁴

The point is therefore not whether international bodies 'ask' states to displace local communities: they do not need to. In the absence of effective monitoring mechanisms, domestic heritage actors are often given free rein to interpret the norms established by UNESCO's cultural conventions in ways that run counter to their ultimate goal, namely the safeguarding of living heritage.³⁵ Conversely, these actors can draw upon the normative authority

27 See Alessandro Chechi, *The Settlement of Cultural Heritage Disputes* (Oxford University Press 2014).

28 Battini (n 25) 359–61.

29 Ibid 363–4; Sam Litton, 'The World Heritage "In Danger" Listing as a Taking' (2011) 44 NYU Journal of International Law and Politics 219, 221–2.

30 'Ngorongoro: UNESCO has never at any time asked for the displacement of the Maasai people' (UNESCO, 21 March 2022) <<https://whc.unesco.org/en/news/2419>>.

31 Lorenzo Casini, 'Cultural Sites Between Nationhood and Mankind' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018); Disko and Sambo Dorrough (n 10) 487.

32 This is particularly the case for the World Heritage Committee: see Chapter 5, Section 5.3.3.

33 As coined by Laurajane Smith, *The Uses of Heritage* (Routledge 2006).

34 For an example of this dynamic, see David Berliner, 'Multiple Nostalgias: The Fabric of Heritage in Luang Prabang (Lao PDR)' in Christoph Brumann and David Berliner (eds), *World Heritage on the Ground: Ethnographic Perspectives* (Berghahn 2016) 103; see also Smith (n 33) 11.

35 The difficulties in examining the implementation of international law at the domestic and local levels have been extensively explored by international legal scholars under the heading of 'norm translation' and 'norm diffusion' theories, amongst others: see e.g. Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms*

which they are imbued with by cultural heritage law and thereby displace questions surrounding heritage management from the political to a purportedly neutral legal realm.³⁶ The heart of the problem is thus that it is unclear to those who are most affected by decisions surrounding the safeguarding of cultural heritage how they can influence and challenge them, due to the dispersion of responsibility for decision-making processes amongst local, domestic and international actors.³⁷

These issues are compounded by the fact that the international legal discourse surrounding the protection of cultural heritage has historically relied heavily upon the prevention of damage to the ‘cultural heritage of all mankind’, positing such damage as a grave loss to the international community and viewing its protection as a common interest of that same community.³⁸ As such, emphasis is not placed upon the importance of heritage to those directly affected by harm to it, but rather on the implicit harm to an amorphous cultural heritage of humankind.³⁹ Communities wishing to articulate their relationship to a given form of cultural heritage are subsequently forced to do so in a universal register or risk being ignored in debates on its pro-

and *Domestic Change* (Cambridge University Press 1999); Antje Wiener, *The Invisible Constitution of Politics: Contested Norms and International Encounters* (Cambridge University Press 2008); Lisbeth Zimmermann, *Global Norms with a Local Face: Rule-of-Law Promotion and Norm-Translation* (Cambridge University Press 2017). Similar work has been done from the perspective of heritage (albeit not through an explicitly legal lens), seeking to understand how the notion of heritage is ‘vernacularised’ across different locales: see e.g. Oscar Salemink, ‘Introduction: Heritagizing Asian Cities: Space, Memory, and Vernacular Heritage Practices’ (2021) 27 *International Journal of Heritage Studies* 769. For a particularly compelling example, see Krupa Rajangam, ‘A Bureaucracy of Care in Managing Hampi World Heritage Site’ (2019) 20 *Journal of Social Archaeology* 144.

36 Robert J. Shepherd, ‘UNESCO’s Tangled Web of Preservation: Community, Heritage and Development in China’ (2017) 47 *Journal of Contemporary Asia* 557, 572; see also Rajangam (n 35) 147.

37 Litton (n 29) 247; Affolder (n 25) 346–8. See also Julia Dehm, *Reconsidering REDD+: Authority, Power and Law in the Green Economy* (Cambridge University Press 2021), whose work ‘interrogates how the operations of global governance distributes rights, power and obligations between scales, and illuminates processes by which authority is globalised while responsibility is localised’ (7), arguing that REDD+ is a form of global governmentality characterised by ‘the simultaneous consolidation of forms of global authority alongside the devolution, decentralisation and pluralisation of governance, as the means by which such authority is exercised’ (46).

38 Atle Omland, ‘The Ethics of the World Heritage Concept’ in Chris Scarre and Geoffrey Scarre (eds), *The Ethics of Archaeology: Philosophical Perspectives on Archaeological Practice* (Cambridge University Press 2006).

39 This is particularly obvious in the context of international criminal law: see Oumar Ba, ‘Who are the Victims of Crimes Against Cultural Heritage?’ (2019) 41 *HRQ* 578. However, compare Susanne Krasmann, ‘Abandoning Humanity? On Cultural Heritage and the Subject of International Law’ (2023) 19 *Law, Culture and the Humanities* 89.

tection.⁴⁰ Cultural heritage law's invocation of notions of common interest has thus been increasingly drawn into question.⁴¹ This dissertation argues that these universalising techniques continue to play a central role in disempowering individuals and communities in international cultural heritage law. Therefore, it seeks to answer the following main research question:

How should the interests of individuals and local communities be safeguarded within the state-centric universalist legal structures and norms of international cultural heritage law?

The following sections explore a number of the assumptions embedded within this research question, and further define a number of its central concepts. As is evident from the phrasing of the research question, the dissertation's consideration of cultural heritage law focuses not only on each treaty's utilisation of certain legal norms, but also more broadly the legal structures which these treaties call into being. The research question qualifies these legal structures and norms as state-centric and universalist. In this context, the phrase 'state-centric' alludes to perennial debates on the position of the state as the chief legal subject of the international legal order.⁴² For the purposes of the dissertation, 'universality' is defined in Chapter 2 as 'the process whereby international legal instruments designate certain regulatory issues as being subject to the common interest of the international community',⁴³ for example through the utilisation of concepts such as the international community, the cultural heritage of humanity, or common concern. Chapter 2 provides an in-depth discussion of the development of universalist legal argumentation within public international law.

The extent to which cultural heritage law's legal structures and norms can be qualified as state-centric and universalist forms the chief focus of the dissertation's analysis in Chapters 3 and 4. While the research question pre-

40 As Lixinski notes, 'community actors ... will want to articulate much broader claims about their rights as particular people, rather than one single claim about the abstracted heritage of humankind': Lucas Lixinski, 'International Cultural Heritage Regimes, International Law, and the Politics of Expertise' (2013) 20 *International Journal of Cultural Property* 407, 411. For particularly telling example, see Sophia Rabliuskas, 'An Indigenous Perspective: the Case of Pimachiowin Aki World Mixed Cultural and Natural Heritage, Canada' [2020] *Journal of World Heritage Studies* 9.

41 See e.g. Erin Thompson, 'Whose Public? Whose Interest? Rethinking Merryman's "The Public Interest in Cultural Property"' (2017) 22 *Art, Antiquity and Law* 305.

42 See e.g. Christoph Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?' (1993) 4 *EJIL* 447; Robert McCorquodale, 'An Inclusive International Legal System' (2004) 17 *LJIL* 477; Anne Peters, 'Humanity as the α and Ω of Sovereignty' (2009) 20 *EJIL* 513; Bardo Fassbender, 'The State's Unabandoned Claim to be the Center of the Legal Universe' (2019) 16 *International Journal of Constitutional Law* 1207. For a further discussion, see Section 2.3.

43 See Section 2.1.

supposes that there is an inherent tension between state-centrism, universalist legal argumentation, and the safeguarding of the interests of individuals and local communities with respect to the international legal protection of cultural heritage, it does not necessarily assume that this relationship must always be antagonistic. This issue is further explored in Section 1.2.1 below, with respect to the possibility of a 'particularistic legal universalism' within cultural heritage law.

The dissertation seeks to answer the research question by examining the five core cultural treaties established under the aegis of UNESCO: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; the 1970 Convention for the Fight against the Illicit Trafficking of Cultural Property; the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage; the 2001 Convention on the Protection of the Underwater Cultural Heritage; and the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage. As will be discussed in Section 1.3.2 below, these conventions have increasingly been treated as constituting a common area of international regulation, variously described as cultural heritage law or international heritage law.

The reason why the dissertation examines the research problem from the perspective of the five core cultural conventions is due to the fact that many of the existing debates on the tensions between cultural heritage law and local communities focus on World Heritage sites,⁴⁴ rather than internationalised cultural heritage across the board. However, compelling evidence also exists with regards to the negative impacts of international heritage inscriptions pursuant to the other cultural conventions of UNESCO, such as the 2003 Intangible Cultural Heritage Convention.⁴⁵ The present dissertation synthesises this body of work, arguing that what has thus far largely been discussed on a case-by-case basis is in fact a systemic problem. In doing so it reflects on the relevance of these discussions through the lens of broader debates within public international law. It therefore seeks to demonstrate that the tensions between 'universalised' cultural heritage protection and the interests of individuals and local communities are not necessarily limited to World Heritage

44 Alongside the abovementioned literature on natural World Heritage sites, there is also a particularly rich body of literature on the impact of World Heritage inscription on the communities living in or around archaeological sites: see e.g. Lynn Meskell, 'Sites of Violence: Terrorism, Tourism, and Heritage in the Archaeological Present' in Lynn Meskell and Peter Pels (eds), *Embedding Ethics* (Bloomsbury 2005); Keiko Miura, 'Conservation of a "Living Heritage Site": A Contradiction in Terms? A Case Study of Angkor World Heritage Site' (2005) 7 *Conservation and Management of Archaeological Sites* 3; Michael Falser, *Angkor Wat – A Transcultural History of Heritage* (De Gruyter 2020); William Carruthers, *Flooded Pasts: UNESCO, Nubia, and the Recolonization of Archaeology* (Cornell University Press 2022). See further Chapter 5, Section 5.3.

45 See *inter alia* Marie Cornu and others (eds), *Intangible Cultural Heritage under National and International Law: Going Beyond the 2003 UNESCO Convention* (Elgar 2020). See further Chapter 5, section 5.4.

sites, but are rather endemic to the legal argumentation employed within UNESCO's cultural conventions.

Furthermore, the main research question is explicitly framed so as to focus on cultural heritage protection pursuant to public international law. As such, the present work does not focus on all forms of cultural heritage protection, but rather specifically examines sites, objects or practices subjected to *international* legal regimes.⁴⁶ While the dissertation acknowledges that it is sometimes difficult to separate internationalised heritage protection from parallel protection regimes established by regional treaties or domestic law, its scope is nonetheless limited to public international law in order to retain the focus of the research. It furthermore specifically adopts a legal approach, in light of the fact that the majority of the works engaging with the impact of UNESCO's cultural conventions at the local level have thus far done so from the perspective of other disciplines, such as archaeology and anthropology.⁴⁷ The present work seeks to fill this gap by analysing the interests of individuals and local communities affected by international heritage inscriptions through the lens of public international law.

Finally, as can be seen from the phrasing of the main research question ('how should'), it is of a recommendatory character. The dissertation thus seeks to not only critically analyse the current law (*lex lata*), but also seeks to make proposals for its change (*lex ferenda*). The underlying normative framework which guides these recommendations, and which constitutes perhaps one of the most fundamental assumptions on which the research question rests, is that the interests of individuals and local communities are intrinsically valuable and deserve consideration with respect to the way that cultural heritage law is structured. Critically, this assumption flows from a yardstick which is *internal* to the law: cultural heritage law's recognition of the importance of maintaining the living heritage value of the cultural heritage it sets out to safeguard. The notion of living heritage value, as well as the dissertation's choice to focus on individuals and local communities as relevant stakeholders for its analysis, is further developed in Sections 1.3.3 and 1.3.4 below. This assumption should furthermore be viewed against the background of a number of broader doctrinal debates within public international law which emphasise the centrality of the individual and the importance of ensuring the participation of affected individuals and groups within international decision-making processes; these will be explored in Section 1.2.2 below.

In order to answer the main research question, the dissertation relies on several descriptive, analytical, and evaluative steps. It thus first seeks to establish the position of cultural heritage law within broader trends relating to the protection of common interests within public international law, and

46 Understood here as binding multilateral legal instruments, as opposed to soft law regimes such as UNESCO's Memory of the World programme.

47 See Chapter 5. On the methodology of the dissertation, see further Section 1.4 below.

the role of universality therein. In doing so, it considers to what extent the interests of individuals and local communities are currently safeguarded within cultural heritage law; sets out the gaps in protection which emerge from this analysis; and considers to what extent these gaps in protection flow from the state-centric and universalist nature of cultural heritage law. The dissertation subsequently makes proposals for change, drawing upon trends within cultural heritage law itself (the aforementioned notion of living heritage value), but also considering to what extent other areas of international law which have faced similar tensions could inform the development of cultural heritage law. These proposals are subsequently situated in the context of broader debates in public international law on the inherent tensions embedded within universalist legal argumentation. These steps will be elaborated upon in the final sections of the introduction, which set out the underlying methodology (Section 1.4) and accompanying structure (Section 1.5) of the dissertation.

1.2 SITUATING THE RESEARCH

1.2.1 Universality and international law

The discussion on the role of universality within cultural heritage law stretches back to some of the earliest debates within the discipline on the normative dichotomy between so-called ‘cultural property nationalism’ and ‘internationalism’,⁴⁸ as well as the tensions flowing from reconciling the protection of cultural heritage as a common interest of the international community with state sovereignty and the principle of territoriality.⁴⁹ These debates have taken place against the background of a broader interdisciplinary discussion on the tension between universal and local values in cultural heritage, in light of the

48 John Henry Merryman, ‘Two Ways of Thinking About Cultural Property’ (1986) 80 AJIL 831. However, several authors have questioned the utility of characterizing debates in cultural heritage law along the nationalism/internationalism divide; this is also not the intention of the present work: Francesco Francioni, ‘Plurality and Interaction of Legal Orders in the Enforcement of Cultural Heritage Law’ in Francesco Francioni and James Gordley (eds), *Enforcing International Cultural Heritage Law* (Oxford University Press 2013) 11; Lucas Lixinski, ‘A Third Way of Thinking about Cultural Property’ (2019) 44 Brooklyn Journal of International Law 563.

49 Francesco Francioni, ‘Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity’ (2004) 25 Michigan Journal of International Law 1209; Anne-Marie Carstens and Elizabeth Varner, ‘Intersections in Public International Law for Protecting Cultural Heritage Law: Past, Present, and Future’ in Anne-Marie Carstens and Elizabeth Varner (eds), *Intersections in International Cultural Heritage Law* (Oxford Academic, Oxford University Press 2020) 10.

relativisation of notions of heritage value in fields such as anthropology and archaeology.⁵⁰

The dissertation seeks to situate these debates on the role of universality in cultural heritage law within broader theoretical discussions on the role of universality in international law. The central conceptual frame through which the dissertation examines the research problem is thus that of the tension between universal modes of reasoning in international law and the impact of these modes of reasoning on the lived realities of individuals and the communities to which they belong. By focusing on cultural heritage law through this lens, the dissertation hopes to outline how the discussions found within cultural heritage law on universality could enrich our understanding of the manifestations of universality within international law, and vice versa.

While the dissertation aligns with other research which has sought to critique the execution of universalist international law in practice,⁵¹ in doing so it does not seek to necessarily reject the role of universality in international legal argumentation per se. Accordingly, it does not argue that the universalist nature of international law is intrinsically problematic: as will be seen the following chapters,⁵² the invocation of universality has been central to the development of contemporary international law and cultural heritage law.⁵³ Instead, the research aligns itself with those authors who see the universal and the particular in international legal argumentation as inseparable,⁵⁴ and, more broadly, the articulation of the universal and the particular as inescapable realities of social life and identity formation.⁵⁵

50 Janet Blake, *International Cultural Heritage Law* (Oxford University Press 2015) 4. See further Section 1.3.3 below.

51 Such as research stemming from critical legal studies and Third World Approaches to International Law (TWAIL) theorists: see e.g. Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004); Martti Koskenniemi, 'Projects of World Community' in Antonio Cassese (ed), *Realizing Utopia* (Oxford University Press 2012). See further Chapter 2, in particular Section 2.3.2.

52 See Chapter 2 and 3.

53 This ties in closely to questions within critical legal scholarship on the extent to which scholars should locate proposals for change within existing international legal frameworks, or whether they should look beyond the law to alternative forms of political organisation: see Karin Mickelson, 'Hope in a TWAIL Register' [2020] TWAIL Review 14.

54 Armin von Bogdandy and Sergio Dellavalle, 'Universalism and Particularism: A Dichotomy to Read Theories on International Order' in Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (eds), *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel* (Oxford University Press 2017); Marie-Benedicte Dembour, 'Following the Movement of a Pendulum: Between Universalism and Relativism' in Jane K. Cowan, Marie-Bénédicte Dembour and Richard A. Wilson (eds), *Culture and Rights* (Cambridge University Press 2001).

55 Ernesto Laclau, *Emancipation(s)* (Originally published 1996, Verso 2007); Rodolphe Gasché, 'How Empty Can Empty Be? On the Place of the Universal' in Simon Critchley and Oliver Marchart (eds), *Laclau: A Critical Reader* (Routledge 2005).

In this sense, to examine the putting into practice of universality in relation to cultural heritage does not result in the rejection by the research of 'particular' universalities in favour of a 'true' universality.⁵⁶ Scholars have thus noted that an interrogation of the workings of universal modes of reasoning should not entail that the task of the scholar is simply to unveil the 'true' particular which is masked by the universal.⁵⁷ Instead, they argue that it is more productive to rethink the relationship between the universal and the particular, in which the universal is not something with a fixed content, but as 'void', 'empty', or 'incomplete', and therefore subject to contestations by *multiple* particularities.⁵⁸ In this understanding, the universal is always modified by the particular; the particular is similarly changed by its engagement with universalist modes of reasoning.⁵⁹

As argued by Laclau, 'the universal has no necessary body and no necessary content; different groups, instead, compete between themselves to temporarily give to their particularisms a function of universal representation'.⁶⁰ Consequently, 'contests over universal values must take place politically and not metaphysically – as an avowed, contestable claim for political universalisation and not as a tireless rendering of an already existing universal truth'.⁶¹ This critique of universalism is therefore particularly appealing to legal scholars, who propose that the legal form is eminently suited to housing political contestations of the nature of the universal,⁶² doubly so in the case of international law.⁶³

Instead of seeking to uncover the existence of a single, 'true' universal, what scholars working within this tradition are thus particularly interested in is to answer questions which focus on the structural nature of invocations of the universal, examining the processes through which universal ideas are

56 Sergei Prozorov, 'What is the "World" in World Politics? Heidegger, Badiou and Void Universalism' 12 *Contemporary Political Theory* 102; Ben Golder, 'On the Varieties of Universalism in Human Rights Discourse' in Petr Agha (ed), *Human Rights Between Law and Politics: The Margin of Appreciation in Post-National Context* (Hart Publishing 2017) 43-4.

57 Ilana Feldman and Miriam Ticktin, 'Introduction: Government and Humanity' in Ilana Feldman and Miriam Ticktin (eds), *In the Name of Humanity: The Government of Threat and Care* (Duke University Press 2010) 2-3. However, compare Ato Sekyi-Otu, 'Deferring to Difference, Cultivating the Civil Commons, Honouring Humanity: What's the Left-Universalist to Do?' (2009) 4 *Journal of the Institute for the Humanities* 1.

58 Golder (n 56) 45-6; Sergei Prozorov, *Theory of the Political Subject: Void Universalism II* (Routledge 2014) xvii-xviii; Laclau (n 55) 34-5. On the fundamentally indeterminate nature of concepts such as the 'public interest', the 'international community' and 'humankind', see Petersmann (n 12) 121, 128.

59 Laclau (n 55) viii.

60 Ibid 34-5.

61 Golder (n 56) 50-1.

62 Ibid 52.

63 Ibid 45-6.

claimed and circulated across the globe,⁶⁴ by ‘asking what it means to claim the mantle of the universal’,⁶⁵ who has the authority to do so⁶⁶ (and conversely, who is silenced by such claims)⁶⁷ as well as the ‘violent hierarchies and erasures’ that can result.⁶⁸ As noted above, this approach particularly lends itself to an analysis of the role of law in articulations of notions of universal value.

The dissertation aligns itself with this body of work, given that it is interested in uncovering ‘the work that international law does in the world’⁶⁹ – how universalist arguments shape how international legal actors see, and subsequently act upon regulatory objects which have been marked as the common interest of the international community, and more specifically cultural heritage.⁷⁰ While some legal scholars have previously examined the workings of universality within cultural heritage law,⁷¹ their analysis has usually been

64 Feldman and Ticktin (n 57) 2-3; Darryl Li, *The Universal Enemy: Jihad, Empire, and the Challenge of Solidarity* (Stanford University Press 2019); Nesam McMillan, *Imagining the International: Crime, Justice, and the Promise of Community* (Stanford University Press 2020).

65 Li (n 64) 3.

66 Britta van Beers, Luigi Corrias and Wouter Werner, ‘Introduction: Probing the Boundaries of Humanity’ in Britta van Beers, Luigi Corrias and Wouter G. Werner (eds), *Humanity across International Law and Biolaw* (Cambridge University Press 2014) 2; Li (n 64) 12.

67 van Beers, Corrias and Werner (n 66) 4.

68 Li (n 64) 10.

69 See e.g. Dehm (n 37), who ‘departs from more pragmatically oriented scholarship focused on how to make REDD+ work – or how to “redeem” its potential flaws’ – instead drawing attention to *the work that REDD+ does in the world*, how it operates to reorganise social relations and establish new forms of authority and new mechanisms of power’ (19); Ciara Laverty, ‘Making Crimes Mean: A Normative Analysis of the Acts that Constitute International Crimes’ (PhD dissertation, Leiden University 2022) 40.

70 Cf. Laurajane Smith, who similarly argues that the authorised heritage discourse ‘naturalizes the practice of rounding up the usual suspects to conserve and “pass on” to future generations, and in doing so promotes a certain set of Western elite cultural values as being universally applicable. Consequently, this discourse validates a set of practices and performances, which populates both popular and expert constructions of “heritage” and undermines alternative and subaltern ideas about “heritage”. At the same time, the “work” that “heritage” does as a social and cultural practice is obscured’: Smith (n 33) 11.

71 Several scholars have thus engaged with concepts such as the ‘cultural heritage of mankind’ or ‘outstanding universal value’, or the idea that cultural heritage protection is a common interest of the international community: see e.g. Francioni, ‘Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity’ (n 49); Roger O’Keefe, ‘World Cultural Heritage: Obligations to the International Community as a Whole?’ (2004) 53 ICLQ 189; Craig Forrest, ‘Cultural Heritage as the Common Heritage’ (2007) 40 Comparative and International Legal Journal of South Africa 124; Joseph P Fishman, ‘Locating the International Interest in Intrnational Cultural Property Disputes’ (2010) 35 Yale Journal of International Law 347; Trpimir M Šošić, ‘The Common Heritage of Mankind and the Protection of the Underwater Cultural Heritage’ in Trpimir M Šošić, Budislav Vukas and Božidar Bakotić (eds), *International Law: New Actors, New Concepts, Continuing Dilemmas: Liber Amicorum Božidar Bakotić* (Brill Nijhoff 2010); Sophia Labadi, *UNESCO, Cultural Heritage, and Outstanding Universal Value* (AltaMira Press 2013); Federico Lenzerini and Ana Filipa Vrdoljak (eds), *International Law for Common Goods: Normative Perspectives on Human Rights*,

limited to the interaction between international and national forms of authority over cultural heritage,⁷² as opposed to examining the tensions between the global and the local which flow from the deployment of universalist modes of reasoning in cultural heritage law. The present work seeks to fill this gap in international cultural heritage law, and explicitly seeks to place these developments within broader debates in international legal scholarship.

A recognition of the 'void' nature of the universal facilitates a view of universality in international law as at once both hegemonic and potentially counterhegemonic.⁷³ This opens up the possibility of calling upon universalising international argumentation as a form of resistance for members of particular groups who are excluded by the current articulation of the universal in cultural heritage law.⁷⁴ This can be described as a form of 'particularistic legal universalism',⁷⁵ which readily admits that there is no 'true' universal, but that the process of articulating universality is a core part of contemporary international politics – and that the role of international law within these processes should be acknowledged.⁷⁶

The dissertation similarly seeks to build upon these insights in its exploration of the workings of universality in cultural heritage law. It thus acknowledges that while the invocation of the 'universal' in cultural heritage law has often turned out negatively for individuals and local communities, there should be room within cultural heritage law for these groups to reclaim the label of

Culture and Nature (Hart 2014); Andrzej Jakubowski, 'Common Cultural Heritage: the European Union, and International Law' in Andrzej Jakubowski, Kristin Hausler and Francesca Fiorentini (eds), *Cultural Heritage in the European Union: A Critical Inquiry into Law and Policy* (Brill 2019); Erez Roman, 'The Journey of Cultural Heritage Protection as a Common Goal for Human Kind: Rosenberg to Al-Mahdi' 7 *Groningen Journal of International Law* 112.

72 Much along the lines of the dichotomy between cultural property nationalism and internationalism originally posited by Merryman. See e.g. Jean Musitelli, 'World Heritage, between Universalism and Globalization' (2003) 11 *International Journal of Cultural Property* 323; Casini (n 31); Robert Peters, 'Nationalism Versus Internationalism: New Perspectives Beyond State Sovereignty and Territoriality in the Protection of Cultural Heritage' in Anne-Marie Carstens and Elizabeth Varner (eds), *Intersections in International Cultural Heritage Law* (Oxford Academic, Oxford University Press 2020).

73 Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?' (2007) 18 *EJIL* 379, 406-7; Geoff Gordon, 'Universalism' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law* (Elgar 2019) 865, 877.

74 Laclau (n 55) 33; Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842-1933* (Cambridge University Press 2015); James D. Ingram, 'Cosmopolitanism from Below: Universalism as Contestation' (2016) 17 *Critical Horizons* 66, 73; Jouannet (n 73) 406; Gordon (n 73) 865; Li (n 64) 59. For an example of this potential within cultural heritage law, see Lucas Lixinski, 'Heritage Listing as a Tool for Advocacy: The Possibilities for Dissent, Contestation, and Emancipation in International Law Through International Cultural Heritage Law' (2015) 5 *Asian JIL* 387.

75 While the term is inspired by the work of Becker Lorca (n 74), I deploy it in a slightly different manner here.

76 Petersmann (n 12) 250-1.

the universal for themselves by creating pathways in which they can articulate their own vision of what it means to safeguard cultural heritage of universal interest.⁷⁷

1.2.2 Participation and human rights-based approaches

The discussion of the role of universality in cultural heritage law also touches upon questions concerning the ‘recalibration’ of cultural heritage law from a state-centric body of law to one focused around the ‘human dimension’ of cultural heritage safeguarding.⁷⁸ This development is evident in the gradual expansion of the subject matter of international heritage law, from cultural property to cultural heritage, to now also including matters such as intangible cultural heritage and cultural diversity,⁷⁹ alongside an increasing emphasis on the role of ‘communities’ within international heritage law.⁸⁰ Part and parcel of this move towards a human-centred international heritage law are increasing calls for the adoption of a human rights-based approach to heritage governance, as already noted above. These developments can in part be seen as the intellectual legacy of a broader shift within a panoply of fields (not in

77 On an articulation of this argument from the perspective of philosophy, see Erich Hatala Matthes, ‘Intrinsic and Universal Value in Heritage Ethics’ in *Routledge Handbook of Heritage Ethics* (Routledge Forthcoming). Compare also Lixinski, ‘A Third Way of Thinking about Cultural Property’ (n 48), who argues in favour of a vision of cultural heritage law which does not just ‘[add] another actor through whose prism to frame the law and its effects; rather, it is a way of pluralizing access to law- and decision-making ... a way of framing subalternity in international law in a way that does not allow it to be co-opted by other more established actors, but instead creates necessary spaces for intervention by these actors without the filtering of the state, international bureaucracies, or both’ (at 565).

78 See e.g. Francesco Francioni, ‘The Human Dimension of International Cultural Heritage Law: An Introduction’ (2011) 22 *EJIL* 9; Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination* (n 19).

79 Elisa Novic, ‘Remedies’ in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020) 643.

80 See e.g. the addition of the ‘5th C’ of ‘communities’ to the Strategic Objectives of the World Heritage Convention in 2005: World Heritage Committee, Decision 31 COM 13A (2007) para 5. See further Section 1.3.4 below.

the least heritage studies)⁸¹ emphasising the importance of community participation and seeking to relativise the influence of 'expert' knowledge.⁸²

Whereas initial discussions on the linkages between heritage and human rights focused on how heritage protection not only reinforces respect for human rights,⁸³ but also constitutes an independent element of the right to take part in cultural life,⁸⁴ recent years have witnessed a gradual recognition that heritage protection can also be in tension with the fulfilment of human rights.⁸⁵ The identification of potential human rights abuses which have taken place in the context of (international) heritage protection has thus led to growing demands from civil society and academia to adopt the above-

81 See e.g. the contributions in Steve Watson and Emma Waterton, 'Heritage and Community Engagement' (2010) 16 *International Journal of Heritage Studies* 1; Harriet Deacon and Riëks Smeets, 'Authenticity, Value and Community Involvement in Heritage Management under the World Heritage and Intangible Heritage Conventions' (2013) 6 *Heritage & Society* 129; Gill Chitty (ed) *Heritage, Conservation and Communities: Engagement, Participation and Capacity Building* (Routledge 2017). Compare also the emergence of the fields of public archaeology and public heritage: Lorna-Jane Richardson and Jaime Almansa-Sánchez, 'Do You Even Know What Public Archaeology Is? Trends, Theory, Practice, Ethics' (2015) 47 *World Archaeology* 194; Angela M Labrador and Neil Asher Silberman (eds), *The Oxford Handbook of Public Heritage Theory and Practice* (Oxford University Press 2018).

82 The canonical work in this regard is that of Sherry R. Arnstein, 'A Ladder Of Citizen Participation' (1969) 35 *Journal of the American Institute of Planners* 216.

83 An approach that is particularly evident in the international response to cultural heritage destruction: Kristin Hausler, 'The UN Security Council, the Human Rights Council, and the Protection of Cultural Heritage: A Matter of Peace and Security, Human Rights, or Both?' in Anne-Marie Carstens and Elizabeth Varner (eds), *Intersections in International Cultural Heritage Law* (Oxford Academic, Oxford University Press 2020).

84 See e.g. UN Committee on Economic, Social and Cultural Rights, General Comment No. 21 (21 December 2009) E/C.12/GC/21, para 50; Human Rights Council, Report of the Independent Expert in the Field of Cultural Rights (21 March 2011) UN Doc A/HRC/17/38. See further Janet Blake, 'Taking a Human Rights Approach to Cultural Heritage Protection' (2013) 4 *Heritage & Society* 199; Vrdoljak, 'Human Rights and Cultural Heritage in International Law' (n 16); Francioni and Lixinski (n 10); Yvonne Donders, 'Protection and Promotion of Cultural Heritage and Human Rights through International Treaties: Two Worlds of Difference?' in Charlotte Waelde and others (eds), *Research Handbook on Contemporary Intangible Cultural Heritage: Law and Heritage* (Elgar 2018); Yvonne Donders, 'Cultural Heritage and Human Rights' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020). However, this argument has faced some hurdles in practice: see ECtHR, *Ahunbay and Others v. Turkey*, App. No. 6080/06 (2019), in which the applicants sought to prevent the construction of a hydroelectric power plant which would result in the destruction of an archaeological heritage site. The ECtHR held that there was no individual right to the protection of cultural heritage outside the context of Indigenous and minority rights, and thus considered the application inadmissible. On the background of the case, see Bahar Aykan, 'Saving Hasankeyf: Limits and Possibilities of International Human Rights Law' (2018) 25 *International Journal of Cultural Property* 11.

85 See e.g. Logan (n 10); Ekern and others (n 10); Andrea Durbach and Lucas Lixinski (eds), *Heritage, Culture and Rights: Challenging Legal Discourses* (Hart 2017); Kraak and Aykan (n 10); Peter Bille Larsen (ed) *World Heritage and Human Rights: Lessons from the Asia-Pacific and Global Arena* (Routledge 2018).

mentioned rights-based approaches to heritage governance in order to ensure the mutually reinforcing relationship between heritage protection and respect for human rights.⁸⁶

However, as the present work will demonstrate in subsequent chapters, rights-based and participatory approaches within international heritage law continue to face significant issues.⁸⁷ Whereas such approaches have on the one hand been embedded within regional cultural heritage instruments,⁸⁸ their elaboration within UNESCO's cultural conventions has remained fairly limited.⁸⁹ As such, it is useful to look beyond cultural heritage law to other areas of public international law which have faced similar calls for the adoption of participatory and rights-based approaches,⁹⁰ particularly given that these perspectives have remained largely unexplored within debates on these issues within heritage scholarship. As such, Chapter 6 explores how concepts related to public participation have been implemented in the context of international environmental law and international human rights law.

Similarly, despite the growing popularity of calls for the application of participatory and rights-based approaches within heritage governance, the debate within cultural heritage law and heritage studies only rarely connects these questions to broader debates within international legal theory.⁹¹ Since the early 2000s, international legal scholars have increasingly engaged with

86 Disko and Sambo Dorough (n 10) 487; Vrdoljak, 'UNESCO, World Heritage and Human Rights' (n 10) 471.

87 See in particular Chapter 4.

88 Particularly in the case of participatory approaches: see e.g. European Landscape Convention (adopted 20 October 2000, entered into force 1 March 2004) ETS No. 176 (Landscape Convention); Council of Europe Framework Convention on the Value of Cultural Heritage for Society (adopted 27 October 2005, entered into force 1 June 2011) CETS No. 199 (Faro Convention). However, it is worth noting that the Faro Convention explicitly excludes the possibility that it creates enforceable rights for individuals or communities: art 6(c). Furthermore as Olivier notes, many of the participatory objectives of the Landscape and Faro conventions 'remain aspirational' and 'difficult to operationalize and implement in any conventional political or administrative sense': Adrian Olivier, 'Communities of Interest: Challenging Approaches' (2017) 4 *Journal of Community Archaeology & Heritage* 7, 16. See further Chapter 4, Section 4.3.

89 See Committee on Participation in Global Cultural Heritage Governance, 'Final Report' in International Law Association Report of the Eightieth Conference (Lisbon 2022) (International Law Association, London 2023).

90 See e.g. in relation to the climate change regime: Naomi Roht-Arriaza, 'Human Rights in the Climate Change Regime' (2010) 1 *Journal of Human Rights and the Environment* 211; Annalisa Savaresi, 'Climate Change and Human Rights: Fragmentation, Interplay and Institutional Linkages' in Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018). In relation to nature conservation, see e.g. Sébastien Jodoin, 'Can Rights-Based Approaches Enhance Levels of Legitimacy and Cooperation in Conservation? A Relational Account' (2014) 15 *Human Rights Review* 283; Dehm (n 37) 101, 110.

91 However, see ILA Committee on Participation in Global Cultural Heritage Governance (n 89).

questions concerning the legitimacy of international law,⁹² in particular that of international organisations,⁹³ seeking to elaborate a common set of principles of international governance akin to those found within domestic administrative legal systems.⁹⁴ These debates are centred around the degree to which international decisions have the potential to dramatically impact the lives of individuals and groups far-removed from global centres of power.⁹⁵ In doing so, they draw attention to the need to ensure the participation of such affected groups,⁹⁶ particularly in decision-making processes which purport to represent humankind as a whole yet suffer from a woeful lack of transparency.⁹⁷ While it is not possible to fully engage with this body of literature in the present work due to reasons of scope, its acknowledgment of the existence of a legitimacy gap within international governance forms an important justification for turning our gaze to these issues within cultural heritage law and serves as a source of inspiration for the present work.

Equally, while the dissertation ultimately does not seek to present itself as a work about human rights in heritage governance, it is nonetheless animated by a similar set of concerns and seeks to remain in dialogue with this body of research. It thus also focuses on recentring individuals and communities within heritage governance, and aligns itself with (some of) the tools proposed by proponents of a human rights-based approach to cultural heritage in order to achieve this goal – chiefly those related to participatory approaches

92 See e.g. Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Lawyers' (1999) 93 AJIL 596; Matthias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 EJIL 907; J. H. H. Weiler, 'The Geology of International Law - Governance, Democracy and Legitimacy' (2004) 64 ZaöRV 547; David Held and Mathias Koenig-Archibugi (eds), *Global Governance and Public Accountability* (Wiley-Blackwell 2005); Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008).

93 See e.g. Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010).

94 See e.g. Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15; Eyal Benvenisti, *The Law of Global Governance* (Brill 2014); Sabino Cassese, 'Global Administrative Law: The State of the Art' (2015) 13 International Journal of Constitutional Law 465.

95 See e.g. Richard B. Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108 AJIL 211; Jan Sändig, Jochen Von Bernstorff and Andreas Hasenclever, 'Affectedness in International Institutions: Promises and Pitfalls of Involving the Most Affected' (2018) 3 Third World Thematics 587.

96 Natalie Jones, *Self-Determination as Voice: The Participation of Indigenous Peoples in International Governance* (Cambridge University Press 2023).

97 Elisa Morgera and Hannah Lily, 'Public Participation at the International Seabed Authority: An International Human Rights Law Analysis' (2022) 31 RECIEL 374. For a broader critique on the inability of the deep seabed regime to deliver on its promise of creating benefits for 'humanity as a whole', see Isabel Feichtner, 'Mining for Humanity in the Deep Sea and Outer Space: The Role of Small States and International Law in the Extraterritorial Expansion of Extraction' (2019) 32 LJIL 255; Surabhi Ranganathan, 'Seasteads, Land-grabs and International law' (2019) 32 LJIL 205.

to heritage governance. However, as will be seen in Chapter 2 and 7, the dissertation calls for a ‘humanisation’ of cultural heritage law which goes beyond the application of a human rights-based approach to cultural heritage governance, and which touches more fundamentally on the field’s self-conceptualisation. This approach was already partly hinted at in the discussion in the previous section on the potential for a ‘particularistic legal universalism’ within cultural heritage law.

1.3 DEFINITIONAL ISSUES

1.3.1 Cultural property vs. cultural heritage

Before proceeding to a further discussion of the methodology and structure of the dissertation, it is important to consider a number of definitional points linked to the framing of the research project. The first of these relates to the use of the concept of ‘cultural heritage’. Whereas early developments in the field of international law in this area focused on the protection of ‘cultural property’, over the course of the twentieth century there has been a gradual shift from the notion of cultural property to that of cultural heritage.⁹⁸ The concept of cultural heritage recognises the multifaceted nature of culture as not solely being linked to physical objects – movable and immovable cultural property, such as monuments or cultural artefacts – but also including intangible aspects of cultural heritage, protecting sites,⁹⁹ landscapes,¹⁰⁰ cultural practices,¹⁰¹ and even the very concept of cultural diversity.¹⁰² Embedded in the notion of ‘cultural heritage’ is the idea that it gives expression to that

98 Lyndel V. Prott and Patrick J. O’Keefe, “‘Cultural Heritage’ or ‘Cultural Property’?” (1992) 1 *International Journal of Cultural Property* 307; Francesco Francioni, ‘A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage’ in Abdulqawi A Yusuf (ed), *Standard-setting at UNESCO: Essays in Commemoration of the Sixtieth Anniversary of UNESCO* (Martinus Nijhoff 2007). On the development of ‘cultural heritage’ as a legal concept in non-Anglophone jurisdictions, see Lyndel V Prott, ‘On Comparative Legal Terminology and Patrimoine Culturel’ (2013) 8 *Journal of Comparative Law* 305.

99 Convention for 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).

100 European Landscape Convention.

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

102 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005, entered into force 18 March 2007) 2440 UNTS 311 (Cultural Diversity Convention).

which a given community wishes to pass on to future generations as a form of inheritance.¹⁰³

Simultaneously, the growing dominance of the concept of cultural heritage over that of cultural property wedded the very notion of cultural heritage to the idea of the international community, with its safeguarding being represented as '[transcending] the national interests of individual states or the interests of specific groups and communities, and [representing] the tangible or intangible expression of our shared humanity'.¹⁰⁴ It is precisely this aspect of the concept which forms a core focus of the present work, as will be seen in Chapters 2 and 3. While the concept of 'cultural property' remains in use amongst lawyers and scholars, particularly in the context of international humanitarian law,¹⁰⁵ the present dissertation elects to use the phrase 'cultural heritage' in order to capture the totality of cultural phenomena which are protected by contemporary international law in addition to the universalist tendencies of the field at large.¹⁰⁶

1.3.2 Cultural heritage law as an international legal regime

Closely linked to this is the choice of the dissertation to describe its central field of study as the discipline of 'cultural heritage law', thereby departing from the perspective that the various conventions under examination can be viewed as a single international legal regime.¹⁰⁷ Several authors have pro-

103 Janet Blake, 'On Defining the Cultural Heritage' (2000) 49 ICLQ 61, 68-9. See also Intangible Cultural Heritage Convention art 2(1); Faro Convention.

104 Francioni, 'A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage' (n 98) 222.

105 See e.g. Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge University Press 2006); Jadranka Petrovic, *The Old Bridge of Mostar and Increasing Respect for Cultural Property in Armed Conflict* (Martinus Nijhoff Publishers 2013); Jiri Toman, *Protection of Cultural Property in the Event of Armed Conflict* (Routledge 2016); Emma Cunliffe and Paul Fox (eds), *Safeguarding Cultural Property: All Possible Steps* (Boydell & Brewer 2022).

106 Simultaneously, there has also been a shift in recent years amongst cultural heritage lawyers advocating in favour of a return to the concept of 'property' in order to mitigate the relative indeterminacy of international cultural heritage law, precisely due to the power that the concept of 'property' holds in many domestic legal systems: see Lixinski, 'A Third Way of Thinking about Cultural Property' (n 48) 580-5; cf. Evelien Campfens, 'Cross-border Title Claims to Cultural Objects: Property or Heritage?' (PhD thesis, Leiden University 2021). However, this discussion is beyond the scope of the present dissertation.

107 This does not imply, however, that the dissertation views cultural heritage law as a 'self-contained regime', a term of art developed in the context of the law of state responsibility: see International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682, paras 123-37. Quite to the contrary, 'cultural heritage law is not a discrete and contained body of law, but rather a diverse body of law whose component parts are drawn from – and often developed and contained within – the principal fields of public international law': Carstens and Varner (n 49) 1.

posed that UNESCO's cultural heritage conventions – at minimum comprised by the 1954, 1970, 1972, 2001 and 2003 Conventions – can be viewed as a unified body of law, even though 'the very subject matter and scope of each convention is unique and not designed to specifically interact'.¹⁰⁸ It is in fact this very lack of interaction between conventional cultural heritage norms that is often deemed problematic.¹⁰⁹

Nonetheless, the conventions often implicitly, sometimes explicitly, build upon each other;¹¹⁰ this was particularly in evidence during the drafting of each instrument, as surveyed in Chapter 3 of the present work. UNESCO's cultural conventions have furthermore grown closer to one another over time: approaches developed in one treaty regime, such as the adoption of operational guidelines and the development of independent monitoring mechanisms, have thus subsequently been 'imported' into cultural heritage conventions which did not initially envisage such developments, as will be seen in Chapter 4. However, these interconnections are not necessarily reflected or made explicit at the level of the positive law.

In addition to this, in recent years this group of treaties has also increasingly been described as a distinct treaty regime within public international law, rather than constituting isolated treaties. Certain authors have even argued that general principles can be distilled with regards to the protection of cultural heritage under international law, decoupled from the realm of treaty obligations.¹¹¹ The 2000s and 2010s have thus seen the emergence within doctrine of the view that it is apt to treat the cultural heritage conventions as a common set of international obligations, as is evident in the growth of handbooks treating these conventions as a group,¹¹² and which speak of 'cultural heritage law' or 'international heritage law'.¹¹³ It is for this reason that the present study also employs these terms.

108 Craig Forrest, *International Law and the Protection of Cultural Heritage* (Routledge 2012) 388.

109 See e.g. UNESCO, Internal Oversight Service, 'Audit of the Working Methods of the Convention' (September 2013) IOS/AUD/2013/06.

110 Marina Lostal, *International Cultural Heritage Law in Armed Conflict* (Cambridge University Press 2017) 50.

111 Pierre-Marie Dupuy, 'The Impact of Legal Instruments Adopted by UNESCO on General International Law' in Abdulqawi A Yusuf (ed), *Standard-setting at UNESCO: Essays in Commemoration of the Sixtieth Anniversary of UNESCO* (Martinus Nijhoff 2007); Francesco Francioni, 'General Principles Applicable to International Cultural Heritage Law' in Mads Andenas and others (eds), *General Principles and the Coherence of International Law* (Brill 2019).

112 See e.g. Abdulqawi A Yusuf (ed) *Standard-setting at UNESCO: Essays in Commemoration of the Sixtieth Anniversary of UNESCO* (Martinus Nijhoff 2007); Toshiyuki Kono, *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21st Century* (Martinus Nijhoff Publishers 2010); Forrest, *International Law and the Protection of Cultural Heritage* (n 108); Blake, *International Cultural Heritage Law* (n 50).

113 Blake, *International Cultural Heritage Law* (n 50); Lostal (n 110); Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination* (n 19). See also, for example, the creation of a committee within the International Law Association on 'Cultural Heritage Law' (1988-2016).

1.3.3 Living heritage

The present work frequently refers to the notion of ‘living heritage value’, particularly in the context of the underlying goals which UNESCO’s heritage conventions set out to achieve. Over time, several of these conventions have increasingly sought to emphasise the idea that the value of cultural heritage is not static or timeless, but is instead intrinsically rooted within its broader social context.¹¹⁴ As such, cultural heritage value is not inherent, but dynamic and contingent, emerging from a conscious act of ‘heritagisation’;¹¹⁵ it cannot be separated from the communities which give shape to it and are involved in its transmission from one generation to the next.¹¹⁶ According to this understanding, cultural heritage protection is not about freezing cultural heritage at a fixed point in time, but about providing the conditions for its continuous evolution alongside the communities which value it. This development is informed by a broader evolution of the notion of cultural heritage value in fields such as anthropology, archaeology, and heritage management.¹¹⁷

In terms of positive law, this shift is most strikingly illustrated by the adoption of the 2003 Intangible Cultural Heritage Convention, which explicitly notes that the intangible cultural heritage ‘is constantly recreated by communities and groups in response to their environment, their interaction with nature

114 Although these developments are largely limited to the World Heritage Convention and the Intangible Cultural Heritage Convention: see Gustavo Araoz, ‘Conservation Philosophy and its Development: Changing Understandings of Authenticity and Significance’ (2013) 6 *Heritage & Society* 144; L. Harald Fredheim and Manal Khalaf, ‘The Significance of Values: Heritage Value Typologies Re-examined’ (2016) 22 *International Journal of Heritage Studies* 466. Compare developments in developments in the context of the Council of Europe driven by the European Landscape Convention and the Faro Convention: Olivier (n 88).

115 Barbara Kirshenblatt-Gimblett, *Destination Culture: Tourism, Museums, and Heritage* (University of California Press 1998); Smith (n 33); Valdimar Tr Hafstein, *Making Intangible Heritage: El Condor Pasa and Other Stories from UNESCO* (Indiana University Press 2018). However, for a rebuttal of the critique within critical heritage studies of the notion of intrinsic cultural heritage value, see Matthes (n 77).

116 Francioni, ‘The Human Dimension of International Cultural Heritage Law: An Introduction’ (n 78); Donders, ‘Cultural Heritage and Human Rights’ (n 84) 382.

117 See e.g. D. Fairchild Ruggles and Helaine Silverman, ‘From Tangible to Intangible Heritage’ in D. Fairchild Ruggles and Helaine Silverman (eds), *Intangible Heritage Embodied* (2009); Marta de la Torre, ‘Values and Heritage Conservation’ (2013) 6 *Heritage & Society* 155; William Logan, Ullrich Kockel and Máiréad Nic Craith, ‘The New Heritage Studies: Origins and Evolution, Problems and Prospects’ in William Logan, Máiréad Nic Craith and Ullrich Kockel (eds), *A Companion to Heritage Studies* (Wiley Blackwell 2015); Margarita Díaz-Andreu, ‘Heritage Values and the Public’ (2017) 4 *Journal of Community Archaeology & Heritage* 2; Gamini Wijesuriya, ‘Living Heritage’ in Alison Heritage and Jennifer Copithorne (eds), *Sharing Conservation Decisions: Current Issues and Future Strategies* (ICCROM 2018); Erica Avrami and Randall Mason, ‘Mapping the Issue of Values’ in Erica Avrami and others (eds), *Values in Heritage Management: Emerging Approaches and Research Directions* (Getty Conservation Institute 2019).

and their history’;¹¹⁸ as such, the notion of living heritage value is incorporated into the very definition the convention adopts of cultural heritage.¹¹⁹ Living heritage value has also gradually been incorporated into the operational guidelines of the World Heritage Convention, for example through the establishment of the category of ‘cultural landscapes’;¹²⁰ the inclusion of nomination criteria which specifically focus on the associative heritage values of nominated sites;¹²¹ and the guidelines’ incorporation of the ability for a site to maintain existing ‘dynamic functions’ as an element of the assessment of the integrity of nominated sites.¹²² The World Heritage Committee has moreover increasingly called upon states to protect the intangible cultural heritage associated with World Heritage sites,¹²³ particularly by ensuring respect for the ritual, spiritual and religious associations with local communities might have with a given site.¹²⁴ (Although, as we shall see in subsequent chapters, this practice is problematically inconsistent).

The present work thus adopts the perspective that an evolutionary reading of UNESCO’s cultural heritage conventions establishes the notion of ‘living heritage value’ as a core element of their underlying object and purpose, against which the overall implementation of the conventions can – and should – be assessed.¹²⁵ However, as the following chapters will illustrate, opinions amongst stakeholders as to what is required to safeguard this ‘living

118 Intangible Cultural Heritage Convention art 2(1).

119 On this shift, see Chiara Bortolotto, ‘From Objects to Processes: UNESCO’s “Intangible Cultural Heritage”’ (2007) 19 *Journal of Museum Ethnography* 21.

120 World Heritage Committee, Operational Guidelines for the Implementation of the World Heritage Convention (31 July 2021) WHC.21/01 (WHC OG) para 47. The category of ‘cultural landscape’ was first included in the 1995 version of the Operational Guidelines. See Graeme Aplin, ‘World Heritage Cultural Landscapes’ (2007) 13 *International Journal of Heritage Studies* 427; Amy Strecker, *Landscape Protection in International Law* (Oxford University Press 2018).

121 WHC OG para 77(vi). A variant of nomination criteria (vi) was included in the very first version of the Operational Guidelines in 1977, with an emphasis on association with ‘ideas or beliefs’; it was not until the 1994 version of the Operational Guidelines that a link was made with ‘events or living traditions’: see Elżbieta Nakonieczna and Jakub Szczepański, ‘Authenticity of Cultural Heritage vis-à-vis Heritage Reproducibility and Intangibility: from Conservation Philosophy to Practice’ (2023) *International Journal of Cultural Policy* 1 (in press).

122 WHC OG para 89. This paragraph was first included in the Operational Guidelines following their significant revision in 2005.

123 See e.g. World Heritage Committee, Decision 40 COM 7B.1 (2016) and Decision 42 COM 7B.33 (2018) (in relation to the *Qhapaq Ñan, Andean Road System*); Decision 44 COM 7B.2 (2021) (in relation to the *Historic Town of Grand-Bassam*).

124 See e.g. World Heritage Committee, Decision 38 COM 7B.32 (2014) (in relation to the *Cultural and Historic Ensemble of the Solovetsky Islands*); Decision 38 COM 7B.53 (2014) (in relation to the *Osun-Osogbo Sacred Grove*); Decision 41 COM 7B.96 (2017) (in relation to the *Fort and Shalamar Gardens in Lahore*); Decision 44 COM 7B.20 (2021) (in relation to the *Historic Ensemble of the Potala Palace, Lhasa*).

125 On the methodological implications of this statement, see Section 1.4 below.

heritage' frequently differ.¹²⁶ This is a broader issue which has plagued the emergence of values-based heritage conservation: while 'a values-based approach [to heritage] encourages community involvement ... [it] does not seem to set the terms for this involvement',¹²⁷ nor does it provide any guidance for how to deal with the conflicting interests which arise when multiple communities value a given form of cultural heritage. Heritage experts thus frequently appear to depart from the perspective that the safeguarding of living heritage is indeed an integral element of contemporary heritage management, but only insofar as this goal does not conflict with the preservation of its material elements.¹²⁸ This leads to tensions when implementing UNESCO's cultural conventions, as will become evident in Chapter 5.

1.3.4 Individuals and local communities as relevant stakeholders

It is for this reason that the dissertation seeks to examine the impact of UNESCO's cultural conventions – and particularly their universalist impetus – from the perspective of the individuals and local communities affected by international heritage inscriptions. As already noted above, the focus is on those individuals and communities which '[live] in, with or around' internationalised cultural heritage.¹²⁹ However, in adopting this focus, the dissertation does not necessarily proceed from the assumption that local perspectives on heritage management should automatically be preferred over those framed in a universalist register within international organisations. Such a perspective does not do justice to the fact that the 'local' is, in its own ways, shot through with its own power dynamics;¹³⁰ it also runs the risk of compartmentalising heritage actors within artificial geographical hierarchies which do not correspond to the multiscale reality of international heritage governance.

However, to acknowledge that one must remain cautious not to represent 'the local community' as a fixed entity with a predefined content and views

126 See in particular Chapter 5. For an illustration of this dynamic, see e.g. Miura (n 44).

127 Ioannis Poullos, 'Moving Beyond a Values-Based Approach to Heritage Conservation' (2010) 12 *Conservation and Management of Archaeological Sites* 170, 173.

128 Avrami and Mason (n 117) 12-13; see also Poullos (n 127) 174. This dilemma is also raised by Smith, who writes that many community-centric approaches in heritage management 'tend to be assimilationist and top-down in nature rather than bottom-up substantive challenges to the AHD. In the first instance, these policies and debates are often framed in terms of how excluded groups may be recruited into existing practices, and how many non-traditional visitors be attracted or encouraged to visit existing heritage sites. Laudable, as far as they go – but this creates a conceptual framework that heritage practitioners must simply add the excluded and assimilate them into the fold rather than challenge underlying preconceptions': Smith (n 33) 37.

129 Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination* (n 19) 23.

130 Mark Purcell, 'Urban Democracy and the Local Trap' (2006) 43 *Urban Studies* 1921, 1923-7.

does not mean that there is no analytical utility in analysing the problems outlined in the previous sections from the perspective of local communities.¹³¹ It has thus been generally accepted that individuals and local communities have difficulty in accessing international decision-making processes within UNESCO; doubly so in the case of historically marginalised communities such as Indigenous peoples.¹³² This exacerbates the problems within international heritage governance which are caused by a lack of effective oversight and reliance upon the good faith of States Parties,¹³³ and represents an important practical justification to examine the impact of UNESCO's cultural conventions from the perspective of individuals and local communities.

The cultural conventions themselves have furthermore increasingly recognised local communities as relevant stakeholders,¹³⁴ such as in the case of the World Heritage Convention,¹³⁵ the Underwater Cultural Heritage Convention,¹³⁶ and the Intangible Cultural Heritage Convention.¹³⁷ The need to further acknowledge the perspectives of individuals and local communities within international heritage law has also been emphasised by actors such as the Special Rapporteur in the Field of Cultural Rights and the Special

131 On the challenges of the notion of 'community', see Ingrid Burkett, 'Traversing the Swampy Terrain of Postmodern Communities: Towards Theoretical Revisionings of Community Development' (2001) 4 *European Journal of Social Work* 233; Stefan Berger, Bella Dicks and Marion Fontaine, "'Community': a Useful Concept in Heritage Studies?" (2019) 26 *International Journal of Heritage Studies* 325, 344.

132 See e.g. Christoph Brumann, 'Imagining the Ground from Afar: Why the Sites Are so Remote in World Heritage Committee Sessions' in Christoph Brumann and David Berliner (eds), *World Heritage on the Ground: Ethnographic Perspectives* (Berghahn 2016).

133 See Chapter 4.

134 Although some conventions explicitly do not refer to individuals or local communities as relevant stakeholders: see e.g. the Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention (16 December 2021) C54/21/9.SP/Resolutions, Resolution 9.SP 9 (Second Protocol Guidelines), paras 12-13 (defining the 'key actors' of the Second Protocol as the Parties, the Meeting of the Parties, the Committee, and UNESCO; other relevant stakeholders including 'international and national governmental and non-governmental organizations'). On the position of individuals and local communities within the cultural conventions, see further Chapter 4, Section 4.3.

135 WHC OG para 12 calls upon States Parties to ensure the 'participation of a wide variety of stakeholders and rights-holders, including site managers, local and regional governments, local communities, indigenous peoples, non-governmental organizations (NGOs) and other interested parties and partners'.

136 Operational Guidelines for the Convention on the Protection of the Underwater Cultural Heritage (August 2015) CLT/HER/CHP/OG 1/REV (UCHC OG) para 11 calls upon States Parties to ensure the 'participation of a wide variety of professionals, site managers, local and regional governments, local communities, underwater archaeologists, conservation specialists, non-governmental organizations ("NGOs") and the public at large'.

137 As noted above, the definition of intangible cultural heritage in the Intangible Cultural Heritage Convention is shaped around the idea that such heritage flows from the recognition as such by 'communities, groups and, in some cases, individuals' (art 2).

Rapporteur on the Rights of Indigenous Peoples.¹³⁸ Indeed, when reading cultural heritage law in light of human rights law, individuals and local communities emerge as rights-holders – not only of the right to take part in cultural life, but also in relation to other rights such as the right to private and family life, the right to housing, and the right to self-determination.¹³⁹ As such, the position of individuals and local communities as stakeholders and rights-holders further underscores the utility of a closer analysis of their position within international heritage law.

Finally, the dissertation's focus on the 'local' as an analytical lens through which to view cultural heritage law also flows from the inherent blind spots of a state-centric system of not only cultural heritage law, but also public international law more broadly.¹⁴⁰ The International Law Association's Committee on Participation in Cultural Heritage Governance has similarly argued in favour of considering the interests of those most affected by cultural heritage governance,¹⁴¹ aligning with a broader move within the international legal literature focusing on the affectedness paradigm. As already noted above, international legal scholars have thus expressed a growing concern with regards to the impact of international law at local levels, and attendant issues of legitimacy.¹⁴² This body of work represents a further justification for the present work's focus on the 'local' within international heritage law.

1.4 METHODOLOGY

The main methodology adopted within the dissertation is that of doctrinal legal methodology: a critical analysis of the sources of international law in order to arrive at a statement of the current law (*lex lata*), and the subsequent diagnosis of the deficiencies within this law in order to make proposals for legal change (*lex ferenda*)¹⁴³ in light of the notion of living heritage value.¹⁴⁴ As noted above, the central legal sources that will be relied upon are the core

138 See e.g. Report of the Independent Expert in the Field of Cultural Rights (n 84) para 79-80; Human Rights Council, Report of the Special Rapporteur on the rights of indigenous peoples, Protected areas and indigenous peoples' rights: the obligations of States and international organizations (19 July 2022) A/77/238, paras 43-4.

139 Alexander H.E. Morawa and Gabriel Zalazar, 'The Inter-relationship of the World Heritage Convention and International Human Rights Law: a Preliminary Assessment and Outlook' in Peter Bille Larsen (ed), *World Heritage and Human Rights: Lessons from the Asia-Pacific and Global Arena* (Routledge 2018); Disko and Sambo Dorough (n 10) 518; Vrdoljak, 'UNESCO, World Heritage and Human Rights' (n 10) 471. See further Chapter 4.

140 See Chapters 2, 3, and 4.

141 Committee on Participation in Global Cultural Heritage Governance (n 89).

142 See Section 1.2.2.

143 Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 3 *Erasmus Law Review* 130, 131.

144 See Section 1.3.3 above.

treaties concerned with the international protection of cultural heritage (that is to say, the text of these treaties), interpreted in light of relevant subsequent agreements and subsequent practice, primarily in the form of operational guidelines adopted under the aegis of these conventions.¹⁴⁵ In addition to these elements, the dissertation will also take into account the preparatory works of the cultural heritage conventions as a supplementary means of interpretation.¹⁴⁶ Finally, this analysis is complemented by an examination of relevant international legal doctrine and, where appropriate, the case-law of international courts and tribunals.

As is evident from the preceding sections, the present work seeks to respond to multidisciplinary perspectives from fields that have charted the issues facing contemporary cultural heritage practice, such as sociology, (critical) heritage studies, archaeology and anthropology. Beyond more broadly theorising the frictions that arise when the 'global' and the 'local' meet,¹⁴⁷ these fields have repeatedly addressed the detrimental effects of heritage governance on local communities.¹⁴⁸ Insights from these disciplines shape the research problem, as these issues have remained largely uncharted within international legal research.¹⁴⁹ Simultaneously, what is often lacking in this body of literature is the link between cultural heritage practices 'on the ground' and the international legal framework;¹⁵⁰ heritage scholars and lawyers have drawn attention to the difficulties of combining insights from both fields.¹⁵¹ It is for this reason that the dissertation adopts a doctrinal approach to the research problem.

Each chapter contains different elements of this approach. Of these, Chapters 2, 4 and 6 represent the most 'classical' illustration of the doctrinal legal methodology outlined above. Chapter 2 is thus primarily interested in examining how the concept of 'universality' has been constructed within a range of international legal regimes, and simultaneously how international legal scholars have sought to grapple with the use of these universalist legal techniques within public international law. In order to examine these themes, the chapter

145 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31.

146 VCLT art 32.

147 Anna Lowenhaupt Tsing, *Friction: An Ethnography of Global Connection* (Princeton University Press 2005).

148 See Chapter 5.

149 Sanne Taekema and Bart van Klink, 'On the Border: Limits and Possibilities of Interdisciplinary Research' in Sanne Taekema and Bart Van Klink (eds), *Law and Method: Interdisciplinary Research into Law* (Mohr Siebeck 2011).

150 Andrea Durbach and Lucas Lixinski, 'Introduction' in Andrea Durbach and Lucas Lixinski (eds), *Heritage, Culture and Rights: Challenging Legal Discourses* (Hart 2017) 3.

151 Lucas Lixinski, 'Between Orthodoxy and Heterodoxy: the Troubled Relationships Between Heritage Studies and Heritage Law' (2015) 21 *International Journal of Heritage Studies* 203; Evan Hamman and Herdis Hølleland (eds), *Implementing the World Heritage Convention: Dimensions of Compliance* (Elgar 2023) 7-8.

combines an analysis of a range of treaty texts which draw upon universalist legal concepts – such as the ‘international community’, ‘common interest’, the ‘common heritage of humankind’, and the principle of ‘common concern’ – with an exploration of international legal doctrine on these concepts alongside a brief analysis of their role in the case-law of international courts and tribunals. Similarly, Chapter 6 discusses a range of legal concepts developed in the context of international environmental law and international human rights law which could potentially be utilised in cultural heritage law in order to respond to the problems faced by individuals and local communities in international heritage governance, such as the principle of public participation, the duty to consult, and the right to free, prior and informed consent. As such, this chapter also remains relatively close to a traditional doctrinal analysis.

Chapter 4 examines the protection, monitoring and implementation mechanisms employed within cultural heritage law, with a particular emphasis on the role for individual and community participation within the World Heritage Convention and the Intangible Cultural Heritage Convention. While this interpretation is guided by the text of the treaties themselves, the chapter also goes beyond these texts by drawing on relevant subsequent agreements and subsequent practice of the States Parties to the conventions.¹⁵² In relation to the latter, the increasing use within UNESCO’s cultural conventions of operational guidelines subject to continuous revision demonstrates the nature of these treaties as living instruments.¹⁵³ These guidelines can thus be considered as relevant subsequent agreements or subsequent practice which can be taken into account alongside the text of the conventions as an interpretive aid.¹⁵⁴ While not all commentators consider that the conventions’ operational

152 VCLT art 31(3)(a)-(b).

153 Acknowledging the cultural conventions as ‘living instruments’ entails a recognition that their interpretation will develop over time; the phrase is frequently employed in the context of human rights and environmental treaties: Daniel Moeckli and Nigel D. White, ‘Treaties as “Living Instruments”’ in Dino Kritsiotis and Michael J. Bowman (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018). Proponents of such ‘evolutionary interpretations’ of cultural heritage treaties include Francesco Francioni, ‘The Preamble’ in Francesco Francioni (ed), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press 2008) 6-7; Giulio Bartolini, ‘Disasters: An Additional (Legal) Dimension for the International Protection of Cultural Heritage’ in Massimo Iovane and others (eds), *The Protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry* (Oxford University Press 2021).

154 Although the precise status of these operational guidelines as subsequent agreements or subsequent practice will depend upon the specific terms of each treaty and their rules of procedure, the International Law Commission has held that decisions adopted within the framework of a Conference of States Parties (or similar organs) ‘may embody ... a subsequent agreement ... or give rise to subsequent practice’, even if adopted by consensus: ILC, ‘Report of the International Law Commission on the Work of its 70th Session’ (30 April-1 June and 2 July-10 August 2018) UN Doc A/73/10, para 51, Draft Conclusion on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, Conclusion 11(2)-(3). While the ILC explicitly excludes the decisions of ‘bodies with a limited

guidelines constitute a form of subsequent agreement or practice,¹⁵⁵ the present work argues that these operational guidelines are indispensable tools in the interpretation of the conventions,¹⁵⁶ given that they have led to a number of fundamental transformations in the working methods of the cultural conventions which would not necessarily be suggested by a first reading of the treaty texts in and of themselves.¹⁵⁷ As acknowledged by the International Law Commission, the value of such subsequent agreements and practice in contributing to the interpretation of a convention does not hinge upon their legally binding character (or the lack thereof).¹⁵⁸ In any event, the fact that these guidelines are adopted by the States Parties to the conventions is a strong argument in favour of their status as representing some degree of consensus amongst them on the interpretation of the conventions.

Chapter 4 also draws extensively on the practice of the intergovernmental bodies established by the cultural conventions, in particular that of the World Heritage Committee and the Intergovernmental Committee established by the

membership' from its conclusions (para 83), the Operational Guidelines of the World Heritage Convention are the only operational guidelines of the cultural conventions which are not subsequently submitted for adoption to the applicable Conference of States Parties, after initial adoption by such bodies with limited membership: see further Chapter 4, Section 4.2.3. Nonetheless, several authors have held that the Operational Guidelines of the World Heritage Convention nonetheless constitute a form of subsequent agreement or subsequent practice: see Gionata P. Buzzini and Luigi Condorelli, 'Art.11, List of World Heritage in Danger and Deletion of a Property from the World Heritage List' in Francesco Francioni and Federico Lenzerini (eds), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press 2008) 188-9 ('provided that they are not substantially contradicted by the States Parties to the Convention – especially those which are not members of the Committee'); Forrest, *International Law and the Protection of Cultural Heritage*, 45-6.

155 Lostal (n 110) 84; Catherine Redgwell, 'Protecting Natural Heritage and Its Transmission to Future Generations' in Abdulqawi A Yusuf (ed), *Standard-setting in UNESCO: Normative Action in Education, Science and Culture*, vol 1 (UNESCO 2007) 287. Indeed, one notable exception to such a conclusion is formed by the Operational Guidelines of the Underwater Cultural Heritage Convention, which contain a savings clause which explicitly states that they do not constitute a subsequent agreement: UCHC OG para 22.

156 Lostal (n 110) 84; Lucas Lixinski and Vassilis P Tzevelekos, 'The World Heritage Convention and the Law of State Responsibility: Promises and Pitfalls' in Anne-Marie Carstens and Elizabeth Varner (eds), *Intersections in International Cultural Heritage Law* (Oxford University Press 2020) 251; Hamman and Hølleland (n 151) 22.

157 See in particular Chapter 4, Section 4.2 and 4.3.

158 Scholars have occasionally sought to assess whether the operational guidelines of the World Heritage Convention are legally binding: Sabine von Schorlemer, 'Compliance with the UNESCO World Heritage Convention: Reflections on the Elbe Valley and the Dresden Waldschlössen Bridge' (2008) 51 *German Yearbook of International Law* 321, 331-3; Diana Zacharias, 'The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010) 320-2; Lixinski and Tzevelekos (n 156) 251. However, as acknowledged by the ILC, this question is ultimately irrelevant in order to assess their value as interpretative aids: ILC (n 154) Conclusion 10(1).

Intangible Cultural Heritage Convention, in order to uncover how they have applied the conventions' provisions and the extent to which they have taken the interests of individuals and local communities into account in their decisions.¹⁵⁹ The focus of this analysis is primarily on the inscription and monitoring decisions of these bodies, alongside the emerging practice of the non-compliance mechanisms established by the conventions. An analysis of this practice reveals the normative inconsistencies between the seemingly progressive approach advocated by the conventions' operational guidelines with respect to the participation of individuals and local communities, and the degree to which the governing bodies of the World Heritage Convention and the Intangible Cultural Heritage Convention in particular fail to follow up on these promises in their practice.¹⁶⁰

The other chapters place less emphasis on the strict application of doctrinal legal methodology. Chapter 3 is thus primarily interested in exploring why states felt moved to create international conventions to safeguard cultural heritage, and the underlying choices involved in framing these safeguarding exercises in the language of universality. As such, it is chiefly concerned with the *process* by which states arrived at the ultimate treaty texts. By more closely examining the *travaux préparatoires* of UNESCO's cultural conventions, the chapter is able to reconstruct states' justifications for not only calling into being the 'international law of culture', but also their reasoning for doing so in a universalist register. Given that it is at the moment of codification that these universalist justifications emerge most clearly and were the subject of significant debate amongst states, an analysis of the *travaux préparatoires* is warranted.¹⁶¹

Finally, Chapter 5 adopts a dual methodological approach in order to inquire into the impact of international heritage listing. On the one hand, the chapter analyses qualitative case studies on the impact of individual inscriptions on the World Heritage List of the World Heritage Convention and the Representative List and Urgent Safeguarding List of the Intangible Cultural Heritage Convention, drawn from the work of scholars in disciplines such as archaeology and anthropology. This analysis is complemented by a second limb of enquiry based on doctrinal research methods, which investigates the decisions adopted by the World Heritage Committee and Intergovernmental

159 While the actions of such intergovernmental bodies do not, strictly speaking, represent a form a subsequent agreement or subsequent practice in the sense of article 31 of the VCLT (given that they are adopted by bodies with limited membership rather than the conventions' plenary bodies), when taken in tandem with the *reactions* (or lack thereof) of States Parties to the decisions of these bodies they can arguably be viewed as contributing to the interpretation of the conventions: Lostal (n 110) 84.

160 See Chapter 4, Section 4.2 and 4.3.

161 Compare Millicent McCreath, 'Community Interests and the Protection of the Marine Environment within National Jurisdiction' (2021) 70 ICLQ 569, who adopts a similar approach in relation to the notion of 'community interest' in environmental law.

Committee with respect to the monitoring of specific international inscriptions in order to confirm the findings of the collected case studies.

While this approach has a number of important methodological limitations,¹⁶² the main motivation for the adoption of this dual approach was in order to filter out – inasmuch as this is possible without further primary quantitative or qualitative analysis – to what extent the negative effects of international heritage listing identified within other disciplines are the result of ‘demands’ formulated at the international level. An analysis of the practice of these intergovernmental bodies furthermore allows one to gauge whether they are aware of the negative impacts of a given inscription on particular individuals or local communities; and, if so, whether they are sufficiently responsive to these developments.

1.5 STRUCTURE

As already noted above, the dissertation seeks to answer the following main research question: How should the interests of individuals and local communities be safeguarded within the state-centric universalist legal structures and norms of international cultural heritage law? In order to answer this question, the dissertation begins by addressing the role of universality within international law more broadly, in order to situate international heritage law within these trends.

Chapter 2 thus examines how international law regulates the protection of common interests through universalist legal concepts, enquiring whether the role granted to the state in this regard is being challenged by new doctrinal and level developments. After a brief exploration of the construction of the concept of ‘universality’ in international legal doctrine – defined as the process whereby international legal instruments designate certain regulatory issues as being subject to the common interest of the international community – the chapter subsequently examines a selection of international legal regimes which illustrate these universalising trends within contemporary public international law: international human rights law, international humanitarian law, international criminal law, and the law of the global commons. It subsequently turns to the tension which international legal scholars have identified with regards to the emergence of these common interest norms: the fact that they seek to achieve their goal (the protection of common interests) through a largely bilateralist international legal system, described as a tension between the ‘form and function’¹⁶³ of contemporary public international law. It concludes by examining theories on the so-called ‘humanisation’ of international

162 See Chapter 5, Section 5.1.

163 See Catherine Brölmann, ‘Law-Making Treaties: Form and Function in International Law’ (2005) 74 *Nordic Journal of International Law* 383.

law which international legal scholars have posited as potential solutions to this tension.

Chapter 3 subsequently asks how cultural heritage regimes in public international law have invoked these same ideas of universality and common interest. It narrates the emergence of cultural heritage norms within public international law in the nineteenth and early twentieth centuries, culminating in the adoption of the 1954 Hague Convention. Thereafter, it examines the five core conventions – 1954, 1970, 1972, 2001 and 2003 – in turn, focusing on their invocation of universalist concepts such as the ‘cultural heritage of mankind’, ‘outstanding universal value’, and the ‘international community’. The chapter specifically focuses on the emergence of these concepts within the drafting processes of the respective conventions, in order to debunk some of the underlying mystique of these universalist concepts within cultural heritage law and to demonstrate that concepts such as the ‘cultural heritage of mankind’ are constructed and politically contingent concepts rather than eternally enduring principles. In doing so, it argues that the drafting histories of the cultural conventions demonstrate that the utilisation of universalist concepts in cultural heritage law should emphatically not be read as an indication that the field seeks to impose meaningful limits on the sovereignty of the territorial state over ‘its’ cultural heritage. The chapter concludes with a brief analysis of the extent to which these universalist principles are present within a range of parallel developments which similarly deal with the protection of cultural heritage, such as regional cultural conventions, international criminal law and human rights law.

Having identified cultural heritage law as a common interest regime along the lines of those discussed in Chapter 2, Chapter 4 complements this analysis by asking whether the protection, monitoring and implementation mechanisms employed within cultural heritage law suffer from the same tensions between ‘form and function’ which can be identified with respect to other common interest regimes. It begins by analysing the protection mechanisms employed across the cultural conventions of UNESCO, exploring the extent to which the substantive and procedural obligations employed within the conventions reflects their status as common interest regimes. It subsequently turns to the regularisation and expansion of the contentions’ monitoring and implementation mechanisms, such as periodic reporting, other procedures established to monitor the implementation of the conventions by states, and the mechanisms established to respond to potential situations of non-compliance by states. Finally, animated by its overall goal to assess potential tensions between ‘form and function’ in cultural heritage law, the chapter examines the extent to which actors other than states are granted a role in securing the common interest identified by the respective treaty regimes, focusing on individuals and local communities.

Chapter 5 continues along this line of thought by enquiring what the impact is of the implementation of UNESCO’s cultural conventions on individuals and

local communities. It focuses in particular on the impact of the 1972 World Heritage Convention and the 2003 Intangible Cultural Heritage Convention. The chapter identifies a range of detrimental effects of international heritage inscription. In the case of tangible heritage, this can involve limitations of existing property rights in the name of heritage protection; the eviction and forced relocation of residents; or the exclusion of living heritage values in the management of inscribed heritage, such as the religious, ritual or other associative values connected to a given tangible heritage site. In the case of intangible cultural heritage, international inscriptions can result in the solidification and extension of the control of the state over minority cultures located within its territory, or foster nationalism and inter-community conflict. However, the chapter also takes care to emphasise the positive effects of such inscriptions, underlining their emancipatory potential for individuals and local communities. The chapter concludes with a brief consideration of the role of human rights in the decisions of the World Heritage Committee and the Intergovernmental Committee in light of the tensions outlined in the chapter with respect to the positions of individuals and local communities in international heritage governance.

Chapter 6 broadens the view once again beyond the scope of cultural heritage law to public international law as a whole. It thus asks to what extent developments in other areas of international law could help to shape efforts to foreground the interests of individuals and local communities within cultural heritage law, focusing on legal concepts drawn from the fields of international environmental law and human rights law. Both fields have contributed to the development of a tripartite right of public participation in decision-making, particularly under the aegis of the Aarhus Convention and the Escazú Agreement. Similarly, both fields have contributed to the codification of the duty to consult and the right to free, prior and informed consent, particularly in the context of the rights of Indigenous peoples. Each of these developments carries inherent promise for the shaping of similar principles of public participation within cultural heritage law; the chapter charts the potential course that such developments could take.

Finally, Chapter 7 summarises the preceding chapters, returning to the overarching research question of the dissertation and outlining how the interests of individuals and local communities can be foregrounded within cultural heritage law by drawing more closely on developments within neighbouring areas of law. In its final section, the chapter explores to what extent viewing cultural heritage law through the lens of humanisation theories of international law could help to ameliorate the position of individuals and local communities with respect to internationalised cultural heritage protection. In doing so, it calls upon the need to create pathways for these individuals and communities to reclaim the label of the 'universal' – a form of particularistic legal

universalism along the lines of that described above – in order to counter-balance the centrality of the state within cultural heritage law and to bridge the divide between the local and the global within international heritage protection processes.

Universality has been intrinsic to the construction of the international legal project, although its precise incarnation has shifted across time. This chapter explores how international law regulates the protection of common interests through universalist legal concepts, and questions to what extent the role granted to the state is being challenged, both from the perspective of legal doctrine and developments in positive law. The overall goal of the chapter is thus to map the contours of the debate surrounding notions of universality within general international law, in order to situate similar developments in cultural heritage law within this broader lens in subsequent chapters.

In its first section, this chapter reflects on the numerous facets of the normative construction of the concept of ‘universality’ in international legal doctrine. The second section subsequently examines how various international legal regimes, such as human rights, international humanitarian law, international criminal law, space law, the law of the sea and international environmental law, give shape to these concepts of universality in positive law. The final section will discuss critiques of these notions of universality and common interest and their manifestation in positive law, as well as doctrinal arguments made by scholars in favour of the ‘humanisation’ of international law. The latter discussion is the counterpart of an increasing emphasis in international legal instruments upon the importance of participation in international governance, a trend which will be discussed in Chapter 6. Both developments appear to challenge the predominant role given to states in the guarding of common interests.

2.1 DOCTRINAL APPROACHES TO UNIVERSALITY

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 (and, in contemporary international law, a wide range of non-state actors as well) beyond purely bilateral or reciprocal interests: a ‘body of legal rules regulating universal

* Sections of the present chapter have been published in Sophie Starrenburg, ‘The Genealogy of the Concept of “Universality” within Cultural Heritage Law’, in Amy Strecker and Joseph Powderly (eds), *Heritage Destruction, Human Rights and International law* (Brill 2023).

human concerns, the range of which is constantly extending'.¹ Part and parcel of this trend is the emergence of 'common interests' within international law,² although the precise definition of what constitutes a 'common interest' differs according to the perspective of the observer.³ The term 'universality' is employed in the present chapter to denote the process whereby international legal instruments designate certain regulatory issues as being subject to the common interest of the international community.⁴ In doing so, they transform these issues from issues within the sphere of a state's sovereign interest into issues subject to (universal) inter-state cooperation in the interest of the international community.⁵ Without necessarily attaching any normative implications to this process, universality can thus be viewed as a paradigm which shapes the designation and legal treatment of common interests within international law.⁶

The term 'universality' has a broad range of connotations beyond doctrinal legal scholarship, for example in connection to cosmopolitan philosophies.⁷ Similarly, ideas of universality can also be connected to developments in early modern international legal thought in Europe, such as ideas of 'universal reason' in the works of natural law scholars such as Vittoria, Suarez and

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- 1 Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press 1964) 367; see also Alexandre Kiss, 'The Common Heritage of Mankind: Utopia or Reality' (1985) 15 *International Journal* 423, 426; Georges Abi-Saab, 'Whither the International Community?' (1998) 9 *EJIL* 248, 251.
 - 2 Jonathan I Charney, 'Universal International Law' (1993) 87 *AJIL* 529, 529. Compare the concept of 'public interest', which is frequently invoked within domestic law: Christoph Bezemek and Tomas Dumbrovsky, 'The Concept of Public Interest' in Luboš Tichý and Michael Potacs (eds), *Public Interest in Law* (Intersentia 2021).
 - 3 See e.g. Bruno Simma, who defines 'community interests' from the perspective of the values which they embody, 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': Bruno Simma, 'From Bilateralism to Community Interest' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217, 233. Compare the position of Giorgio Gaja, who defines general interest as an interest with 'a dimension that goes beyond the individual States or entities immediately concerned by a breach ... A general interest need not be a universal interest, belonging to all States and other entities. It may exist only for some States: for instance, those that are party to a particular treaty. A general interest also need not belong to the international community': Giorgio Gaja, 'The Protection of General Interests in the International Community' (2014) 364 *Recueil des Cours de l'Académie de Droit International* 13, 21-2.
 - 4 These regulatory issues can comprise a single tangible object, but can also refer to a collective of tangible objects (such as a plant or animal species) or intangible objects (such as international peace and security, the environment, or intangible cultural heritage).
 - 5 See Friedmann (n 1).
 - 6 Armin von Bogdandy and Sergio Dellavalle, 'Universalism and Particularism: A Dichotomy to Read Theories on International Order' in Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (eds), *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel* (Oxford University Press 2017) 482; Simma (n 3) 233.
 - 7 Roman Kwiecień, 'Universality and Coherence under the Experiences of the League of Nations' (2015) 17 *International Community Law Review* 175, 180-1.

Grotius.⁸ For these scholars, the universal validity of international law was derived from it being grounded in the universal human experience, founded in reason. Laws formed in the image of this experience were by association universal, regardless of their actual geographical application.⁹ While these discussions are beyond the scope of the present dissertation, critiques of natural law universalism are often also similar to those levied at modern incarnations of universalism: both notions purport to be ‘abstract, neutral and universally applicable’, when they in fact often only represent the views of a narrow section of international society.¹⁰

By contrast, in contemporary international legal doctrine ‘universality’ is often used to describe a factual situation in relation to the structure of the international legal order, the nature of its participants, and the type of norms within this legal order. Thus, in its most basic formulation, to recall the ‘universal’ status of international law is to state 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.¹¹ Contemporary international law distinguishes itself from earlier legal systems which purported to be universal but were in fact limited in the scope of their potential application on the basis of criteria such as ‘civilisation’.¹² The potentially global application of inter-

8 C Wilfred Jenks, *The Common Law of Mankind* (Stevens and Sons Limited 1958) 66.

9 Geoff Gordon, ‘Universalism’ in Jean d’Aspremont and Sahib Singh (eds), *Concepts for International Law* (Elgar 2019) 866; Emmanuelle Jouannet, ‘Universalism and Imperialism: The True-False Paradox of International Law?’ (2007) 18 EJIL 379, 381.

10 Jouannet (n 9) 380. More generally in relation to the notion of imperialism and international law, see e.g. Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004). On the exclusionary nature of the idea of the ‘international community’ in the works of jurists such as Grotius, see also William E. Conklin, ‘The Exclusionary Boundary of the Early Modern International Community’ (2012) 81 Nordic Journal of International Law 133.

11 See e.g. Jenks (n 8) 62; Friedmann (n 1) 365; Jouannet (n 9) 385–6. This is, of course, a narrow conceptualisation of who belongs to the ‘universal’: states, rather than other (international) legal persons such as peoples or individual human beings. This view can be further contested, not only in light of the continued relevance of regional norms of custom and treaty law, but also the fact that the power to create new international legal norms and the ability to accede to treaties remains limited to states, which were for a long time seen to be the only actors with ‘complete’ international legal personality.

12 ‘Contemporary’ is used here to refer to the international legal order which emerged upon the conclusion of the Second World War with the creation of the United Nations. A remnant of the earlier approach can still be found in article 38(1)(c) of the ICJ Statute, which includes the ‘general principles of law recognized by civilized nations’ as amongst the sources of law to be applied by the Court; the phrase ‘civilized nations’ is generally considered to be obsolete in contemporary usage. However, for accounts complicating the orthodox view of the emergence of this ‘standard of civilization’ in international law and the self-appropriation of this standard by non-European states, see e.g. Anghie (n 10) 52 and further; Alexander Orakhelashvili, ‘The Idea of European International Law’ (2006) 17 EJIL 315;

national legal rules thus implies the normative validity of these rules as opposed to rules which find their origins in imperialist or colonial systems of power, underlining the universality of the international legal order.¹³ Jenks thus lauds the transformation of the international legal community 'from a family of nations based primarily on Western Christendom into a universal world community'.¹⁴

Simultaneously, the assertion that contemporary international law has attained universal normative validity has been contested by Third World Approaches to International Law (TWAIL) and critical legal scholars, who view universalising trends in international law as an extension of imperial power relations.¹⁵ Similarly, others have argued that imbued in the very notion of universalist ideas such as the 'international community' and 'common interests' is the exclusion of those who do not meet or agree with these standards;¹⁶ a new incarnation of the 'standard of civilization', for 'even a universal community knows an outside, an environment against which it defines and delineates its identity'.¹⁷

Scholars speaking of the 'universality' of international law also use the phrase to denote that international law is not only potentially universal in its geographical scope: in relation to certain rights and obligations, such as *jus cogens* norms, all states are in fact bound.¹⁸ As such, the modern international order is universal not only by virtue of its participants, but also in relation to the universal application of certain legal norms. Perhaps the most radical form of universality in this respect posits that there are norms which bind humankind as a whole.¹⁹ On the one hand, orthodox international lawyers readily accept that certain international legal norms have emerged which create rights and duties for legal actors other than states, such as individuals; international criminal law and international human rights law are cases in point. Similarly, environmental law and human rights law have evinced a tentative recognition of diffuse global communities as rights-holders, such as future

Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842-1933* (Cambridge University Press 2015).

13 Jouannet (n 9) 385.

14 Jenks (n 8) 62.

15 Jouannet (n 9) 382. See further Section 2.3 below.

16 Andreas Paulus, 'International Community' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013) par 1-2.

17 Ibid par. 3.

18 Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 EJIL 265, 267-8; André Nollkaemper, 'Universality' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (Oxford University Press 2011) paras 1-7.

19 Simma, 'Universality of International Law from the Perspective of a Practitioner' (n 18) 267-268; Antônio Augusto Cançado Trindade, *International Law for Humankind* (2nd rev. edn, Martinus Nijhoff Publishers 2013).

generations.²⁰ Nonetheless, the view which posits humankind as an independent legal subject has remained controversial. Wolfrum thus argues that it is more appropriate to consider states as trustees or fiduciaries for humankind, rather than stating that humankind is an international legal person as such.²¹

While it is thus generally agreed that humanity is not an independent subject of international law, universalist legal concepts such as the 'international community' or the 'common heritage of mankind' – both of which will be discussed in section 2.2 below – nonetheless embody an important 'symbolic dimension'.²² As Dupuy argues, the 'international community', while indeed fictional, is a 'very particular kind of fiction': a legal fiction which helps to constitute, at least in part, the contemporary international legal order.²³ Similarly, Tams argues that while international law alone does not make the international community, it does '[offer] the natural language in which many debates are conducted' on the nature of this international community, and can become the 'glue' that holds it together, by 'embodying

20 Such as in the context of climate change: see e.g. 'Maastricht Principles on the Human Rights of Future Generations' (OHCHR, 3 February 2023) <<https://www.ohchr.org/sites/default/files/documents/new-york/events/hr75-future-generations/Maastricht-Principles-on-The-Human-Rights-of-Future-Generations.pdf>>. However, it is important to note that the recognition of such rights remains heavily dependent on the formulation of environmental rights in specific jurisdictions. Their international legal status thus remains heavily contested and more within the realm of *lex ferenda* than *lex lata*: see e.g. Bridget Lewis, 'The Rights of Future Generations within the Post-Paris Climate Regime' (2018) 7 *Transnational Environmental Law* 69; Fons Coomans, 'Towards 2122 and Beyond: Developing the Human Rights of Future Generations' (2023) 41 *Netherlands Quarterly of Human Rights* 53. See also the recent reticence of the Committee on the Rights of Child to categorise the position of future generations in the context of climate change as one predicated on rights, instead framing it within the context of the principle of intergenerational equity: UN Committee on the Rights of Child, General Comment No. 26 (22 August 2023) UN Doc CRC/C/GC/26, para 11.

21 Rüdiger Wolfrum, 'Common Heritage of Mankind' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2009) paras 27-8; see also Ellen Hey, 'Interdependencies, Conceptualizations of Humanity and Regulatory Regimes' in Britta van Beers, Luigi Corrias and Wouter G. Werner (eds), *Humanity Across International Law and Biolaw* (Cambridge University Press 2014) 255. On the concept of the fiduciary state, see Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 *AJIL* 295; Evan J Criddle and Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (Oxford University Press 2016).

22 Danièle Lochak, *Le droit et les paradoxes de l'universalité* (Presses Universitaires de France 2010) 233.

23 Pierre-Marie Dupuy, 'From a Community of States Towards a Universal Community?' in Riccardo Pisillo Mazzeschi and Pasquale De Sena (eds), *Global Justice, Human Rights and the Modernization of International Law* (Springer 2018) 48, 55. Villalpando similarly argues that 'there is a social and legal reality' behind the concept: Santiago Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law' (2010) 21 *EJIL* 387, 388.

decisions reached by the members of the community and helping to stabilize them'.²⁴ These views share certain affinities with constructivist philosophies of international law, which view legal norms and the international legal order from which they emanate as co-constitutive.²⁵

'Universality' is also used in contemporary international legal doctrine as a starting point for normative arguments about the nature of the international legal order as a 'universal' legal order.²⁶ It is thus at times taken to refer to the argument international law is 'an organized whole, a coherent legal system',²⁷ an expression of 'international public authority',²⁸ akin to the arguments proposed by constitutionalist thinkers.²⁹ In this understanding, the development of the international legal order should be guided by the contours of domestic constitutional orders or administrative law.³⁰

Along similar lines, 'universality' has become theoretical shorthand for the proposal that international law represents – or should represent – the common interests of the international community, broadly construed to extend beyond the community of states to also include other actors, such as individuals.³¹ Some have argued that the growth of 'common interest' norms

24 Christian J. Tams, 'International Community' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Elgar 2019) 511.

25 See e.g. Nicholas Onuf, 'The Constitution of International Society' (1994) 5 EJIL 1; Jutta Brunnée and Stephen J. Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 39 Columbia Journal of Transnational Law 19.

26 Sergio Dellavalle, 'Beyond Particularism: Remarks on Some Recent Approaches to the Idea of a Universal Political and Legal Order' (2010) 21 EJIL 765, 767.

27 Simma, 'Universality of International Law from the Perspective of a Practitioner' (n 18) 267. See also Kwiecień (n 7) 180-1.

28 This line of thought is frequently associated with German legal scholars from the public law tradition: Andrea Bianchi, *International Law Theories: An Inquiry Into Different Ways of Thinking* (Oxford University Press 2016) 44. See e.g. Armin von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field' in Armin Von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010); Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (2017) 28 EJIL 115. See also Sarah Thin, 'Community Interest and the International Public Legal Order' (2021) 68 Netherlands International Law Review 35.

29 See e.g. Erika De Wet, 'The International Constitutional Order' (2006) 55 ICLQ 51; Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009); Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff 2009).

30 Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15; Sabino Cassese, 'Global Administrative Law: The State of the Art' (2015) 13 International Journal of Constitutional Law 465.

31 Benedict Kingsbury and Megan Donaldson, 'From Bilateralism to Publicness in International Law' in Ulrich Fastenrath (ed), *From Bilateralism to Community Interest* (Oxford University Press 2011) 79; Kwiecień (n 7) 180-1; Thomas Hoffmeister and Thomas Kleinlein, 'Inter-

within international law suggests a shift from a state-centric body of law to a body of law focused on individual human beings,³² a trend which we shall return to later in this chapter. Proponents of this line of thought argue in favour of a relativisation of the notion of international legal subjectivity and a move away from ‘the “civilist”, bilateralist structure of the traditional law ... [towards] a true *public* international law’,³³ in which obligations do not solely operate on a reciprocal basis between states but are ‘owed to an international community of States and ultimately all humankind, and enforceable by (or on behalf of) this community’.³⁴

Some scholars take this line of thought one step further, employing ‘universality’ to denote the position that international law reflects a certain degree of normative international consensus in the form of common values,³⁵ although such consensus might differ widely depending on the topic at hand.³⁶ Comparisons are frequently made here between the notion of ‘international society’ and a shift towards a true ‘international community’ based on shared values.³⁷ The degree to which these shared values are indeed

national Public Order’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2019).

- 32 Britta van Beers, Luigi Corrias and Wouter Werner, ‘Introduction: Probing the Boundaries of Humanity’ in Britta van Beers, Luigi Corrias and Wouter G. Werner (eds), *Humanity across International Law and Biolaw* (Cambridge University Press 2014) 1. This trend is also often described as the ‘humanisation’ of international law, a term popularised by Bruno Simma, Theodor Meron and A.A. Cançado Trindade; see Vassilis P. Tzevelekos, ‘Revisiting the Humanisation of International Law: Limits and Potential’ (2013) 1 *Erasmus Law Review* 62. See also Wolfgang Benedek, ‘Humanisation of International Law, Human Rights and the Common Interest’ in Wolfgang Benedek and others (eds), *The Common Interest in International Law* (Intersentia 2014).
- 33 Simma, ‘Universality of International Law from the Perspective of a Practitioner’ (n 18) 267-8. On the notion of ‘publicness’ and an ‘international public legal order’, see also Thin (n 28).
- 34 Kingsbury and Donaldson (n 31) 80. For an early formulation of this theory, see Philip C. Jessup, *A Modern Law of Nations: An Introduction* (The Macmillan Company 1948) 2. For well-known proponents of this idea, see Simma, ‘From Bilateralism to Community Interest’ (n 3) 233; Andreas Paulus, ‘Whether Universal Values can Prevail over Bilateralism and Reciprocity’ in Antonio Cassese (ed), *Realizing Utopia* (Oxford University Press 2012) 89.
- 35 Wolfgang Benedek and others, ‘Conclusions: The Common Interest in International Law - Perspectives for an Undervalued Concept’ in Wolfgang Benedek and others (eds), *The Common Interest in International Law* (Intersentia 2014) 219. See also Friedmann (n 1) 297; Christian J Tams, ‘Individual States as Guardians of Community Interests’ in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011) 380. Others explicitly deny that values are part of the elaboration of community interests: Villalpando (n 23) notes, for example, that ‘[t]he preservation of public goods derives from a utilitarian necessity ... which ... could be encouraged by a common ethical sense but is not necessarily related to it’ (at 393).
- 36 Abi-Saab (n 1) 249. See also Tams (n 35) 506.
- 37 Drawing upon similar distinctions made by authors such as Hedley Bull, Louis Henkin, and more broadly the work of Ferdinand Tönnies: Paulus, ‘International Community’ (n 16) par 3; Abi-Saab (n 1) 249.

present is connected to the ability of international law to realise the protection of common interests; thus Friedmann writes that the success of a truly co-operative international law – as opposed to a law of mere coexistence – is dependent on the diversity of values held with regards to a given issue in which cooperation is necessary. A greater diversity of viewpoints will make it more difficult to cooperate and thus frustrate the development of international law beyond its traditional *do-ut-des* structure.³⁸ Similarly, Jouannet argues that if international law is to progress beyond merely respecting state interests towards the promotion of a common good, this development should necessarily be accompanied by the harmonisation of values.³⁹

Others instead emphasise the importance of decision-making procedures in the elaboration of common interests rather than the harmonisation of values.⁴⁰ Thus Simma argues that it is precisely the diversity of values held across the globe which makes such procedures necessary: ‘heterogeneity does not exclude the universality of international law, as long as the law retains – and further develops – its capacity to accommodate an ever larger measure of such heterogeneity’, in particular through judicial dispute settlement mechanisms and international organisations.⁴¹ Similarly, Benedek *et al.* suggest that, beyond basing common interests on ideas of common values, it is also possible to simply state that ‘common interests are those that are backed by a communal legal spirit’, as reflected in broad support for the topic in treaties or customary law. In doing so, these authors seek to depart from a factual perspective and to thereby remove the necessity of relying upon the identification of shared values in order to elaborate on the existence of common interests in international law.⁴² Even if an issue has not yet been legislated at the international level, they argue that it is also possible to identify common interests on the basis of whether a particular interest ‘can only be safeguarded through common action’,⁴³ as is the case for issues such as climate change, which cannot be resolved by individual members of the international community but are nonetheless in their interest to protect.⁴⁴

Along similar lines, certain scholars underline the possibilities of finding common ground in a diverse world. Thus Onuma argues in favour of a ‘trans-civilizational’ perspective of international law, distinguishing those ideas that are held universally across the globe (a position which he describes as true

38 Friedmann (n 1) 297.

39 Jouannet (n 9) 387.

40 Paulus, ‘Whether Universal Values can Prevail over Bilateralism and Reciprocity’ (n 34) 91. See also work of republican scholars such as Samantha Besson and Mortimer Sellers, focusing on questions of democratic legitimacy in international law.

41 Simma, ‘Universality of International Law from the Perspective of a Practitioner’ (n 18) 265.

42 Benedek and others (n 35) 220.

43 Ibid 220.

44 Abi-Saab (n 1) 251; Villalpando (n 23) 393.

‘universality’) from those ‘which, in the eyes of their believers, are held to have universal value’ (described as ‘universalism’).⁴⁵ In his view, true normative universality of international law can thus be reached through common dialogue between different groups within international society. Similarly, Yusuf posits that ‘[i]t is not a paradox to say that the universality of international law depends on diversity ... universalization means borrowing and adapting concepts and principles from different legal traditions’.⁴⁶ Similarly to Onuma, he argues that diversity is thus not a barrier towards achieving universality, but a necessary condition for its success.⁴⁷

2.2 UNIVERSALITY ACROSS INTERNATIONAL REGIMES

Having explored the various understandings of the notion of ‘universality’ in international legal doctrine, the following section asks how the concept has been expressed within positive law. Recalling the working definition of ‘universality’ provided at the beginning of the previous section – as the process whereby international legal instruments designate certain regulatory issues as being subject to the common interest of the international community – the following sections will firstly explore this idea in relation to general international law and subsequently in relation to a number of international legal sub-régimes, in particular with respect to what can be termed the law of the global commons: international environmental law, the law of the sea and space law. The next two chapters shall subsequently explore these same themes in depth in relation to cultural heritage law.

2.2.1 General international law

The notion of a ‘common interest’ arguably gained a foothold in contemporary positive international law with the creation of the United Nations (UN): the preamble of the Charter notes ‘that armed force shall not be used, save in the

45 Yasuaki Onuma, *International Law in a Transcivilizational World* (Cambridge University Press 2017) 15. Onuma provides the example of the ‘universal authority’ of the Chinese emperor in pre-modern Chinese dynasties.

46 Abdulqawi A Yusuf, ‘Diversity of Legal Traditions and International Law’ (2013) 2 Cambridge Journal of International and Comparative Law 681, 683.

47 Contrast the position of certain critical legal scholars who argue that the Eurocentric nature of international law cannot be remedied by diversifying the actors involved in its elaboration, as this is embedded in the very legal structures of international law: see Ntina Tzouvala, ‘The Specter of Eurocentrism in International Legal History’ (2021) 31 Yale Journal of Law & the Humanities 413.

common interest'.⁴⁸ The existence of common interests is reaffirmed in the statement of the purposes of the United Nations in article 1, which holds that the UN shall 'be a centre for harmonizing the actions of nations in the attainment of these common ends',⁴⁹ namely the maintenance of peace and security, the development of friendly relations amongst states, and cooperation amongst states in solving international problems. The common interests identified in the UN Charter have since become increasingly diversified – in part through the broadening of the scope of action of the UN, and in part through the mushrooming of international agreements and organisations tasked with the protection of an ever-growing range of goals which have been identified as being in some way 'common', either to the community of states or humankind.

The 'international community' is also a recurring actor in the resolutions of UN bodies such as the General Assembly and the Security Council, having been invoked by different groupings of states for different reasons throughout the history of the organisation, as has been extensively charted in the work of Dupuy and Paulus on the history of these bodies.⁵⁰ The 1960s and 1970s saw the championing of the concept in particular by the newly independent states in documents such as the Tehran Declaration on Human Rights in 1968⁵¹ and the Declaration on the Establishment of a New International Economic Order in 1974.⁵² From the 1990s onwards, the concept shifted in politics, for example being invoked by the Security Council in the context of its resolutions on international peace and security.⁵³ The end of the Cold War saw the celebration of the 'timeless and universal' nature of the principles

48 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) XV UNCIO 335 (UN Charter). Kiss argues that we can look back even further in order to see the first inklings of community interest norms in public international law, for example in the development of treaties guaranteeing freedom of navigation of international water-courses and the abolishment of the slave trade: Kiss (n 1) 426.

49 Isabel Feichtner, 'Community Interest' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2007) para 15; Abi-Saab (n 1) 258-9.

50 Dupuy (n 23) 48-53; Andreas Paulus, *Die internationale Gemeinschaft im Völkerrecht: eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (C.H. Beck 2001).

51 The Declaration recognised 'that peace is the universal aspiration of mankind and that peace and justice are indispensable to the full realization of human rights and fundamental freedoms', calling upon members of the international community to fulfil their human rights obligations and recognising the Universal Declaration of Human Rights as stating 'a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family': Final Act of the International Conference on Human Rights (22 April-13 May 1968) UN Doc A/CONF.32/41, Proclamation of Tehran.

52 The General Assembly proclaimed 'the establishment of a new international economic order based on equity, sovereign equality, interdependence, common interest and cooperation among all States': Declaration on the Establishment of a New International Economic Order, UNGA Res 3201 (S-VI) (1 May 1974) UN Doc A/RES/3201 (S-VI).

53 Dupuy (n 23) 48-53; see UNSC Res 688 (5 April 1991) UN Doc S/RES/688 (Gulf War); UNSC Res 929 (22 June 1994) UN Doc S/RES/929 (Rwanda); UNSC Res 940 (31 July 1994) UN Doc S/RES/940 (Haiti); UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368 (9/11).

embodied in the Charter,⁵⁴ as well as a call for inter-civilizational dialogue and a new emphasis on the 'common humanity' which united the members of the United Nations.⁵⁵ These statements were once again affirmed at the 60th session of the General Assembly in the World Summit Outcome, which further asserted the importance of 'common fundamental values' to the maintenance of international relations.⁵⁶

As noted above, the normative action of the organs of the United Nations in pursuit of the common interests of the international community has been supported by the emergence of a wide range of treaty-based norms which do not concern 'the immediate interest of a state or states, but a more remote concern: a benefit for all humankind which can be obtained only by international co-operation and the acceptance of obligations by all governments, even if they receive no immediate return',⁵⁷ such as human rights and environmental protection. In many situations, an appeal to universality – or, more commonly, 'the interests of humanity' – is relied upon in order to justify international legislation on the subject, as we shall see in the sections below.⁵⁸ In doing so, these instruments transformed issues which had until then been considered only of interest from the perspective of morality (and hence within the realm of domestic jurisdiction or the *domaine réservé*) into issues of positive international law.⁵⁹

It is against the background of this substantive expansion of international legal regulation in the twentieth century that several scholars have sought to create typologies of treaty obligations in order to capture the changing character of the international legal order.⁶⁰ Both McNair and Fitzmaurice proposed a typology of essentially three categories of treaties (with an additional, fourth, category being reserved for 'constitutive' treaties which establish international organisations).⁶¹ The first category concerns the *traités-contrats*, 'treaties, bi-

54 United Nations Millennium Declaration, UNGA Res 55/2 (18 September 2000) UN Doc A/RES/55/2.

55 Global Agenda for Dialogue among Civilizations, UNGA Res 56/6 (21 November 2001) UN Doc A/RES/56/6, preamble.

56 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, para 4.

57 Kiss (n 1) 427.

58 Feichtner (n 49) para 5.

59 Hey (n 21) 244.

60 Although such attempts have also equally drawn critique: Oppenheim's *International Law* is pessimistic about the endeavour, noting that 'attempts at classification of the different kinds of treaties are of limited usefulness'. See Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law: Peace*, vol 1 (9th edn, Oxford University Press 2008) 1203.

61 McNair furthermore proposed an additional category, that of 'treaties having the character of conveyances ... whereby one state creates in favour of another, or transfer to another, or recognizes another's ownership of, real rights, rights *in rem*', such as treaties of cession: Arnold D. McNair, 'The Functions and Differing Legal Character of Treaties' (1930) 11 *British Yearbook of International Law* 100, 101-2. Both of these categories – constitutive treaties and treaties having the character of conveyances, are beyond the scope of the present work.

lateral or multilateral, that are based on a reciprocal exchange of rights or benefits'.⁶² This category of treaties is likened to domestic contracts, and involves the exchange of benefits between parties with opposed interests.⁶³ These treaties create bilateral relations between the contracting parties, regardless of the status of the treaty itself as bilateral or multilateral; the latter 'can be considered as a bundle of interwoven bilateral relationships dominated by the principle of reciprocity'.⁶⁴ Fulfilment of these obligations by the state is juridically dependent upon the actions of the state operating at the other end of the bargain.⁶⁵ Examples of this category include border agreements or the law of trade.⁶⁶

The second category is that of 'interdependent' treaties, 'whose character make the performance of one party dependent on that of all the other parties'.⁶⁷ This intermediate category consists of treaty regimes reliant on 'global reciprocity', which establish obligations, 'the scrupulous performance of which by all states bound by them constitutes a condition *sine qua non* for the functioning of the system they set up'.⁶⁸ Such treaties are often established to attain a common interest of the international community, such as nuclear disarmament; however, what distinguishes these types of agreements from other agreements undertaken in the collective interest is their synallagmatic nature.⁶⁹

62 Catherine Brölmann, 'Law-Making Treaties: Form and Function in International Law' (2005) 74 *Nordic Journal of International Law* 383, 387-8. See also Lea Brilmayer, 'From 'Contract' to 'Pledge': The Structure of International Human Rights Agreements' (2007) 77 *British Yearbook of International Law* 163, 164-5.

63 McNair (n 61) 105, quoting Lauterpacht, *Private Law Sources and Analogies of International Law* (1927) para 70. However, others have pointed out that the domestic law of contracts remains fundamentally different from the law of treaties: see e.g. Akbar Rasulov, 'Theorizing Treaties: The Consequences of the Contractual Analogy' in Christian J Tams, Antonios Tzanakopoulos and Andreas Zimmermann (eds), *Research Handbook on the Law of Treaties* (Elgar 2014).

64 Linos-Alexander Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 *EJIL* 1127, 1132.

65 Brilmayer (n 62) 164-5.

66 Although there are some caveats in characterising trade law in this manner: some would argue, for example, that trade law and the development of the Bretton Woods system should also be seen as a common interest regime: see e.g. Christian Tietje and Andrej Lang, 'Community Interests in World Trade Law' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018) This demonstrates the limitations of relying upon the categorisation of treaty norms in order to assess the changing nature of contemporary international law: many common interest regimes thus continue to rely upon the reciprocal exchange of rights and obligations amongst the parties to a given treaty.

67 Brölmann (n 62) 387-8.

68 Sicilianos (n 64) 1134.

69 Ibid 1135.

The third category is that of *traités-lois* or law-making treaties.⁷⁰ For these treaties, ‘the juridical force of the obligation is inherent, and not dependent on a corresponding performance by the other parties to the treaty . . . so that the obligation is of a self-existent character, requiring an absolute and integral obligation and performance under all conditions’.⁷¹ This category is likened to legislation, in which performance by one party of the obligations flowing from the treaty does not necessarily lead to a direct benefit for the other parties beyond the realisation of ‘a collective interest that transcends the individual interests of the contracting parties’;⁷² such as the protection of the environment or the realisation of human rights. In short, these treaties are considered to be non-synallagmatic;⁷³ they are not reducible to a so-called ‘bundle’⁷⁴ of bilateral rights and obligations between the contracting parties. One can return here to the example of human rights treaties, of which it is commonly held that they do not protect the interests of states, but the rights of individuals under their jurisdiction.⁷⁵ It is for this reason that the growth of such ‘non-bilaterisable’ obligations is frequently associated with the emergence of common interests in international lawmaking.⁷⁶

However, the statement that reciprocity no longer plays a role in relation to common interests is not uncontroversial. Klabbers, for example, reaffirms Lauterpacht’s argument that the notion of consent stands at the heart of a treaty, regardless of its content. While the normative content of a so-called ‘legislative’ treaty might thus differ radically from traditional contractual treaties, both remain founded on the principle of consent.⁷⁷ Similarly, Simma and Paulus suggest that while the types of interests international law seeks to address have indeed changed over time, the legal nature of these norms

70 McNair (n 61); Brölmann (n 62) 387-8.

71 ‘Second Report on the Law of Treaties by Sir Gerald Fitzmaurice’ (1957) UN Doc A/CN.4/107, as cited in Brölmann 387-8.

72 Joost Pauwelyn, ‘A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?’ (2003) 14 EJIL 907, 907.

73 Catherine Brölmann, ‘Typologies and the “Essential Juridical Character” of Treaties’ in Dino Kritsiotis and Michael J. Bowman (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018) 94.

74 Pauwelyn (n 72) 908.

75 Brilmayer (n 62) 164-5.

76 Thin (n 28) 52. See also Cottier, who argues that ‘the essential element of reciprocity in terms of interests and benefits is lacking’ with respect to common interest regimes; ‘benefits are not directly mutual; obligations incurred are essentially one-sided’: Thomas Cottier, ‘The Principle of Common Concern of Humankind’ in Thomas Cottier (ed), *The Prospects of Common Concern of Humankind in International Law* (Cambridge University Press 2021) 8.

77 Brölmann, ‘Law-Making Treaties: Form and Function in International Law’ (n 62) 398; Jan Klabbers, ‘The Community Interest in the Law of Treaties: Ambivalent Conceptions’ in *From Bilateralism to Community Interest* (Oxford University Press 2011) 772.

remain at their heart reciprocal.⁷⁸ This continued reliance on reciprocity remains crucial in light of the lack of centralised enforcement within international law; in this understanding, reciprocity is not a source of weakness of traditional international legal norms, but ‘the principal leitmotiv, a constructive, mitigating, and stabilizing force’.⁷⁹ Given that it is not possible to fully delve into the role of reciprocity within contemporary international law,⁸⁰ in subsequent chapters the characterisation of an obligation as (non-)reciprocal is merely used to refer to the question whether the obligations contained in such a treaty amount to a mutual exchange of rights and obligations between the contracting states.

As such, many authors consider that the acknowledgement of common interests through the elaboration of legal norms for their protection arguably did not change the structure of international law as such: it remained (and some argue, still remains) centred around state sovereignty and state consent as a central organising factor.⁸¹ That being said, some developments can be pinpointed within positive law which take the first steps towards a transformation from a wholly state-centric international community to one which takes into account certain common interests. This shift is thus often marked by the emergence of positive over negative obligations, which do not establish obligations of result but rather of means, often within an institutional framework which recognises the common but differentiated responsibilities of individual states; examples of such frameworks shall be discussed in the following sections.

A further example at the level of general international law of the emergence of considerations of universality in positive international law is the recognition of *jus cogens* norms and obligations *erga omnes*.⁸² The development of these concepts by the International Court of Justice (ICJ) evinces a growing recogni-

78 Simma, ‘From Bilateralism to Community Interest’ (n 3); Bruno Simma, ‘Reciprocity’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2008) para 6; Andreas Paulus, ‘Reciprocity Revisited’ in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011).

79 Simma, ‘Reciprocity’ (n 78) paras 1-2. See also Paulus, ‘Reciprocity Revisited’ (n 78) 115, 123-4, 126, 128.

80 See Arianna Whelan, *Reciprocity in Public International Law* (Cambridge University Press 2023).

81 Abi-Saab emphasises, for example, that the distinction between the laws of coexistence and cooperation are not based on the *ratione materiae* of the legal norms at stake but rather on the nature of the laws adopted. In other words, the distinction is thus ‘not a division according to the objects of regulation, but according to the way in which regulation is approached’: Abi-Saab (n 1) 250.

82 Ignacio De La Rasilla Del Moral, ‘Nihil Novum Sub Sole Since the South West Africa Cases? On Ius Standi, the ICJ and Community Interests’ (2008) 10 *International Community Law Review* 171, 191; Sandesh Sivakumaran, ‘Impact on the Structure of International Obligations’ in Menno T. Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford University Press 2009).

tion of the existence of common interests within international law.⁸³ Thus the Court famously stated in *Barcelona Traction* that ‘an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State’.⁸⁴ Already several decades earlier, it had hinted at similar consequences in its advisory opinion on *Reservations to the Genocide Convention*, where it famously noted that the convention possessed a number of ‘special characteristics’: in light of its subject-matter, ‘the contracting States do not have any interests of their own; they merely have, one and all, a common interest’, the result being that ‘one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties’.⁸⁵ As such, the capacity of states to both make and object to reservations to the convention was altered in light of this object and purpose.⁸⁶ Since its dictum in *Barcelona Traction*, the Court has affirmed the existence of *erga omnes* obligation in relation to a number of norms,⁸⁷ such as the principle of self-deter-

83 Nollkaemper (n 18) paras 28-29. See e.g. *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; *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6.

84 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Preliminary Objections) [1970] ICJ Rep 3, para 33.

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

86 Alvarez, in his dissenting opinion, added the following on the nature of the ‘new’ type of treaty represented by the Genocide Convention: for one, ‘they have a universal character; they are in, a sense, the *Constitution* of international society; the *new international constitutional law*. They are not established for the benefit of private interests but for that of the general interest; they impose obligations upon States without granting them rights, and in this respect are unlike ordinary multilateral conventions which confer rights as well as obligations upon their parties’: *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Dissenting Opinion of M. Alvarez) [1951] ICJ Rep 15, at 40.

87 Marco Longobardo, ‘The Standing of Indirectly Injured States in the Litigation of Community Interests before the ICJ: Lessons Learned and Future Implications in Light of The Gambia v. Myanmar and Beyond’ (2021) 24 *International Community Law Review* 476, 484.

mination,⁸⁸ genocide,⁸⁹ torture,⁹⁰ and certain rules of international humanitarian law.⁹¹

Similarly, the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts firmly established the possibility of non-injured states responding to breaches of common interest norms by invoking the responsibility of the state for an internationally wrongful act, if '[t]he obligation breached is owed to the international community as a whole'.⁹² Recent developments at the International Court of Justice and elsewhere have further solidified the possibility of states seeking to enforce *erga omnes partes* norms even if they are not directly affected by the breach of the obligation in question, either through judicial proceedings or countermeasures of general interest (although the Court has yet to explicitly recognise the standing of non-injured states for non-treaty-based *erga omnes* obligations, as opposed to obligations *erga omnes partes*).⁹³ States are now also permitted to bring judicial claims on behalf of common interests before a wide range of other bodies besides the International Court of Justice, for example through inter-state procedures before regional and international human rights bodies.⁹⁴

88 *Case Concerning East Timor (Portugal v. Australia)* (Judgment of 30 June 1995) [1995] ICJ Rep 90, para 29 (although the Court did decline to exercise its jurisdiction over the impugned violation of the right to self-determination of East Timor); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 155; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, para 180.

89 *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6, para 64; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* (Judgment of 11 July 1996) [1996] ICJ Rep 595, para 31; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Judgment of 3 February 2015) [2015] ICJ Rep 3, para 89; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (Judgment on Preliminary Objections) [2022] para 107.

90 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Judgment of 20 July 2012) [2012] ICJ Rep 422, paras 68-9.

91 *Wall Advisory Opinion* (n 88) para 155.

92 UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83, Annex, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, art 48(1)(b).

93 See e.g. *Questions Relating to the Obligation to Prosecute or Extradite* (n 90) (in relation to obligations *erga omnes partes*); *Chagos Advisory Opinion* (n 88) para 180; *Application of the Convention on the Prevention and Punishment of Genocide (The Gambia v. Myanmar)* (Application Instituting Proceedings and Request for Provisional Measures) General List No. 178 [2019]; *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic)* (Joint Application Instituting Proceedings) [2023]. See also Longobardo (n 87) 497; Denis Alland, 'Countermeasures of General Interest' (2002) 13 EJIL 1221, 1222.

94 However, many of these procedures have only rarely (or never) been used as states prefer to use diplomatic means to resolve such disputes: Tams (n 35) 384, 387-8.

As such, even though common interests no longer wholly fall within the realm of domestic jurisdiction,⁹⁵ individual states continue to play an important role in the monitoring and enforcement of these norms. This lends credence to theories which view state sovereignty as a form of trusteeship: given that the international community cannot necessarily act independently of the individual states of which it is comprised, the state 'is required to act as the custodian of the common interest, while the international community has the right to monitor the relevant state's exercise of responsible sovereignty and has the duty to assist'.⁹⁶ As we shall see in later chapters, this also constitutes the main method through which common interests are expressed within cultural heritage law regimes.

2.2.2 Answering to the international community: international human rights law

In the case of human rights, appeals to the common interest of the international community are most often made by recourse to ideals of the inherent dignity of human beings,⁹⁷ such as can be found in the preambles of instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant of Economic, Social and Cultural Rights.⁹⁸ In this sense, international human rights instruments are often put forward as evidence of a trend moving away from bilateralism to common interests in international law, and the broadening of earlier approaches towards protecting common interests which focused on regulatory issues which are by their nature cross-border rather than wholly located within the territory of the state (such as watercourses or transboundary environmental pollution). While the concept of human rights – in particular its use in fora such as the UN Security Council – acknowledges the negative cross-border effects of human rights violations (such as global insecurity),⁹⁹

⁹⁵ Benedek and others (n 35) 225.

⁹⁶ Ibid 224.

⁹⁷ Although as de Feyter points out, human rights treaties are often not framed in the language of 'common interest': Koen de Feyter, 'The Common Interest in International Law: Implications for Human Rights' in Wouter Vandenhoe (ed), *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge 2015) 162-3.

⁹⁸ van Beers, Corrias and Werner (n 32) 7-8. See also the work of Cançado Trindade, who argues that the notion of humanity and respect for human dignity permeates contemporary international law and works as a limiting force over the power of the state: Antônio Augusto Cançado Trindade, 'Some Reflections on the Principle of Humanity in its Wide Dimension' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Elgar 2013); Trindade, *International Law for Humankind* (n 19).

⁹⁹ E.g. UNSC Res 1296 (19 April 2000) UN Doc S/RES/1296; UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674. For an overview of relevant practice, see Vera Gowlland-Debbas, 'The Security Council as Enforcer of Human Rights' in Bardo Fassbender (ed), *Securing*

within human rights regimes proper the core focus is on the moral value of individual human beings (and sometimes, collectives) and their inherent dignity.

In the context of human rights law the term ‘universality’ also possesses a very specific connotation which differs from those surveyed in section 2.1, namely as part of the central proposition that international human rights are universal, indivisible, interdependent and interrelated.¹⁰⁰ To assert the universality of human rights in this context thus denotes the argument that human rights are the same for all human beings, without distinction, and that these rights are indeed universally possessed by all by virtue of one’s humanity;¹⁰¹ ‘it signifies the rejection of the notion of “non-persons” or inferior human beings’¹⁰² which is at the heart of many human rights violations.

This argument has several facets, similarly to the understandings of universality in general international law explored above: it can thus refer to the currently existing legal reality, in which these rights have been accepted by the majority of states through the vehicle of international human rights treaties. However, it can also imply the argument that these legally recognised human rights also carry universal *moral* validity.¹⁰³ It is the latter assertion which has been fiercely contested in practice and scholarship, in particular by those who argue that the phrase ‘universal human rights’ is meaningless, and human rights can only ever develop in culturally-bounded contexts, determined by national origin, religious beliefs, or cultural traditions.¹⁰⁴ Critics of the concept of universal human rights seek to point out the Eurocentric nature of their origin; their respondents have in turn sought to emphasise the global and cross-

Human Rights? Achievements and Challenges of the UN Security Council (Oxford University Press 2011).

100 World Conference on Human Rights, Vienna Declaration and Programme of Action (12 July 1993) UN Doc A/CONF.157/23, para 5. See also UN General Assembly, Report of the Special Rapporteur in the Field of Cultural Rights: Universality, Cultural Diversity and Cultural Rights (25 July 2018) UN Doc A/73/227.

101 Abdullahi A. An-Na’im and Louis Henkin, ‘Islam and Human Rights: Beyond the Universality Debate’ (2000) 94 Proceedings of the American Society of International Law 95, 95-6.

102 Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff 2001) 4. See also Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 HRQ 281.

103 Brems (n 102) 5-9. See also Louis Henkin, ‘The Universality of the Concept of Human Rights’ (1989) 506 Annals of the American Academy of Political and Social Science 10; Donnelly (n 102).

104 Nick Goetschalckx, ‘The Mythic Universality of the Universal Declaration on Human Rights: Revisiting the Drafting History of the UDHR in Search of a Foundational Theory’ in Jan Wouters and others (eds), *Can We Still Afford Human Rights? Critical Reflections on Universality, Proliferation and Costs* (Elgar 2020) 27-8. See also Michael Ignatieff, ‘The Attack on Human Rights’ in Robert McCorquodale (ed), *Human Rights* (Routledge 2003). For a canonical formulation of this view, see e.g. American Anthropological Association, ‘Statement on Human Rights’ (1947) 49 American Anthropologist 539.

confessional origins of the modern international human rights movement.¹⁰⁵ However, these arguments are however beyond the scope of the present work.

As noted above, human rights have undergone a far-reaching process of institutionalisation in which the state is required to answer to the international community – represented either by an assembly of its fellow states or members of expert bodies – for purported human rights violations within its jurisdiction. These legal developments pay tribute to the idea that the protection of human rights is too important to be left to the state alone, thereby transcending the interests of state sovereignty. Thus 2006 saw the establishment of the Human Rights Council under the auspices of the UN Charter; the Council is ‘responsible for promoting universal respect for the protection of all human rights’,¹⁰⁶ *inter alia* through the carrying out of a Universal Periodic Review of all human rights obligations and commitments of the Member States of the UN.¹⁰⁷

The political approach adopted within the Council is supplemented by the work of the numerous Special Procedures established by the Council, as well as the UN human rights treaty bodies and several regional human rights courts. These judicial bodies moreover have jurisdiction to hear complaints brought by individuals with regards to potential human rights violations by states (albeit on the condition of state consent and generally also the requirement of the exhaustion of domestic remedies).¹⁰⁸ In doing so, they circumvent

105 Goetschalckx (n 104) 27-8; Brems (n 102) 8. Cf. Mark Goodale, ‘The Myth of Universality: The UNESCO “Philosophers’ Committee” and the Making of Human Rights’ (2018) 43 *Law & Social Inquiry* 596; Mark Goodale, *Letters to the Contrary: A Curated History of the UNESCO Human Rights Survey* (Stanford University Press 2018).

106 UNGA Res 60/251 (3 April 2006) UN Doc A/RES/60/251, para 2.

107 *ibid*, para 5(e). See e.g. Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press 2015).

108 See e.g. Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR Optional Protocol) art 1; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) UN Doc A/63/435 (ICESCR Optional Protocol) art 1; International Covenant on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (ICERD) art 14; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83 (CEDAW Optional Protocol) art 1; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 22; Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR) art 34; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (IACHR) art 44, 62; Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (adopted 10 June 1993, entered into force 24 January 2004) OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III), art 5(3), 34(6); African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (African Charter) art 55, 56.

the necessity of relying upon states to enforce common interest norms, for example through diplomatic protection, countermeasures of general interest, or the bringing of a claim before inter-state dispute settlement bodies such as the International Court of Justice as a non-injured state.¹⁰⁹ These human rights institutions represent one of the few venues within which individuals have standing to represent their claims before an international judicial body, thereby (theoretically) relativising the central position of the sovereign state within the international legal order.

The nature of human rights obligations has also spurred on a number of normative developments within international law more broadly; these developments posit that the central importance of human rights should change the scope and operation of a number of orthodox international legal norms. Thus the emergence of concepts such as humanitarian intervention and the Responsibility to Protect (R2P) are premised on the importance of protecting human rights, if necessary at the expense of the principle of non-intervention and state sovereignty.¹¹⁰ In certain circumstances it has also been argued that human rights obligations should assume a higher position in the hierarchy of norms: in situations of conflict between human rights and other legal norms, such as the law of state immunity, it is thus argued that human rights should take precedence.¹¹¹ In the realm of secondary norms, it has also been widely argued that the rules of treaty law should operate differently in the realm of human rights, in particular with respect to the rules concerning reservations and treaty interpretation.¹¹² While it is not possible to reflect on the political

109 However, see Longobardo (n 87) for a discussion of the revitalisation of the use of these bilateralist fora to enforce community interests. The recent cases of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*; *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic)*; and *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* are examples in point: the former two cases concern a case brought by a third-party state, whereas the latter saw numerous interventions from third-party states.

110 Although the precise scope of the violations which would permit intervention pursuant to the R2P doctrine remains contested; the 2005 World Summit Outcome Document thus limits the scope of the principle to 'genocide, war crimes, ethnic cleansing and crimes against humanity': 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, para 138. By contrast, the UNSG's 2005 report does include human rights within the scope of R2P: UN General Assembly, In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary General (21 March 2005) UN Doc A/59/2005, paras 132, 135. See also Emma McClean, 'The Responsibility to Protect: The Role of International Human Rights Law' (2008) 13 *Journal of Conflict and Security Law* 123.

111 An argument which was notably rejected in *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)* (Judgment of 3 February 2012) [2012] ICJ Rep 99, para 91.

112 On reservations, see HRC, General Comment No. 24 (4 November 1994) UN Doc CCPR/C/21/Rev.1/Add.6; *Loizidou v. Turkey*, App. No. 15318/89 (1995) para 70. See Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin* (Martinus Nijhoff 1995); R. Baratta, 'Should Invalid Reservations to Human Rights Treaties be Disregarded?' (2000) 11 *EJIL*

and legal intricacies of these developments within the scope of the present work, they can be seen as the normative counterpart of the institutional trends outlined above.

2.2.3 Considerations of humanity: international humanitarian law and international criminal law

Along the same vein as international human rights law, international humanitarian law and international criminal law seek to establish the shared interest of the international community in preventing and punishing certain acts which are considered universally reprehensible (although the philosophical accounts as to *why* this is the case vary widely). Thus humanitarian law is structured around the core idea that states must take note of certain considerations of humanity during wartime, thereby minimising unnecessary suffering.¹¹³ While some degree of disagreement remains with regards to the central position of this principle of humanity – the continued usage of the ‘laws of armed conflict’ as opposed to ‘international humanitarian law’ by certain key actors being illustrative of these underlying tensions¹¹⁴ – provisions stipulating the contours of the principle of humanity are generally considered to constitute rules of customary international law in light of their fundamental nature.¹¹⁵ Certain authors also argue that international humanitarian law,

413; Ineta Ziemele and Lásma Liede, ‘Reservations to Human Rights Treaties: From Draft Guideline 3.1.12 to Guideline 3.1.5.6’ (2013) 24 EJIL 1135. More broadly on the impact of human rights law on the operation of secondary norms of international law, see Menno T. Kamminga and Martin Scheinin, *The Impact of Human Rights Law on General International Law* (Oxford University Press 2009).

113 As embodied, for example, in the Martens Clause: see Tamás Hoffmann, ‘An Eternal Promise? – Three Sketches on the Universality of International Humanitarian Law’ in Enikő Dácz, Cristina Griessler and Kovács Henriett (eds), *Traum von Frieden – Utopie oder Realität?* (Nomos Verlag 2015) 239–40.

114 Ibid 237–8. This point is closely tied to ongoing debate as to the relationship between international humanitarian law and human rights law: see e.g. Anthony E. Cassimatis, ‘International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law’ (2008) 56 ICLQ 623; Noëlle Quénivet, ‘Introduction: The History of the Relationship Between International Humanitarian Law and Human Rights Law’ in Roberta Arnold and Noëlle Quénivet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Brill 2008); Terry D. Gill, ‘Some Thoughts on the Relationship Between International Humanitarian Law and International Human Rights Law: A Plea for Mutual Respect and a Common-Sense Approach’ [2013] Yearbook of International Humanitarian Law 251.

115 E.g. arts 4, 15 of Hague Convention (IV) Respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277; 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 (Geneva Convention IV) Common Article 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entry

with its relatively early development of concepts such as individual criminal responsibility for grave breaches of humanitarian law and establishment of a range of individual procedural and substantive rights can be seen as an early marker of a shift from a purely bilateral international legal system to a field of law shaped by the interests of the international community.¹¹⁶

Similar considerations played a role in the emergence of international criminal courts and tribunals and the new categories of crimes which these institutions were created to adjudicate, such as genocide and crimes against humanity.¹¹⁷ However, in contrast to humanitarian law, international criminal law squarely focuses on the individual – as potential victim and perpetrator – as a subject of international law. In the process, the state generally takes a backseat, underlining the fact that the emergence of international criminal law is not due to any purported cross-border effects of the crimes which it purports to adjudicate, but should instead be seen as a codification of the interests of the international community.¹¹⁸

into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II) preamble. The ‘elementary principles of humanity’ also figure in the jurisprudence of the ICJ: see e.g. *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* (Judgment of 9 April 1949) [1949] ICJ Rep 4, at 22; *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* (Judgment of 27 June 1986) [1986] ICJ Rep 15, paras 79, 218; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 79. See e.g. Kjetil Mujezinovic Larsen, Camilla G Guldahl Cooper and Gro Nystuen (eds), *Searching for a Principle of Humanity in International Humanitarian Law* (Cambridge University Press 2013); Rene Urueña, ‘Deciding What Is Humane: Towards a Critical Reading of Humanity as a Normative Standard in International Law’ in Britta van Beers, Luigi Corrias and Wouter G. Werner (eds), *Humanity Across International Law and Biolaw* (Cambridge University Press 2014) 179; Heike Krieger, ‘Rights and Obligations of Third Parties in Armed Conflicts’ in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018) 449–50.

116 Janina Dill, ‘“The Rights and Obligations of Parties to International Armed Conflicts”: From Bilateralism but Not Toward Community Interest?’ in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018) 433, 439–40.

117 See Christopher MacLeod, ‘Towards a Philosophical Account of Crimes Against Humanity’ (2010) 21 EJIL 281; Luigi Corrias, ‘The Inhuman Stain: Representing Humanity in International Criminal Law’ in Britta van Beers, Luigi Corrias and Wouter G. Werner (eds), *Humanity Across International Law and Biolaw* (Cambridge University Press 2014).

118 The caveat to this statement is that it mainly applies in relation to the ‘core’ international crimes tried by the International Criminal Court, and not necessarily to broader categories of international crime which have been established by treaty (such as drug trafficking) or which can also be tried in domestic courts (such as piracy). See e.g. Christine Schwöbel-Patel, ‘The Core Crimes of International Criminal Law’ in Kevin Jon Heller and others (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press 2018) on the utility of the distinction between international criminal law and transnational criminal law. A further exception is of course also the recent addition to the subject-matter jurisdiction of the ICC, namely the crime of aggression: article 8bis(2) of the Rome Statute defines an ‘act of aggression’ as ‘the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations’: Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute).

Thus the Genocide Convention 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'.¹¹⁹ In its Advisory Opinion on *Reservations to the Genocide Convention*, the International Court of Justice furthermore explicitly stipulated that '[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'.¹²⁰ Similarly, the preamble to the ILC's 2019 Draft Articles on Prevention and Punishment of Crimes Against Humanity recalls that 'throughout history millions of children, women and men have been victims of crimes that deeply shock the conscience of humanity', and that crimes against humanity are 'among the most serious crimes of concern to the international community as a whole'.¹²¹ In its commentary to the Draft Articles, the Commission noted that when acts '[shocking] the conscience of humanity ... because of their gravity, constitute egregious attacks on humankind itself, they are referred to as crimes against humanity'.¹²²

More broadly, the rapidly proliferating international criminal courts and tribunals seek to '[represent] humanity as a whole' and to execute justice in its name.¹²³ Corrias and Gordon further argue that while these institutions claim to represent an already existing humanity with clearly fixed moral aims, they in fact 'call [this global public] into being' through their judgments, and thereby possess an important constitutive function.¹²⁴ Similarly, as Addis argues in relation to universal jurisdiction, international criminal law can be

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

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

121 International Law Commission, 'Draft Articles on Prevention and Punishment of Crimes Against Humanity, with commentaries' (2019) UN Doc A/74/10. The Draft Articles were submitted to the UN General Assembly in 2019; the Sixth Committee subsequently decided in November 2022 to take the matter of a convention on crimes against humanity under consideration in 2023: UN General Assembly, Crimes Against Humanity (14 November 2022) UN Doc A/C.6/77/L.4.

122 Draft Articles on Prevention and Punishment of Crimes Against Humanity (n 121) 24.

123 L. D. A. Corrias and G. M. Gordon, 'Judging in the Name of Humanity: International Criminal Tribunals and the Representation of a Global Public' (2015) 13 *Journal of International Criminal Justice* 97, 98. See also Kai Ambos, 'Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law' (2013) 33 *Oxford Journal of Legal Studies* 293, 314; Nesam McMillan, *Imagining the International: Crime, Justice, and the Promise of Community* (Stanford University Press 2020).

124 Corrias and Gordon (n 123) 98.

seen as a 'process through which the identity of the international community is imagined and enacted'.¹²⁵

In doing so, international criminal law represents a different approach to the notion of the 'universal' than is evident in other areas of international law, such as the law of the commons as discussed below. As the structure of international criminal law is explicitly focused on the *individual* and is indebted to domestic criminal law, the notion of universality is not reflected in the structure of international crimes per se (which is more the case for provisions managing, say, the deep seabed or outer space) but rather the justification for the existence of an international criminal judicial apparatus which, unlike domestic criminal law, is far from self-explanatory.¹²⁶ These justifications can range from the impact of the crime on humanity,¹²⁷ its gravity,¹²⁸ or its impact on international peace and security.¹²⁹

Each of these strands can be seen in the statutes of the respective international courts and tribunals. Thus the preamble of the Rome Statute of the International Criminal Court (ICC) recalls how certain atrocities 'deeply shock the conscience of humanity', and that these crimes moreover 'threaten the peace, security and well-being of the world'. As a result, the goals of the Court are to prevent the impunity of those responsible for 'the most serious crimes of concern to the international community'.¹³⁰ Similarly, in the UN Security Council resolutions which called for the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the Security Council determined that the situation in Yugoslavia and Rwanda respectively '[constituted] a threat to international peace and security', thereby requiring the creation of an international criminal tribunal.¹³¹ As we shall see in the following chapter, this logic is equally evident in the ways that international courts and tribunals

125 Adeno Addis, 'Imagining the International Community: The Constitutive Dimension of Universal Jurisdiction' (2009) 31 HRQ 129, 129.

126 See Ryan Liss, 'Crimes Against the Sovereign Order: Rethinking International Criminal Justice' (2019) 113 AJIL 727; Julia Geneuss and Florian Jeßberger (eds), *Why Punish Perpetrators of Mass Atrocities?* (Cambridge University Press 2020); Margaret M. deGuzman, *Shocking the Conscience of Humanity* (Oxford University Press 2020); Frédéric Mégret, 'The International Criminal Court: Between International *Ius Puniendi* and State Delegation' (2020) 23 Max Planck Yearbook of United Nations Law 161.

127 See Ruti Teitel, *Humanity's Law* (Oxford University Press 2011); Rustam Atadjanov, *Humaneness as a Protected Legal Interest of Crimes Against Humanity: Conceptual and Normative Aspects* (Springer 2019); Liss (n 126) 740-3.

128 deGuzman (n 126).

129 For an overview, see Liss (n 126) 739; deGuzman (n 126) 64.

130 1998 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 5.

131 UNSC Res 808 (22 February 1993) UN Doc S/RES/808; see also UNSC Res 827 (25 May 1993) UN Doc S/RES/827; UNSC Res 955 (8 November 1994) UN Doc S/RES/955.

approach issues of cultural heritage in their judgments concerning the destruction of cultural heritage, such as in the former Yugoslavia and Mali.

2.2.4 The law of the global commons: the law of the sea, space law, international environmental law

Early incarnations of the law of the global commons – in particular international environmental law – focused on minimising cross-boundary damage, embodied within the no-harm principle.¹³² However, the initial concern with minimising such cross-boundary damage eventually morphed into a recognition of the need to protect the environment regardless of state boundaries on the basis of a range of justifications, ranging from the anthropocentric to the intrinsic. This resulted in the growth of international regulation of phenomena which are either wholly internal to state borders, or conversely located in areas beyond national jurisdiction; both areas historically fell outside the scope of international environmental regulation in light of the principle of state sovereignty.¹³³ The following sections will focus on two of the most notable doctrinal developments of universality in the law of the global commons: the common heritage of humankind and the principle of common concern. Both concepts have been widely deployed across a range of legal regimes, such as the law of the sea, space law, and international environmental law.

2.2.4.1 *Common heritage of humankind*

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. Whereas, as noted above, in the case of human rights or humanitarian law universality is generally invoked to justify international regulation, in international environmental law and the law of the sea recourse to universality has concrete consequences for the form of protection employed, particularly in relation to the principle of the common heritage of humankind (CHH).

132 *Trail Smelter (United States, Canada)* (1938, 1941) 3 RIAA 1905, 1965: the Arbitral Tribunal famously held that, ‘under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.’ For more recent jurisprudence, see e.g. *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment of 20 April 2010) [2010] ICJ Rep 14, para 101.

133 For an overview of these developments, see Nico Schrijver, ‘Managing the Global Commons: Common Good or Common Sink?’ (2016) 37 *Third World Quarterly* 1252.

The concept was most famously introduced in 1967 by Maltese ambassador Arvid Pardo in relation to the deep seabed and was rapidly (albeit controversially) endorsed by the General Assembly in 1970 in its Declaration of Principles Governing the Seabed.¹³⁴ The notion had emerged implicitly within the Antarctic Treaty System some ten years earlier; it was also the subject of discussions within the context of the law of the sea in 1958, where it failed to receive support.¹³⁵ It was subsequently codified (albeit with a great deal of resistance from a number of developed states) in the UN Convention on the Law of the Sea (UNCLOS) in 1982.¹³⁶ In parallel developments, it was also applied in relation to the moon and outer space,¹³⁷ and more indirectly to Antarctica.¹³⁸ It is generally argued that the principle of the common heritage of humankind can only be applied in areas beyond national jurisdiction,¹³⁹ although similar invocations of the interests of 'mankind' can be found in

134 Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, UNGA Res 2749 (XXV) (17 December 1970) UN Doc A/RES/2749 (XXV). Although the concept was circulating in various venues at the time (including in relation to the then-developing law of outer space by Armando Cocca), Pardo's declaration is generally viewed as the moment when the principle entered common discourse. On the development of the principle, see M.C.W. Pinto, 'The Common Heritage of Mankind: Then and Now' (2013) 361 *Recueil des Cours de l'Académie de Droit International* 13.

135 Antarctic Treaty (adopted 1 December 1959, entered into force 23 June 1961) 402 UNTS 71 (Antarctic Treaty) arts 1-4. On the Antarctic Treaty System, see Kiss (n 1) 428-9; cf. Jutta Brunnée, 'Common Areas, Common Heritage, and Common Concern' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2012) 563-4. On the law of the sea, see Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997) 216.

136 UN Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 136. See Michael Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind' in Malgosia Fitzmaurice, David M Ong and Panos Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar 2010).

137 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, UNGA Res 1962 (XVIII) (13 December 1963) UN Doc A/RES/18/1962, para 1; 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, entered into force 10 October 1967) 610 UNTS 205 (Outer Space Treaty) art 1; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (adopted 5 December 1979, entered into force 11 July 1984) 1363 UNTS 3, art 11(1) (Moon Treaty). See also Ernst Fasan, 'The Meaning of the Term Mankind in Space Legal Language' (1974) 2 *Journal of Space Law* 125; Kiss (n 1) 431; Duncan French, 'Common Concern, Common Heritage and Other Global(-ising) Concepts: Rhetorical Devices, Legal Principles or a Fundamental Challenge?' in Michael Bowman, Peter Davies and Edward Goodwin (eds), *Research Handbook on Biodiversity and Law* (Elgar 2016) 342.

138 Antarctic Treaty, preamble.

139 Rüdiger Wolfrum, 'The Principle of the Common Heritage of Mankind' (1983) 43 *ZaöRV* 312, 313.

treaty regimes relating to resources within the national jurisdiction of states.¹⁴⁰

While the CHH principle does not necessarily establish humankind as a legal subject, its emergence within international law does indicate that the interests of 'humankind' are not wholly subsumed within the interests of the international community of states: to the contrary, the principle is intended to reflect the aspirations and interests of humankind, broadly conceived as present and future generations of humankind, and thus transcend national self-interest.¹⁴¹ However, 'humankind' cannot – in the current incarnation of international law – act independently of states and international organisations.¹⁴²

There are a number of core elements of the concept of the common heritage of humankind. The first of these is the reservation of the protected area for peaceful use, a principle which can be found in relation to both the deep seabed as well as outer space.¹⁴³ Coupled with the requirement of exclusively peaceful use, the principle also entails the preservation of the protected area for future generations.¹⁴⁴

Invocation of the common heritage of humankind also implies the necessity of international cooperation and common management of the protected resource.¹⁴⁵ Such common management can involve the regulation of the utilisation of the resource by a managing body, as is the case for the International Seabed Authority in relation to the deep seabed and was intended

140 Cottier *et al.* note: 'waterfowl are regarded as "an international resource"; the natural and cultural heritage are "part of the world heritage of mankind as a whole"; the conservation of wild animals is "for the good of mankind"; the resources of the seabed, ocean floor and sub-soil are "the common heritage of humankind"; and plant genetic resources are "a heritage of mankind"': Thomas Cottier and others, 'The Principle of Common Concern and Climate Change' (2014) 52 *Archiv des Völkerrechts* 293, 298-9.

141 Wolfrum, 'The Principle of the Common Heritage of Mankind' (n 138) 318; see also Christopher C. Joyner, 'Legal Implications of the Concept of the Common Heritage of Mankind' (1986) 35 *ICLQ* 190, 195; René Jean Dupuy and Daniel Vignes, *Handbook on the New Law of the Sea*, vol 1 (Martinus Nijhoff 1991) 579-81. Compare Fasan (n 137), who wrote optimistically in 1974 that 'mankind is just undergoing the painful process of becoming a new legal subject of international law' (at 131). Although this idea has not come to fruition in the years since, it does indicate the sense of potentiality which surrounded discussions about the common heritage of humankind in this era (the 1970s and 1980s).

142 Wolfrum, 'The Principle of the Common Heritage of Mankind' (n 138) 318-9.

143 See e.g. art 141 UNCLOS, art 3(1) Moon Agreement. Wolfrum, 'Common Heritage of Mankind' (n 21) para 26; Joyner (n 141) 191-2; Kiss (n 1) 440. Compare Nico Schrijver (n 135) who writes that arguably 'the deep sea-bed has not been completely demilitarized nor reserved for peaceful purposes only' (at 220).

144 Wolfrum, 'Common Heritage of Mankind' (n 20) para 26. As Schrijver (n 135) notes, '[w]hile the Moon Agreement explicitly refers to the interests of future generations, the Law of the Sea Convention does not, nor does it define "mankind". Nevertheless, it would seem to be in line with the spirit of the Convention to include not only present but also future generations as beneficiaries' (at 220).

145 Wolfrum, 'Common Heritage of Mankind' (n 21) para 26; Joyner (n 141) 191-2.

to be the case for the resources of the moon.¹⁴⁶ The tasks of such an international administering body can involve the distribution of rights to exploit the resources of the area or resource.¹⁴⁷

A further element of the common heritage of humankind principle is that of non-appropriation of the area or resources in question.¹⁴⁸ As Alexandre Kiss succinctly describes, 'common space areas would be regarded legally as regions owned by no one, though hypothetically managed by everyone. Sovereignty would be absent, as would all its legal attributes and ramifications.'¹⁴⁹ No entity can thus exercise ownership over an area which has been designated as the common heritage of humankind.¹⁵⁰

A corollary of the principle of non-appropriation – and a particularly controversial element of the common heritage of humankind – is the sharing of benefits amongst all states.¹⁵¹ such benefits can range from the sharing of scientific knowledge of the resource to sharing income derived from its exploitation (for example in relation to the mining of the deep seabed or the exploitation of the resources of outer space).¹⁵² It was this element of the common heritage of humankind principle which was strongly advocated for by proponents of the New International Economic Order (NIEO) during the drafting of UNCLOS; these states viewed benefit sharing 'as a tool to redress the disparities between developing and developed states'.¹⁵³ However, the benefit-sharing principles which were established in UNCLOS underwent significant change with the adoption of the Agreement relating to the Implementation of Part XI in 1994,¹⁵⁴ which paved the way for the widespread adoption of UNCLOS by developed states. The changes made to the UNCLOS regime as

146 Wolfrum, 'Common Heritage of Mankind' (n 21) para 26. In relation to the moon, see art 11(5) Moon Agreement; see also art 137(1)-(2) UNCLOS.

147 Joyner (n 141) 191-2.

148 UNCLOS art 137. See also Schrijver (n 135) 218-9.

149 Joyner (n 141) 191-2.

150 Ibid 194.

151 Wolfrum, 'Common Heritage of Mankind' (n 21) para 26; Joyner (n 141) 191-2; Schrijver (n 135) 220.

152 Joyner (n 141) 191-2.

153 Stéphanie Kpenou, 'Fresh Water as Common Heritage and a Common Concern of Mankind' in Mara Tignino and Christian Bréthaut (eds), *Research Handbook on Freshwater Law and International Relations* (Elgar 2018) 7. However, as Ranganathan points out, developing states were initially not uniformly enthusiastic about applying the idea of the common heritage of mankind to the deep seabed: Surabhi Ranganathan, 'The Common Heritage of Mankind' in Jochen von Bernstorff and Philipp Dann (eds), *The Battle for International Law* (Oxford University Press 2019) 40.

154 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 28 July 1994, entered into force 28 July 1996) 1836 UNTS 3 (Implementation Agreement).

a result of the Implementing Agreement attracted fierce critique from developing countries.¹⁵⁵

Debates surrounding the principles of non-appropriation and benefit sharing illustrate that the ideological landscape of the common heritage of humankind remains highly changeable,¹⁵⁶ in particular between developed and developing states; the latter emphasise the importance of ownership truly being vested in humankind as a whole, with economic benefits of any exploitation also being distributed equitably.¹⁵⁷ A certain degree of uncertainty also remains with regards to the precise scope of the principle: while a number of core elements can be identified, others remain controversial.¹⁵⁸ That being said, the principle has nonetheless become firmly established and has indeed since then also been subject to evolutionary interpretations of its scope which emphasise its place within common interest norms within international law.¹⁵⁹

Ultimately, the concept of the common heritage of humankind was (and remains) 'radical', as it sought 'to move the law from a competitive system that reflected the national interests of powerful states to one that requires global cooperation for the benefit of all humanity'.¹⁶⁰ There have been several attempts since 1982 to apply the concept to a wide range of issues, such as biodiversity, the protection of plant genetic resources, the prevention of climate change, the atmosphere, the protection of marine living resources in areas beyond national jurisdiction, and even cultural heritage, but none has been

155 R.P. Anand, 'Common Heritage of Mankind: Mutilation of an Ideal' in R.P. Anand (ed), *Studies in International Law and History: An Asian Perspective* (Springer 2004) 196. See also Karin Mickelson, 'Co-opting Common Heritage: Reflections on the Need for South-North Scholarship' in Obijiofor Aginam and Obiora Okafor (eds), *Humanizing Our Global Order: Essays in Honour of Ivan Head* (University of Toronto Press 2003) 115; Edwin Egede, *Africa and the Deep Seabed Regime: Politics and International Law of the Common Heritage of Mankind* (Springer 2011) 65-6, who notes that the concept of communal ownership was not alien to African states participating in the drafting of UNCLOS.

156 Kiss (n 1) 438. See also Ikechi Mgbeoji, 'Beyond Rhetoric: State Sovereignty, Common Concern, and the Inapplicability of the Common Heritage Concept to Plant Genetic Resources' (2004) 16 LJIL 821, 826.

157 Joyner (n 141) 193. See also Schrijver (n 135), who notes that 'it could be said that most industrialized nations have preferred to establish an agency which would simply register claims of potential miners, allocate mining sites to them, and collect royalties and taxes', in contrast to the preferred regime of developing states (at 219).

158 Joyner (n 141) 191-2.

159 Karin Mickelson, 'Common Heritage of Mankind as a Limit to Exploitation of the Global Commons' (2019) 30 EJIL 635, 662; see in particular *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber) (Advisory Opinion, 1 February 2011) ITLOS Reports 2011, 10.

160 Prue Taylor, 'The Concept of the Common Heritage of Mankind' in Douglas Fisher (ed), *Research Handbook on Fundamental Concepts of Environmental Law* (Elgar 2016) 306.

successful to date.¹⁶¹ Several commentators have thus noted that the concept 'has gone out of fashion', partly due to its politicisation in the sphere of UNCLOS debates and the championing of the principle by the NIEO.¹⁶² Nonetheless, it has remained a point of reference for discussion in the law of the sea, in particular with the re-emergence of debates surrounding the exploitation of the Area in the 2000s and 2010s,¹⁶³ and the adoption of a legally binding agreement under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.¹⁶⁴

2.2.4.2 Common concern

Because of the stalling of the growth of the common heritage principle, since the 1990s treaties have increasingly had recourse to the principle of common concern.¹⁶⁵ While both the CHH principle and common concern seek to

161 Ibid 306, 311-312, 325; Dire Tladi, 'The Common Heritage of Mankind and the Proposed Treaty on Biodiversity in Areas beyond National Jurisdiction: The Choice between Pragmatism and Sustainability' (2016) 25 Yearbook of International Environmental Law 113, 113-14; Mickelson, 'Common Heritage of Mankind as a Limit to Exploitation of the Global Commons' 637. However, the principle has also been included in the African Charter, article 22(1) of which provides that '[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.' However, the right seems to be 'primarily rhetorical, as Ouguergouz notes: Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff 2003) 332.

162 The 'New International Economic Order'. See Taylor (n 160) 323; Tladi (n 161) 113-14; Kiss (n 1) 437; French (n 137) 341; Brunnée (n 135) 563-4; Nico Schrijver, 'De teloorgang van het Gemeenschappelijk Erfgoed der Mensheid' (1999) 48 *Ars Aequi* 405. However, compare French, who draws attention to the advisory opinion of the ITLOS Seabed Disputes Chamber on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*; he argues that the Chamber 're-envisions' the CHH principle (at 355-6).

163 See e.g. Ranganathan (n 153).

164 UN General Assembly, Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (19 June 2023) UN Doc A/CONF.232/2023/4 (BBNJ Agreement) art 7(b). See Tladi (n 161); Elizabeth M. De Santo and others, 'Stuck in the Middle with You (and Not Much Time Left): The Third Intergovernmental Conference on Biodiversity Beyond National Jurisdiction' (2020) 117 *Marine Policy* 1; A. B. M. Vadrot, A. Langlet and I. Tessnow-von Wysocki, 'Who Owns Marine Biodiversity? Contesting the World Order Through the 'Common Heritage of Humankind' Principle' (2022) 31 *Environmental Politics* 226.

165 See e.g. UNGA Res 43/53 (27 January 1988) UN Doc A/RES/43/53. However, as Cottier *et al.* note, the roots of the principle can be traced back '[a]s early as 1949, [when] tuna and other fish were considered to be "of common concern" to the parties to certain treaties by reason of their continued use by those parties': Cottier and others (n 140) 298. On the nature of common concern as a principle of environmental law, see Friedrich Soltau, 'Common Concern of Humankind' in Kevin R Gray, Richard Tarasofsky and Cinnamon Carlarne (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016) 204.

address the interests of the international community in areas or in relation to resources which transcend national interest,¹⁶⁶ common concern has had greater success in being incorporated into international environmental law, although its use is not necessarily any less controversial in practice than the common heritage principle.¹⁶⁷

Unlike the common heritage of humankind, the notion of common concern is not limited to areas beyond national jurisdiction, and can equally apply within and beyond areas of national sovereignty – precisely those areas which the CHH principle has failed to find application, such as in treaties concerning biodiversity and climate change.¹⁶⁸ Examples of such common concern regimes are the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement,¹⁶⁹ the Convention on Biological Diversity,¹⁷⁰ the International Treaty on Plant Genetic Resources for Food and Agriculture,¹⁷¹ and the 2003 Intangible Cultural Heritage Convention.¹⁷² Authors have argued for a range of additions to the common concern principle, such as forests,¹⁷³ freshwater resources,¹⁷⁴ plant biodiversity,¹⁷⁵ atmospheric degradation,¹⁷⁶ and even the responsibility to protect.¹⁷⁷

166 Bharat H. Desai and Balraj K. Sidhu, 'Climate Change as a Common Concern of Humankind: Some Reflections on the International Law-Making Process' in Jordi Jaria-Manzano and Susana Borrás (eds), *Research Handbook on Global Climate Constitutionalism* (Elgar 2019) 155-6.

167 French (n 137) 342.

168 Brunnée (n 135) 564-5; see also Dinah Shelton, 'Common Concern of Humanity' (2009) 39 *Environmental Policy and Law* 83, 83.

169 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entry into force 21 March 1994) 1771 UNTS 107 (UNFCCC); Paris Agreement (adopted 12 December 2015, entry into force 4 November 2016) 3156 UNTS 79 (Paris Agreement). On the notion of common concern in the climate change regime, see *inter alia* Jutta Brunnée, 'The Global Climate Regime: Wither Common Concern?' in Rüdiger Wolfrum and Holger Hestermeyer (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Brill Nijhoff 2012).

170 Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD).

171 International Treaty on Plant Genetic Resources for Food and Agriculture (adopted 3 November 2001, entered into force 29 June 2004) 2400 UNTS 303.

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

173 Maša Kovic Dine, 'Consequences of the Recognition of Forest Protection as a Common Concern of Humankind for the Anthropocene' in Michelle Lim (ed), *Charting Environmental Law Futures in the Anthropocene* (Springer 2019).

174 See Edith Brown Weiss, 'The Coming Water Crisis: A Common Concern of Humankind' (2012) 1 *Transnational Environmental Law* 153; Kpenou (n 153).

175 Aline Jaeckel, 'Intellectual Property Rights and the Conservation of Plant Biodiversity as a Common Concern of Humankind' (2013) 2 *Transnational Environmental Law* 167.

176 Nadia Sánchez Castillo-Winckels, 'Why "Common Concern of Humankind" Should Return to the Work of the International Law Commission on the Atmosphere' (2017) 29 *Georgetown Environmental Law Review* 131.

The principle of common concern is generally used in situations where 'all states derive common benefits from protective action';¹⁷⁸ it 'stands for the proposition of a shared problem and shared responsibility, and for an issue which reaches beyond the bounds of a single community and state'.¹⁷⁹ The threat in question is often 'marked by [its] gravity and potential irreversibility of impacts',¹⁸⁰ and tends to relate either to harm to humanity (as in the case of intangible cultural heritage) or harm to the global environment (as in the case of climate change).¹⁸¹ As Shelton notes, '[h]arm to a matter of common concern is often widespread and diffuse in origin, making it difficult if not impossible to rely on traditional bilateral norms of state responsibility to enforce international norms'.¹⁸² It is generally argued that it is necessary to employ the common concern principle because 'the very structure of the international legal order is found to be wanting' in relation to the problem at stake.¹⁸³ Many issues of common concern are thus also linked to obligations *erga omnes*; in light of the importance of managing the threat posed by the common concern, such obligations in turn allow non-injured states to act in order to protect the common interest.¹⁸⁴

One of the most important normative consequences of the identification of an issue as common concern is international cooperation,¹⁸⁵ often in the form of an institution established to manage the threat, rather than the establishment of a regime to share benefits as is the case for the CHH principle.¹⁸⁶ As Brunnée notes, while such institutions remain chiefly political creatures, 'they operate within a legal framework ... placing constraint at some level upon impermissible action',¹⁸⁷ as well as facilitating the establishment of non-compliance procedures which foreground the necessity of judicial dispute settlement procedures, reflecting that the interest of states is to facilitate compli-

177 Krista Nakavukaren Schefer and Thomas Cottier, 'Responsibility to Protect (R2P) and the Emerging Principle of Common Concern' in Peter Hilpold (ed), *Responsibility to Protect: a New Paradigm of International Law?* (2014).

178 Brunnée, 'Common Areas, Common Heritage, and Common Concern' (n 135) 564-565. Although, as Shelton notes, '[t]he phrase "common concern of humanity" is rich in implications. As an international law term, it is notable, first for what it does not include, which is a reference to states': Shelton (n 168) 83.

179 Cottier and others (n 140) 301. Importantly, as Shelton notes: 'It is neither biological diversity nor the climate in isolation that are common concerns. It is rather the conservation of biological resources, and climate change and adverse effects therefrom, that are a common concern'. See Shelton (n 168) 85.

180 Soltau (n 165) 207-8.

181 Castillo-Winckels (n 176) 147.

182 Shelton (n 168) 83.

183 French (n 137) 335.

184 Ibid 350; Shelton (n 168) 86.

185 Brunnée, 'Common Areas, Common Heritage, and Common Concern' (n 135) 565-7; French (n 137) 350; Castillo-Winckels (n 174) 147.

186 Soltau (n 165) 206.

187 Brunnée, 'The Global Climate Regime: Wither Common Concern?' (n 169) 730-1.

ance – and thus the prevention of the manifestation of the threat posed by the common concern – rather than punishing non-compliance. These organs ultimately operate within the bounds of state sovereignty, but are structured in such a way ‘as to maximize opportunities for collective action’.¹⁸⁸ Furthermore, while the participants in these cooperative mechanisms are normally limited to states, participation in the management of the common concern will ideally also involve non-state actors at all levels.¹⁸⁹ This broad degree of participation reflects that the common concern is indeed ‘common’ in the broadest sense of the term, extending beyond the interests of states to humanity as a whole (although numerous scholars draw into doubt whether such broad participation is actually achieved meaningfully in practice).¹⁹⁰

Unlike the principle of common heritage, the use of the common concern principle generally does not imply specific obligations for states,¹⁹¹ rather operating in such a manner that ‘it signals that states’ freedom of action may be subject to limits even where other states’ sovereign rights are not affected’.¹⁹² As Cottier *et al.* argue, the principle ‘implies an agreement to recognise the very existence of a shared problem. Such recognition does not yet entail per se an obligation to act upon the problem’.¹⁹³ Instead of undermining state sovereignty, the principle thus legitimises ‘international interest in the conservation and use of the resource’.¹⁹⁴ That being said, some authors argue that it is possible to attach certain substantive implications to the identification of an issue as common concern, such as the precautionary principle, the no harm principle, the principle of sustainable development, the principle of common but differentiated responsibilities, and the principle of intergenerational equity.¹⁹⁵

In recent years the principle of common concern has failed to continue to secure the support of states following initial enthusiasm in the 1990s in light of the fact that its substance remains unsettled.¹⁹⁶ However, as some authors note, in some ways it is exactly this normative indeterminacy which constitutes its strength. As French notes, ‘common concern was chosen precisely to avoid

188 Ibid 728.

189 Werner Scholtz, ‘Greening Permanent Sovereignty through the Common Concern in the Climate Change Regime: Awake Custodial Sovereignty!’ in Oliver C. Ruppel, Christian Roschmann and Katharina Ruppel-Schlichting (eds), *Climate Change: International Law and Global Governance*, vol 2 (Nomos 2013) 206.

190 Shelton (n 168) 86; see also Kovic Dine (n 173) 101.

191 French (n 137) 354; Brunnée, ‘The Global Climate Regime: Wither Common Concern?’ (n 169) 723; Alexandre Kiss, ‘The Common Concern of Mankind’ (1997) 27 *Environmental Policy and Law* 244, 246.

192 Brunnée, ‘Common Areas, Common Heritage, and Common Concern’ (n 135) 565-7; see also Cottier and others (n 140) 302.

193 Cottier and others (n 140) 301.

194 Ibid 307-308; see also Schefer and Cottier (n 177) 129; Shelton (n 168) 85.

195 Castillo-Winckels (n 176) 144; Kovic Dine (n 173) 101.

196 Castillo-Winckels (n 176) 132-133.

raising the spectre of (direct) international interference ... it generates global interest, and thus removes the conceit of an exclusive domestic domain'.¹⁹⁷ As such, seeing the principle in a negative light – a weaker alternative to the common heritage of humankind – would be to miss the mark, as 'its potential to raise challenges to the established legal order is highly significant'.¹⁹⁸ By facilitating the interest of the international community in issues that would under normal circumstances be considered to fall within the sovereignty of the territorial state, the common concern principle thereby establishes limits on the exercise of this sovereignty – and perhaps even redefining the nature of sovereignty itself in such a manner that the state is considered as a trustee of the issue which constitutes a common concern.¹⁹⁹

2.3 THE STATE AS THE SOLE ARBITER OF COMMON INTERESTS?

2.3.1 The regulation of the protection of common interests in international law

The starting point of this chapter was the concept of universality, defined as the process whereby international legal instruments designate certain regulatory issues as being subject to the common interest of the international community. The chapter set out to answer how international law regulates the protection of these common interests, viewed through the twin lenses of legal doctrine and positive law.

As can be seen in the previous section, notions of common interest have influenced the development of international law over the course of the twentieth and twenty-first centuries. An ever-growing number of international treaties draw upon the language of universality, invoking concepts such as the 'international community'; 'common', 'community' or 'universal interest'; 'common concern'; or the 'common heritage of humankind'. In certain situations, the identification of a given regulatory issue as being subject to the common interest of the international community has concrete consequences both at the level of primary and secondary norms. With regards to the latter, norms protecting the common interest are frequently identified as *jus cogens* norms or obligations *erga omnes* and are sometimes subject to differential regimes with respect to the invocation of state responsibility or the application of the rules concerning reservations or treaty interpretation.

197 French (n 137) 343-4.

198 Ibid 356.

199 Ben Boer, 'Land Degradation as a Common Concern of Humankind' in Federico Lenzerini and Ana Filipa Vrdoljak (eds), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature* (Hart 2005); Jaeckel (n 175) 187; Kiss, 'The Common Concern of Mankind' (n 189); Cottier and others (n 140) 304.

It is particularly with reference to the law of the global commons that identification of a given issue as a common interest leads to consequences at the level of the primary norms adopted, with the concepts of the common heritage of mankind and common concern being prime examples. In the case of the principle of common concern the main consequence is that the need for international cooperation is explicitly identified as one of the core parameters which should define the further development of the law; by contrast, in the case of regimes drawing upon the principle of the common heritage of humankind there are also a range of limitations imposed upon the use of the resource or area. The resource or area is thus reserved for peaceful use and cannot be appropriated by individual states; moreover, it is not only subject to international cooperation but also frequently common management and benefit-sharing mechanisms.

In certain situations, the identification of a common interest also has institutional consequences, such as the creation of an international court or tribunal, the possibility of individual complaints mechanisms, the creation of a management body which is wholly independent from states, or – most frequently – the joint management of the issue through an assembly of States Parties which is transparent to the public at large and which provides methods of participation for certain types of non-state actors, such as NGOs. The idea behind the creation of these institutions is the view that the common interest in question is either too important to be left to the supervision of the state alone, or is of such a nature that its management inherently crosses borders and thereby requires an international approach.

2.3.2 A tension between the form and function of common interest regimes

However, these developments have been accompanied by their own tensions, most prominently the mismatch between the central organising principles of the international legal order – which remain chiefly bilateralist in nature – and the goals articulated by many of these new common interest regimes.²⁰⁰ As such, the expansion of international legal norms focused on the protection of common interests has been matched by the emergence of numerous doctrinal accounts developed by scholars grappling with the notion of universality. At their core, these arguments are concerned with the tensions implied by the shift of international law from ‘coexistence to cooperation’ and the idea that the tools with which international law is equipped remain wanting in order to achieve these goals, in light of the ‘incomplete’ nature of the international

200 As Schrijver, ‘Managing the Global Commons: Common Good or Common Sink?’ (n 133) notes in relation to regimes established for the protection of common goods, these regimes frequently suffer from a ‘lack of effective supervisory mechanisms’ and the ‘absence of a coherent and compulsory peaceful dispute-settlement system’: 1261.

legal system and the continued operation of state sovereignty and state consent as guiding principles within that system.

More broadly, this has been described as a 'tension between [the] form and function' of treaties concluded in the pursuit of global, rather than bilateralist interests.²⁰¹ Whereas treaties are often dependent on mechanisms of reciprocity to ensure performance of their obligations – such as the suspension of obligations or the taking of countermeasures – these mechanisms are less successful in ensuring compliance with community norms. A similar tension emerges with respect to the bilateralist nature of many international dispute settlement mechanisms.²⁰² While some developments have occurred which counter this trend (such as the emergence of new institutions or *jus cogens* and *erga omnes* outlined above), these developments often remain piecemeal. The following quote by Antonio Cassese is particularly evocative in this regard:

The great promises heralded in the 1960s and 1970s – the upholding of forward-looking notions such as obligations *erga omnes*, "obligations owed to the international community as a whole", *jus cogens*, the aggravated responsibility of states, the common heritage of mankind, the right to development – have remained unfulfilled ... It is as if states, after much discussion and interminable polemics on its placement and configuration, had built a magnificent skyscraper, provided it with an entrance, floors, stairs, lifts, fully furnished rooms, and even vases full of freshly cut flowers, and then left the building empty, for nobody dares to enter and live there.²⁰³

This tension also emerges with respect to the examples of universality discussed in the second section. While notions of common interest have influenced the development of international law over the course of the twentieth and twenty-first centuries, questions remain about the extent to which international law has developed in such a way as to truly change the central role of state sovereignty within public international law in the guaranteeing of common interests.²⁰⁴ Quite to the contrary, the majority of these developments function

201 Brölmann, 'Law-Making Treaties: Form and Function in International Law' 386 (n 62); Brölmann, 'Typologies and the "Essential Juridical Character" of Treaties' (n 73) 386. See also Thin (n 28) 54-5.

202 André Nollkaemper, 'International Adjudication of Global Public Goods: The Intersection of Substance and Procedure' (2012) 23 EJIL 769, 771.

203 Antonio Cassese, 'Soliloquy' in Paola Gaeta and Salvatore Zappalà (eds), *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (Oxford University Press 2008) lxvii-iii.

204 Benedek and others (n 35) 221; Villalpando (n 23) 401-10. See also McCreath, who notes (with respect to the protection of the marine environment within national jurisdiction) that the identification of a given issue as a community interest '[does] not necessarily give rise to binding legal obligations for States' and 'does not change the character of the primary obligation by which the [State] was already bound': Millicent McCreath, 'Community

within the realm of state sovereignty; perhaps redefining its scope – expanding the reach of international interest into issues previously considered to fall wholly within the realm of domestic jurisdiction, or reconfiguring the state as a trustee exercising its sovereignty on behalf of present and future generations of humankind – but never fully undermining its existence.²⁰⁵ Certain conceptions of the common interest within international law are thus in fact centrally derived from the interests of the international community, *as represented by individual state governments*, in which states are perceived as the custodians of the common interest.²⁰⁶ That this should be the case is perhaps only logical, in light of the fact that these principles have been developed by states themselves and a viable alternative to their central role in international governance has yet to be developed.²⁰⁷

However, there are nonetheless still valid reasons to question the current system and the dominant role of states therein – particularly when held against the light of the universalist goals which states themselves have formulated through the vehicle of international law. As Graf notes, there is reason to be wary of universalist language in international law as a ‘normative corrective to the state’, precisely ‘because arguments for the enforcement of mankind’s universal law can easily entail arguments for the solidification of the sovereign state’,²⁰⁸ rather than the protection of other actors who are intended to be the ultimately beneficiary of common interest norms.²⁰⁹ In a manner that is comparable to the functioning of the concept of ‘public interest’ in domestic law,²¹⁰ the invocation of common interests in public international law often functions as a trump card over other interests.²¹¹ The main difference in the case of international law, however, is that there is no corresponding institutional apparatus to challenge ‘false’ invocations of the common interest (as would be the case in many domestic political systems, where the executive is required to answer to the legislative and judiciary); the tension between

Interests and the Protection of the Marine Environment within National Jurisdiction’ (2021) 70 ICLQ 569, 600-1.

205 Cottier and others (n 140) 304; Scholtz (n 189) 202; Schrijver (n 133) 1259.

206 de Feyter (n 97) 160. With regards to the legitimacy of the state in this regard, Benvenisti sees ‘sovereigns as key venues for policymaking’, instead calling for a ‘reinterpretation’ of sovereignty which ‘retains the state as an important democratic venue for exercising personal and communal self-determination’: Benvenisti (n 21) 300.

207 French (n 137) 340.

208 Sinja Graf, *The Humanity of Universal Crime: Inclusion, Inequality, and Intervention in International Political Thought* (Oxford University Press 2021) 173.

209 Benvenisti writes how ‘[m]any international organisations have functioned to further disempower diffuse domestic electorates by expanding the executive power of powerful States and increasing the leverage of multinational corporations’: Eyal Benvenisti, *The Law of Global Governance* (Brill 2014) 18.

210 Vaclav Janeczek, ‘Three Problematic Assumptions about Public Interests in Law’ in Luboš Tichý and Michael Potacs (eds), *Public Interest in Law* (Intersentia 2021) 75.

211 Thin (n 28) 41-2.

‘form and function’ outlined above. While the emergence of common interest regimes and the rise of the language of universality in international law thus appears to present a challenge to the central position of state sovereignty in the international legal order, in many situations these regimes in fact solidify the position of the state within that order.²¹²

In light of the state’s privileged role as the sole international legal person with ‘complete’ international legal personality, the state not only becomes the arbiter of what is identified as a common interest, but often also of which methods of protection are adopted in the name of this common interest. What’s more, given that many common interest regimes are focused on cooperation and facilitating state action – rather than punishing non-compliance – the state is subsequently often not subjected to an independent assessment of its implementation of the chosen methods of protection. The excesses of universalist rhetoric are thus often left unchecked in situations where there is a mismatch between the ‘form and function’ of a given common interest regime. This tension can be illustrated with respect to a number of examples from the regimes discussed in the chapter, which illustrate how the empowerment of the state by the emergence of common interests has packed out badly, particularly for non-state actors.

In relation to the law of the global commons, some authors have thus highlighted that the practical application of principles such as the common heritage of humankind and common concern often remain wanting, particularly if viewed from their ability to protect the interests of concrete communities of individuals. Scholars have further pointed out that common interest principles, in particular the common heritage of humankind, have fallen short in their promise towards achieving genuine economic equality.²¹³ In the context of the management of the Area by the International Seabed Authority, Feichtner thus points out that while this system appears to be beneficial for small developing states, the concrete benefits of the regime for the individual citizens of these states remain elusive. Despite this fact, ‘justifications of the expansion of resource extraction [of the deep seabed] frequently invoke the notion of benefits to humanity as a whole,’²¹⁴ a promise which they do not seem to be able to fulfil. Ranganathan similarly argues that the disadvantageous effects of apparently universal forms of law justified on the basis of common benefit are shrouded through the use of the international legal form, where ‘takings

212 Ukri Soirila, *The Law of Humanity Project: A Story of International Law Reform and State-Making* (Hart Publishing 2021) 14, 150.

213 See e.g. Surabhi Ranganathan, ‘Seasteads, Land-grabs and International law’ (2019) 32 LJIL 205; Isabel Feichtner, ‘Mining for Humanity in the Deep Sea and Outer Space: The Role of Small States and International Law in the Extraterritorial Expansion of Extraction’ (2019) 32 LJIL 255; Mickelson, ‘Co-opting Common Heritage: Reflections on the Need for South-North Scholarship’ (n 155) 116.

214 Feichtner, ‘Mining for Humanity in the Deep Sea and Outer Space: The Role of Small States and International Law in the Extraterritorial Expansion of Extraction’ (n 213) 269.

come disguised as givings, expulsions as inclusions, private gains as global solutions'.²¹⁵ Similar dynamics are often at play in other environmental regimes, particularly those creating protected areas.²¹⁶

Comparable critiques are levied at fields such as international criminal law, which heavily draw on ideals of universal humanity: thus McMillan argues that the transactional nature of international criminal law results in the law focusing overtly on the harm caused to actors such as the international community, rather than the harm to individual human beings who lie at the heart of these crimes. In other words, 'the international significance of certain crimes is not found in the local and lived – that is, it is not understood as emanating from the significance of particular lives, people, and their experiences'.²¹⁷ These local harms are appropriated by international criminal law: 'a harm or event becomes international through its refiguring as somehow belonging elsewhere and to others,'²¹⁸ an act irrevocably embedded in existing global-local power dynamics. Simultaneously, the offenders of international criminal law are cast as offending against humankind,²¹⁹ dividing the globe 'into those contravening mankind's law and those complying with it'.²²⁰ By invoking humankind, international criminal law broadens the scope of who can respond to infringements of the law, '[casting] claims to universal crimes as the authorisation to act coercively in political spaces far away',²²¹ yet very rarely in centres of power in the Global North.

More broadly, scholars have expressed doubts with regards to the possibility of identifying and protecting common interests within the international community without thereby falling victim not only to existing power relationships within the international community as a whole, but also between majority and minority communities within individual states.²²² They point towards the fact that community-making implies the drawing of boundaries between 'insiders' and 'outsiders', raising the question who is excluded from the 'universal' international community.²²³ According to this line of thinking, 'universalism at once obscures and legitimizes the particular interests that drive

215 Ranganathan, 'Seasteads, Land-grabs and International law' 214 (n 213); Surabhi Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary' (2019) 30 EJIL 573, 577, 597-8.

216 See e.g. Federica Cittadino, *Incorporating Indigenous Rights in the International Regime on Biodiversity Protection* (Brill Nijhoff 2019); Marie-Catherine Petersmann, *When Environmental Protection and Human Rights Collide* (Cambridge University Press 2022).

217 McMillan (n 123) 6-7.

218 Ibid 6-7.

219 Graf (n 208) 2-3.

220 Ibid 3.

221 Ibid.

222 Benedek and others (n 35) 220; Martti Koskeniemi, 'Projects of World Community' in Antonio Cassese (ed), *Realizing Utopia* (Oxford University Press 2012); Ayça Çubukçu, 'Thinking against Humanity' (2017) 5 London Review of International Law 251.

223 Conklin (n 10) 137; Graf (n 208) 172.

the operation of international law.²²⁴ Scholars working in this tradition argue that this requires us to turn our attention to the political projects which are authorised through the invocation of universal international law, in order to examine whether and how this invocation ‘goes hand in hand with claims to hierarchy and legitimate coercion in world politics’,²²⁵ and to question the neutrality that is implied by the nature of speaking on behalf of the ‘universal’.²²⁶ A particular dilemma which faces scholars from traditions such as TWAIL and critical legal theory is thus whether the universalist modes of reasoning predominantly employed within international law are fundamentally flawed, or whether they can also be used for counterhegemonic purposes.²²⁷

A final core element of the critique of common interest regimes circles around the role of actors other than states in both the identification of common interests and decision-making processes with regards to these interests, coupled with the backlash against international organisations in the context of denials of justice resulting from actions either undertaken directly by the international organisation or by individual states implementing its decisions.²²⁸ Many authors have thus called for the inclusion of more and other stakeholders than the state in international governance, such as individuals.²²⁹ They point out that ‘while international law is no longer created only for States, it remains largely – at least in formal law-making channels – created by States.’²³⁰ A chief concern in this regard is the fact that decision-making procedures in international organisations are often not embedded within the same safeguards as is the case for public institutions at the national level,²³¹ with an attendant call to subject these organisations to the same checks and balances as, for

224 Gordon (n 9) 865.

225 Graf (n 207) 171.

226 Koskeniemi (n 222) 9-10; Benedek and others (n 35) 225-6; Ranganathan, ‘Ocean Floor Grab: International Law and the Making of an Extractive Imaginary’ (n 215) 597. For a concrete example in relation to children’s rights, see Noam Peleg, ‘Illusion of Inclusion: Challenging Universalistic Conceptions in International Children’s Rights Law’ (2018) 24 Australian Journal of Human Rights 326, 326.

227 Martti Koskeniemi, ‘Legal Universalism: Between Morality and Power in a World of States’ in Sinkwan Cheng (ed), *Law, Justice, and Power: Between Reason and Will* (Stanford University Press 2004) 48; Sundhya Pahuja, ‘The Postcoloniality of International Law’ (2005) 46 Harvard International Law Journal 459; Gordon (n 9) 877; Jouannet (n 9) 397. Cf. Pierre-Marie Dupuy, ‘Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskeniemi’ (2005) 16 EJIL 131, who argues that ‘[e]xamples abound of ... universal concepts being hijacked in support of aims that are anything but ... [However], the instrumentalization of law is not a European specialty. It is inherent to its social use’ (at 133-4).

228 Rishi Gulati, *Access to Justice and International Organisations* (Cambridge University Press 2022) 1-2.

229 de Feyter (n 97) 184.

230 Samantha Besson, ‘Ubi Ius, Ibi Civitas: A Republican Account of the International Community’ in Samantha Besson and J.L. Martí (eds), *Legal Republicanism: National and International Perspectives* (Oxford University Press 2009) 210-11.

231 Ibid 206-7.

example, domestic administrative agencies.²³² This critique, chiefly represented by authors within the Global Administrative Law tradition, accordingly places great emphasis on procedural legitimacy as a way of securing justice for non-state actors affected by international governance.²³³ In response to this critique, a range of legal instruments have been developed which emphasise the importance of the participation of affected groups and individuals in decision-making processes concerning the management of common interests, some of which will be discussed in Chapter 6.²³⁴

2.3.3 The 'humanisation' of international law

Precisely how to adequately protect common interests in a legal system which remains centred around states has also formed a central line of thought in the work of a range of scholars interested in the 'humanisation' of international law.²³⁵ These scholars seek to answer the question 'how a community interest of all individuals can be articulated through, and against, a structure of international law designed to accommodate the interests of States as such,'²³⁶ rather than common interests, particularly if the territorial state (wilfully) neglects its custodial role.²³⁷ On the one hand, they argue that public international law has undergone a transformation, in which the state is variously reconfigured as a trustee of common interests,²³⁸ or wholly transformed in such a manner that state sovereignty should be seen as subservient to the interests of humanity.²³⁹ On the other hand, they emphasise that the role of non-state actors looms ever larger; the international legal system is thus no longer wholly predicated around states as the sole legal persons who play

232 Benvenisti, *The Law of Global Governance* (n 209) 16-7.

233 Ibid 22. Although, as Benvenisti points out, 'the emphasis on the proper procedure for decision-making in global governance bodies is [not] a panacea ... the temptation to hide power in the cracks of the rules of procedure is very hard to resist and to thwart': ibid 23-4.

234 See ibid at 158 and further; Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016) 492.

235 See e.g. Simma, 'From Bilateralism to Community Interest' (n 3); Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff Publishers 2006); Antonio Cassese, *Realizing Utopia* (Oxford University Press 2012); Trindade, *International Law for Humankind* (n 19). For an overview of these arguments, see Tzevelekos (n 32); Soirila (n 212) 11, 17. For uses of the phrase 'humanisation' by critical scholars, see e.g. Hani Sayed, 'The Humanization of the Third World' in Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds), *Bandung, Global History, and International Law* (2017) 434.

236 Kingsbury and Donaldson (n 31) 81.

237 Benedek and others (n 35) 225-6; Villalpando (n 23) 409-10.

238 Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (n 21); Benedek and others (n 35) 194.

239 Anne Peters, 'Humanity as the A and Û of Sovereignty' (2009) 20 EJIL 513; Trindade, *International Law for Humankind* (n 19) 637-40.

a role in the creation, elaboration, and enforcement of international law.²⁴⁰ A central element of this trend is the emergence of the international legal personality of the individual as a bearer of rights and obligations under international law.²⁴¹ The figure of the 'human' thus assumes a central role on the stage of international law, with the influence of the state diminishing or becoming radically reconfigured.²⁴²

The theoretical discussion surrounding the purported humanisation of international law often straddles the boundary between *lex lata* and *lex ferenda*. On the one hand, the argument goes that the structure of public international law has already been radically changed from its earlier incarnations, with reference to developments such as *erga omnes* and *jus cogens*, or the emergence of fields such as ICL and IHRL, or the impact of human-rights inspired changes in fields such as treaty law, the law of immunities, diplomatic protection, and state responsibility.²⁴³ Some scholars in particular argue that the influence of human rights is radiating out and impacting all areas of international law.²⁴⁴ However, others point out that these arguments are rejected just as frequently as they are accepted,²⁴⁵ and that sovereignty remains a central organising principle of the international legal order.²⁴⁶ Thus, on the other hand, the second group of humanisation scholars insists that while international law might still be centred around state sovereignty, the emergence of human rights norms and the growing centrality of the individual presents an important agenda for the future development of the law.²⁴⁷ Human rights

240 Robert McCorquodale, 'An Inclusive International Legal System' (2004) 17 LJIL 477; Meron (n 235) xv.

241 Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (n 234) 58, 526, 551-2; Benedek (n 31) 186.

242 Soirila (n 212) 11.

243 Trindade, *International Law for Humankind* (n 19) 640; Menno T. Kamminga, 'Final Report on the Impact of International Human Rights Law on General International Law' in Menno T. Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford Academic, Oxford University Press 2009) 22.

244 Trindade, *International Law for Humankind* (n 19); Kamminga (n 243); Peter-Tobias Stoll, 'A "New" Law of Cooperation: Collective Action across Regimes for the Promotion of Public Goods and Values versus Fragmentation' in Massimo Iovane and others (eds), *The Protection of General Interests in Contemporary International Law* (Oxford University Press 2021) 328.

245 Massimo Iovane, 'Conflicts Between State-Centred and Human-Centred International Norms' in Riccardo Pisillo Mazzeschi and Pasquale De Sena (eds), *Global Justice, Human Rights and the Modernization of International Law* (Springer 2018); Soirila 11, 14, 150.

246 Nehal Bhuta, 'The Role International Actors Other Than States Can Play in the New World Order' in Antonio Cassese (ed), *Realizing Utopia* (Oxford University Press 2012).

247 Tzevelekos (n 32) 75; Gaja (n 3) 45; Cassese, 'Soliloquy' (n 203) lxvii-iii; Antonio Cassese and Luigi Condorelli, 'Is Leviathan Still Holding Sway over International Dealings?' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford Academic, Oxford University Press 2012); Antonio Cassese, 'Gathering Up the Main Threads' in Antonio Cassese (ed), *Realizing Utopia* (Oxford University Press 2012) 653; Simma, 'From Bilateralism to Community Interest' (n 3) 230-4, 249.

and dignity are assumed to be central concepts in this regard.²⁴⁸ The practical counterpart of the humanisation debate is thus a broader discussion within numerous international legal regimes on the promotion of human rights-based approaches to international law.²⁴⁹ Human rights are posited as (at least part of) the answer to the problems created by the tension between international law's commitment to common interests and the determination of its structure by state sovereignty, although these proposals have certainly not gone without critique.²⁵⁰

It is against this theoretical background – a concern with the predominant role of state sovereignty and the mismatch between 'form and function' in the governance of common interests, the impact of the invocation of universalist ideas at the local level, and the debate on procedural legitimacy and the diversification of stakeholders in international law – that this dissertation is situated. As we will see in Chapter 5, similar tensions can also be identified with respect to the workings of universality in cultural heritage law. These tensions force us to question and be attentive to the impact of universalist invocations in international law, not only at the global level between more or less powerful states, but also at the local level, where the invocation of the universal through the vehicle of international law can override local concerns. The current state of affairs thus raises the question: how can we identify what constitutes the common interest of the international community with regards to cultural heritage? Who has the authority to decide upon their identification and subsequent methods of protection? And what is the role of actors other than states in these processes?

The subsequent chapters of this dissertation shall seek to place cultural heritage law within the broader landscape sketched above: the proliferation of common interest regimes and the use of the language of universality therein (Chapter 3); the continued role of the state within these regimes and the tensions between their form and function (Chapter 4 and 5), and the proposals being made to diversify the actors involved in the identification and management of common interests (Chapter 6). It argues that it is useful to view the tensions faced within cultural heritage law alongside these parallel developments within international law at large. The final chapter (Chapter 7) will subsequently return to the humanisation thesis – as well as broader critiques on the predominance of state sovereignty in the enforcement of common interests in international law outlined above – asking whether it is appropriate to apply it in the context of cultural heritage law, thereby reflecting on the

248 Soirila (n 212) 11; Trindade, *International Law for Humankind* (n 19) 637–40; Benedek (n 31) 190; Cassese, 'Gathering Up the Main Threads' (n 247) 653.

249 See e.g. UN General Assembly, 'Renewing the United Nations: A Programme for Reform' (14 July 1997) UN Doc A/51/950 (on the mainstreaming of human rights in the work of the UN).

250 E.g. from critical legal scholars who question the liberatory potential of human rights.

role of universality within cultural heritage law and its future. In doing so, it seeks to draw upon lessons learned from developments in a range of international legal regimes, particularly focusing on principles relating to the participation of individuals and local communities in decision-making processes.

As has been sketched in the previous chapter, notions of universal or common interest are commonplace in public international law. However, the wealth of this practice hides a diversity of approaches (and doctrinal consequences) across international legal regimes.¹ This chapter examines the legal genealogy of the concept of 'universal importance' within cultural heritage law across time, inquiring whether cultural heritage law should be seen as a common interest regime similar to those examined in the previous chapter. The chapter thus seeks to answer the question: how have cultural heritage regimes invoked ideas of universality over time? In doing so, it establishes how the international community has exerted its influence over cultural heritage across the globe through the vehicle of public international law. It will seek to place these developments within the broader trends of universality sketched in the previous chapter.

The present chapter charts the – successful and unsuccessful – 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 the context of UNESCO leading to the adoption of the 1954 Hague Convention, the 1970 Convention for the Fight Against the Illicit Trafficking of Cultural Property, the 1972 World Heritage Convention, the 2001 Underwater Cultural Heritage Convention, and the 2003 Intangible Cultural Heritage Convention.² The section concludes by providing a brief overview of parallel developments, including the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions, international criminal law, international human rights law.

While later chapters will primarily focus on the implementation of the 1972 and 2003 Conventions, it is important to also follow the development of invocations of universality in earlier and later cultural heritage conventions. This is in light of their commonalities and the self-referential character of the

* Sections of the present chapter have been published in Sophie Starrenburg, 'The Genealogy of the Concept of "Universality" within Cultural Heritage Law', in Amy Strecker and Joseph Powderly (eds), *Heritage Destruction, Human Rights and International law* (Brill 2023).

1 Isabel Feichtner, 'Community Interest' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2007), para 5.

2 The chapter thus focuses on intergovernmental attempts to protect cultural heritage; 'soft law' guidelines adopted by professional organisations such as ICCROM and ICOMOS are thus not considered.

course of these developments. It is thus difficult to understand the emphases placed in conventions such as the 1972 and 2003 Conventions without situating them in the context of the broader development of the legal regime of cultural heritage law. It is for this reason that this chapter also explores the invocations of universality in conventions such as the 1954 Hague Convention, the 1970 Convention, and the 2001 Underwater Cultural Heritage Convention.

This collection of legal instruments is unique in light of their shared object of interest and institutional setting; each of the conventions was drafted within UNESCO, some even being drafted concurrently. Whilst each of the conventions was developed to respond to a particular social problem, a number of important commonalities remain. Examining these conventions as a group and emphasising their commonalities, rather than their differences, thus presents a clear added value. As noted in the introduction, several authors have adopted such a holistic approach, emphasising that it is possible to speak of an emerging body of law with a set of shared principles: cultural heritage law.³ The present chapter seeks to contribute to this discussion by adopting a transversal approach to the concept of 'cultural heritage of humankind' and the invocation of the universal importance of cultural heritage. In doing so it seeks to establish why international law seeks to protect cultural heritage, and where the line is drawn as to which forms of heritage it will protect.

These five conventions were also marked by the extensive involvement of expert drafters, including non-legal experts, in the early stages of the drafting process. Nonetheless, as this chapter seeks to demonstrate, the involvement of states in the development of the conventions – not only during drafting, but also after adoption, remains the defining element of the development of the treaty texts. The majority of the conventions surveyed are monitored by (more or less) regular meetings of the States Parties, which discuss the implementation of the conventions and adopt and revise their operational guidelines. It is this continued revision and expansion of the conventions through these institutional frameworks which can lead one to characterise them as 'living instruments', the interpretation of which develops over time in the sense intended by article 31(3)(a)-(c) of the Vienna Convention on the Law of Treaties (VCLT).⁴ This development over time will be tackled in the next chapter, which focuses on the evolution of protection mechanisms for cultural heritage in the context of these five instruments.

The chief focus of the present chapter is on the development of notions relating to the purported 'universal importance' of cultural heritage over time. What follows is thus not so much an exercise in the legal interpretation of the cultural conventions of UNESCO, as the tracing of the reactions of states within a fixed institutional setting to proposals regarding the universal character of

3 See Section 1.3.2 of the introduction.

4 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT). See further Section 1.4 of the introduction.

cultural heritage and the protection thereof. It is at the moment of codification that states are confronted with the basic question as to whether an issue is ripe for international protection, and the most suitable manner in which to shape this protection. As such, the chapter explores the drafting histories of these cultural conventions, whilst taking into consideration that the use of *travaux préparatoires* remains supplementary to the general rule of interpretation in the Vienna Convention on the Law of Treaties.⁵ This approach will be supplemented in later chapters with an analysis of the methods of protection adopted in the respective conventions, and their development and implementation over time (Chapter 4), as well as their shortcomings in practice when viewed through the lens of individual and local community interests (Chapter 5).

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 mix between optimism and prevention of future cultural destruction which lay at the heart of the foundation of UNESCO in 1946, with its goal to 'build peace in the minds of men' through culture.⁶ Changes within this approach can be ascribed, in some situations, to the changing composition of international society, and in particular the expanding state membership and politics of UNESCO.⁷ This chapter argues that the use of universality within the regime of cultural heritage law illustrates the interdependence between the concepts of particularity and universality within international legal argumentation, and the tensions that result from this paradoxical nature of universality.⁸

5 For a comparable approach, see McCreath, who views the 'outcomes from multilateral and diplomatic drafting processes as evidence of the convictions of States' with regards to the identification of common interests in international law: Millicent McCreath, 'Community Interests and the Protection of the Marine Environment within National Jurisdiction' (2021) 70 ICLQ 569, 579.

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

7 Ana Filipa Vrdoljak, 'International Exchange and Trade in Cultural Objects' in Valentina Vadi and Bruno de Witte (eds), *Culture and International Economic Law* (Routledge 2015) 130.

8 On these tensions, see Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?' (2007) 18 EJIL 379; Armin von Bogdandy and Sergio Della-Valle, 'Universalism and Particularism: A Dichotomy to Read Theories on International Order' in Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (eds), *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel* (Oxford University Press 2017).

3.1 EARLY ATTEMPTS AT CODIFICATION

3.1.1 The 'long nineteenth century'⁹ and the 1899 and 1907 Hague Conventions

Several authors have contended that international rules concerning the protection of cultural property – in particular during wartime – can be traced back as far as the sixteenth century.¹⁰ Some early international legal scholars writing on the laws of war, such as Gentili (1552-1608),¹¹ and later Vattel (1714-1767)¹² thus considered the position of cultural property under *ius in bello*,

9 By charting early developments in cultural heritage protection, the author expressly does not seek to establish a 'long genealogy' of cultural heritage protection, a concept which has been the subject of some critique in relation to the history of international law: see Thomas Skouteris, 'Engaging History in International Law' in José Maria Beneyto and David Kennedy (eds), *New Approaches to International Law: the European and the American Experiences* (TMC Asser 2012) 102; Tilmann Altwicker and Oliver Diggelmann, 'How is Progress Constructed in International Legal Scholarship?' (2014) 25 EJIL 425; Valentina Vadi, 'International Law and Its Histories: Methodological Risks and Opportunities' (2017) 58 Harvard International Law Journal 311. Samuel Moyn is the most prominent critic of 'long genealogies' of international law, in particular of human rights law; see Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2012). As such, the emphasis of the present chapter lies on the adoption of international legal instruments in the post-war setting.

10 See e.g. Stanislaw E. Nahlik, 'La protection internationale des biens culturels en cas de conflit armé' (1967) 120 Collected Courses of the Hague Academy of International Law 61 (18th century); Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge University Press 2006) 5-22 (16th century); Craig Forrest, *International Law and the Protection of Cultural Heritage* (Routledge 2012) 64-5 (16th century); Janet Blake, *International Cultural Heritage Law* (Oxford University Press 2015) 1-4 (15th century); Jiri Toman, *Protection of Cultural Property in the Event of Armed Conflict* (Routledge 2016) 3-7 (16th century); Yue Zhang, 'Customary International Law and the Rule Against Taking Cultural Property as Spoils of War' (2018) 17 Chinese Journal of International Law 943 (18th century). There are some authors who contend that concern for the protection of cultural property stretches back even further in history (albeit absent any legal prohibition to that effect): see e.g. Margaret M. Miles, *Art as Plunder: The Ancient Origins of Debate about Cultural Property* (Cambridge University Press 2008). For a comprehensive overview in relation to the laws of war, see Alexander Gillespie, *A History of the Laws of War*, vol 2, *The Customs and Laws of War with Regards to Civilians in Times of Conflict* (Hart 2011) 211-84.

11 Alberico Gentili, *De Iure Belli Libri Tres*, vol 2 (tr John C Rolfe, first published 1612, Clarendon Press 1933) 270, writing that 'to destroy those things which yield no profit in themselves and whose destruction does no damage to the enemy, such as temples, colonnades, statues, and other things of that kind, is the act of one who is mad and utterly raving'.

12 Emmerich de Vattel, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (tr Joseph Chitty, first published 1758, Cambridge University Press 1834), book 3, chapter 9, at para 168: 'For whatever cause a country is ravaged, we ought to spare those edifices which do honour to human society, and do not contribute to increase the enemy's strength – such as temples, tombs, public buildings, and all works of remarkable beauty. What advantage is obtained by destroying them? It is declaring one's self an enemy to mankind, thus wantonly to deprive them of these monuments of art and models of taste'. Further, at para 173, he writes that 'the wanton

arguing in favour of sparing such property unless military necessity dictated otherwise.¹³ National laws concerning the protection of cultural property have a similarly long pedigree, with examples of laws aimed at the preservation of religious heritage emerging in the fifteenth and sixteenth centuries in Europe.¹⁴ Comparable concepts focused on the preservation of (cultural) property can also be found in customary legal systems beyond Europe.¹⁵ However, cultural property legislation in the 'modern' sense of the term only began to clearly emerge from the nineteenth century onwards.¹⁶

While the assessment of the veracity of these claims – either in relation to historical attitudes towards the preservation of cultural heritage, historical customary international norms guaranteeing its protection, or the spread of national cultural property legislation across the globe – is beyond the scope of the present research, it can in any event be noted that preservationist attitudes towards cultural property have a long history, intensifying in the

destruction of public monuments, temples, tombs, statues, paintings, etc. is absolutely condemned, even by the voluntary law of nations, as never being conducive to the lawful object of war'.

- 13 O'Keefe (n 10) 5-13. Along similar lines, a number of peace treaties from the Treaty of Westphalia onwards provided for the restitution of archives and works of art to their country of origin, although many objects were not returned in practice: Nahlik (n 10) 77; Toman (n 10) 5. On 19th and 20th century practice in this regard, see *inter alia* Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge University Press 2006). More generally, see also Gillespie 211-84.
- 14 Blake (n 10) 2. Betts and Ross draw attention to the role of iconoclasm in the wake of the Reformation in leading to the adoption of domestic legislation protecting cultural property: Paul Betts and Corey Ross, 'Modern Historical Preservation – Towards a Global Perspective' (2015) 226 *Past & Present* 7, 9.
- 15 See, for example, the concept of 'waqf' in Islamic law: Eman Assi, 'Islamic Waqf and Management of Cultural Heritage in Palestine' (2008) 14 *International Journal of Heritage Studies* 380; Khalfan Amour Khalfan and Nobuyuki Ogura, 'Sustainable architectural conservation according to traditions of Islamic waqf: the World Heritage-listed Stone Town of Zanzibar' (2012) 18 *International Journal of Heritage Studies* 588; Reyhan Sabri, *The Imperial Politics of Architectural Conservation: The Case of Waqf in Cyprus* (Springer 2019). However, compare Fatimah Alshehaby, 'Cultural Heritage Protection in Islamic Tradition' (2020) 27 *International Journal of Cultural Property* 291. Cf. Indigenous customary management systems in Australia and Tanzania: Johari Hussein and Lynne Armitage, 'Traditional heritage management: The case of Australia and Tanzania' [2014] *Proceedings of the 19th Asian Real Estate Society (AsRES) International Conference, Gold Coast, July 2014*.
- 16 See Astrid Swenson, 'The Law's Delay? Preservation Legislation in France, Germany and England, 1870-1914' in Melanie Hall (ed), *Towards World Heritage: International Origins of the Preservation Movement, 1870-1930* (Ashgate 2011) and Astrid Swenson, *The Rise of Heritage: Preserving the Past in France, Germany and England, 1789-1914* (Cambridge University Press 2013) for a comparative historico-legal analysis of cultural property legislation. See also Henry Cleere, *Archaeological Heritage Management in the Modern World* (Routledge 1990); Forrest 133-4, 225-6; Jean-Pierre Bady and others (eds), 1913: *Genèse d'une loi sur les monuments historiques* (La documentation Française 2013); Miles Glendinning, *The Conservation Movement: A History of Architectural Preservation, Antiquity to Modernity* (Routledge 2013); Betts and Ross (n 14); Jukka Jokilehto, *A History of Architectural Conservation* (2nd edn, Routledge 2017).

nineteenth century.¹⁷ The French Revolution and Napoleonic Wars marked increasing concern with the status of cultural property during wartime, evidenced in the writings of Quatremère de Quincy¹⁸ and Abbé Grégoire.¹⁹ These statements called upon the shared value of the heritage in question as one belonging to civilisation as a whole.²⁰ The nineteenth and early twentieth centuries subsequently emerge as a 'formative period', during which 'the protection of specific places, or sites, moved from a cause of national and imperial concern to one of international concern'.²¹ This period also saw the emergence of civil society organisations who not only took issue with the protection of cultural property within national boundaries, but also beyond them.²²

Simultaneously, the nineteenth century also saw the wide-scale looting of cultural artefacts in the colonial territories of European powers,²³ alongside the imposition of colonial legal regimes aimed at the preservation of cultural property as part of a broader 'civilising' discourse. The latter often functioned as an imprimatur for the extraction of archaeological artefacts to budding

17 See e.g. the contributions in Melanie Hall (ed) *Towards World Heritage: International Origins of the Preservation Movement, 1870-1930* (Ashgate 2011); see also O'Keefe (n 10) 8-9, writing that during the Enlightenment 'the actual paintings and sculptures, grand buildings and monuments, ruins and relics ... came to be viewed as a metaphysical estate whose well-being was a common human concern'.

18 Quatremère de Quincy, *Letters to Miranda and Canova on the Abduction of Antiquities from Rome and Athens* (Chris Miller tr, first published 1797, Getty Publications 2012).

19 See O'Keefe (n 10) 15. See also the infamous case of the *Marquis de Smerueles*: Berenika Drazewska, 'The Human Dimension of the Protection of the Cultural Heritage from Destruction during Armed Conflicts' (2015) 22 *International Journal of Cultural Property* 205, 206.

20 Simultaneously, as Spitra points out, the nineteenth century also witnessed the growth of nationalist cultural property legislation, in which the justification for the protection of cultural property was on the basis of their position as emanating from the sovereign state: Sebastian M. Spitra, 'The Administration of Culture in International Law since the 19th Century: A New Historical Narrative' (2021) 5 *University of Vienna Law Review* 121, 127-8.

21 Melanie Hall, 'Introduction: Towards World Heritage' in Melanie Hall (ed), *Towards World Heritage: International Origins of the Preservation Movement, 1870-1930* (Ashgate 2011) 1, 10; O'Keefe (n 10) 13.

22 Examples in this regard are the Society for the Protection of Ancient Buildings (1877) and the National Trust (1895) in England; the *Congrès international pour la protection des oeuvres d'art et des monuments*, organised in Paris on the occasion of the 1899 *Exposition Universelle*. See Hall, 'Introduction: Towards World Heritage' (n 21) 16; Erik Goldstein, 'Redeeming Holy Wisdom: Britain and St. Sophia' in Melanie Hall (ed), *Towards World Heritage: International Origins of the Preservation Movement 1870-1930* (Ashgate 2011) 59, 62, on proposals to establish the Hagia Sophia in Istanbul as an internationally managed cultural site under the purview of the League of Nations. See also O'Keefe (n 10) 17, writing that '[p]reservationism at home flowed easily into a concern for the architecture, art and antiquities of other countries'.

23 At the forefront of the debate with regards to the return of cultural heritage looted during the 19th century are the so-called 'Benin Bronzes': see e.g. Dan Hicks, *The Brutish Museums: The Benin Bronzes, Colonial Violence and Cultural Restitution* (Pluto Press 2020).

‘universal museums’ in the West.²⁴ Both of these developments should thus function as a counterbalance to assessments which see the period as the starting point of a nascent internationalist concern for cultural preservation, as opposed to a reification of the balance of power in the colonial era. All in all, there is thus is ‘a significant gap in the historical narrative of [cultural heritage law] when it comes to the colonial past’.²⁵ The nineteenth century furthermore witnessed the dissemination and hybridisation of concepts such as ‘museums’ and ‘cultural preservation’ in nation states beyond Europe as the result of cross-cultural interactions and imperial imposition,²⁶ thereby laying the groundwork for the global acceptance of this way of viewing cultural heritage in the twentieth century. Independent non-Western states furthermore adopted their own domestic legislation relating to cultural objects during this period, often modelled on similar legislation from Western states, in order to cement their status as ‘civilised nations’.²⁷ However, these developments at the level of domestic law are similarly beyond the scope of the present work.

Turning to international law, the end of the nineteenth century marked the first codification of rules explicitly protecting cultural property under international humanitarian law in the form of the 1899 and 1907 Hague Conventions. This codification had been presaged by similar rules in the 1863

24 Spitra (n 20) 132-3. These domestic legal regimes were mirrored at the international level in treaties granting rights to excavate: Sebastian M. Spitra, ‘Civilisation, Protection, Restitution: A Critical History of International Cultural Heritage Law in the 19th and 20th Century’ (2020) 22 *Journal of the History of International Law / Revue d’histoire du droit international* 329, 334-5. See further Margarita Díaz-Andreu, *A World History of Nineteenth-Century Archaeology: Nationalism, Colonialism, and the Past* (Oxford University Press 2007).

25 Spitra, ‘The Administration of Culture in International Law since the 19th Century: A New Historical Narrative’ (n 20) 122.

26 See e.g. Paul Basu and Vinita Damadoran, ‘Colonial Histories of Heritage: Legislative Migrations and the Politics of Preservation’ (2015) 226 *Past & Present* 240, on the dissemination of cultural heritage legislation within the British Empire; Caroline Ford, ‘The Inheritance of Empire and the Ruins of Rome in French Colonial Algeria’ (2015) 226 *Past & Present* 57, on French colonial Algeria; Yujie Zhu and Christina Maags, *Heritage Politics in China: The Power of the Past* (Routledge 2020) Chapter 2 on China; Masaaki Morishita, *The Empty Museum: Western Cultures and the Artistic Field in Modern Japan* (Ashgate 2012) and Noriko Aso, *Public Properties: Museums in Imperial Japan* (Duke University Press 2013) on Japan. More broadly, on the development of archaeology and how the field was intertwined with both imperialism and nationalism, see e.g. Donald Malcolm Reid, *Whose Pharaohs? Archaeology, Museums, and Egyptian National Identity from Napoleon to World War I* (University of California Press 2002); Zeynep Çelik, *About Antiquities: Politics of Archaeology in the Ottoman Empire* (University of Texas Press 2016).

27 Spitra, ‘Civilisation, Protection, Restitution: A Critical History of International Cultural Heritage Law in the 19th and 20th Century’ (n 24) 341, providing the example of the Ottoman Empire, El Salvador and Honduras. See further on the Ottoman Empire: Blake (n 10) 2-3. See also Natsuko Akagawa, *Heritage Conservation in Japan’s Cultural Diplomacy: Heritage, National Identity and National Interest* (Routledge 2015) 47-54; Alice Lopes Fabris, ‘The Practice of Asian States Implementing the Principle for Protection of Monuments and Works of Art before World War I’ (2021) 5 *The Asian Yearbook of Human Rights and Humanitarian Law* 267.

Lieber Code,²⁸ the 1874 Brussels Declaration,²⁹ and the 1880 Oxford Manual of the *Institut de Droit International*.³⁰ Besides establishing general rules concerning civilian property such as the prohibition of attacking undefended locales and the prohibition of pillage,³¹ the 1899 Hague Convention also provided that during sieges and bombardments ‘all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity ... provided they are not used at the same time for military purposes’.³² Such buildings needed to be marked by a visible sign previously notified to the other combatants. The 1907 Hague Conventions went one step further, explicitly including ‘historic monuments’ as protected property for which ‘all necessary steps must be taken to spare’ them in the course of a siege or bombardment.³³ The 1899 and 1907 Conventions furthermore both pro-

28 Instructions for the Government of Armies of the United States in the Field (24 April 1863) reproduced in D Schindler and J Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff 1988) 3 (Lieber Code) arts 34-6. Article 34 provides that ‘property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge’, such as museums, were not to be considered public property liable to seizure. Furthermore, pursuant to article 35, ‘[c]lassical works of art, libraries, scientific collections, or precious instruments ... must be secured against all avoidable injury’.

29 Project of an International Declaration concerning the Laws and Customs of War (27 August 1874) reproduced in D Schindler and J Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff 1988) 22 (Brussels Declaration). Art 8 provided, in relation to belligerent occupation, that ‘property of ... institutions dedicated to religion, charity and education, the arts and sciences even when State property, shall be treated as private property. All seizure and destruction of, or wilful damage to, institutions of this character, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities’. In relation to sieges and bombardments, art 17 provided that ‘all necessary steps must be taken to spare, as far as possible, buildings dedicated to art, science, or charitable purposes, hospitals, and places where the sick and wounded are collected provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings by distinctive and visible signs to be communicated to the enemy beforehand’.

30 The Laws of War on Land (9 September 1880) reproduced in D Schindler and J Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff 1988) 36 (Oxford Manual); mention of cultural property is indirectly made in article 34, which provides that ‘buildings dedicated to religion, art, science and charitable purposes’ must be spared from bombardment if possible. Article 53 furthermore provided, in relation to belligerent occupation, that ‘[t]he property of municipalities, and that of institutions devoted to religion, charity, education, art and science cannot be seized. All destruction or wilful damage to institutions of this character, historic monuments, archives, works of art, or science, is formally forbidden, save when urgently demanded by military necessity’.

31 Hague Convention (II) with Respect to the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) 189 CTS 429 (Second Hague Convention), Annex, Regulations Concerning the Laws and Customs of War on Land, arts 25, 28.

32 Ibid art 27.

33 Hague Convention (IV) Respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277 (Fourth Hague Convention), Annex, Regulations Concerning the Laws and Customs of War on Land, art 27.

hibited the 'seizure of and destruction, or intentional damage done' to 'religious, charitable, and educational institutions, and those of arts and science', as well as to 'historical monuments, works of art or science' during occupation.³⁴ These regulations further underlined the existence of at least a modicum of shared international concern with cultural preservation, although the legal norms in question did not directly draw upon notions of universality or common interest.

3.1.2 The International Committee on Intellectual Cooperation (1920-1946)

The destruction of various forms of cultural heritage across Europe during the First World War was decried by intellectuals as damage to the 'artistic heritage' or 'property' of mankind.³⁵ In a report circulated internationally by the Netherlands Archaeological Society (*Nederlandsche Oudheidkundige Bond*) after the war on the possibility of future rules for the protection of cultural property during wartime, it was stated that the destruction had not only caused losses to private owners or territorial states, but to 'humanity as a whole'.³⁶ The codification of rules concerning the protection of cultural property which had begun in 1899 in The Hague was subsequently revived during the interbellum, chiefly within the context of one of the League of Nations' technical organisations: the International Committee on Intellectual Cooperation (ICIC), based in Geneva; its executive body, the International Institute of Intellectual Cooperation (IIIC), based in Paris; and its sub-organ, the International Museums Office (*Office International des Musées* or OIM), also based in Paris.³⁷ The work of the ICIC was accompanied by debates concerning post-war restitution of cultural property in the broader context of the League

34 Second Hague Convention, Regulations, art 56; Fourth Hague Convention, Regulations, art 56.

35 O'Keefe (n 10) 40.

36 '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.

37 On the work of the ICIC, see *inter alia* Jean-Jacques Renoliet, *L'UNESCO oubliée: La Société des Nations et la coopération intellectuelle (1919-1946)* (Publications de la Sorbonne 1999); Akira Iriye, *Cultural Internationalism and World Order* (Johns Hopkins University Press 1997); Akira Iriye, *Global Community: the Role of International Organisations in the Making of the Contemporary World* (University of California Press 2002); Daniel Laqua, 'Transnational Intellectual Cooperation: the League of Nations and the Problem of Order' (2011) 6 *Journal of Global History* 223; Annamaria Ducci, 'Europe and the Artistic Patrimony of the Interwar Period: The International Institute of Intellectual Cooperation at the League of Nations' in Mark Hewitson and Matthew D'Auria (eds), *Europe in Crisis: Intellectuals and the European Idea, 1917-1957* (Berghahn Books 2012); Corinne A Pernet, 'Twists, Turns and Dead Alleys: The League of Nations and Intellectual Cooperation in Times of War' (2014) 12 *Journal of Modern European History* 342; Sebastian M. Spitra, *Die Verwaltung von Kultur im Völkerrecht: Eine postkoloniale Geschichte* (Nomos 2021).

of Nations, which are beyond the scope of the present work: the following section focuses explicitly on those projects of the ICIC which can be seen as the predecessors of post-war treaties on cultural heritage.³⁸

Whilst the ICIC can boast of a moderate claim of being able to engage in global law-making during this period,³⁹ it was nonetheless founded on particularly Western humanist ideals of achieving peace through mutual intellectual understanding and 'the idea of unilinear progress of civilisation and development'.⁴⁰ Thus the Swiss vice-president of the ICIC, Gonzague de Reynold, was able to note in 1938 without irony that it was imperative that the ICIC 'save the essentials of civilisation', placing this mission within a broader historical trend in which '[n]o centre of culture has ever been able to exist in isolation: either it has disappeared, or else it has been kept alive by other and often far distant centres'.⁴¹ 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'.⁴² 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.⁴³

The ICIC undertook a number of projects aimed at the preservation and protection of cultural property during the interbellum. Two of these projects are of particular relevance, as the work carried out by the ICIC during this period formed the foundation of later work within UNESCO on the same themes. These projects were the regulation of the trade in cultural property, which

38 On restitution within the context of the League of Nations, see chapter 3 of Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (n 13).

39 Susan Pedersen, 'Back to the League of Nations' (2007) 112 *The American Historical Review* 1091; Jan Kolasa, *International Intellectual Cooperation: The League Experience and the Beginnings of UNESCO* (Zakład Narodowy 1962) 28; Katharina Rietzler, 'Experts for Peace: Structures and Motivations of Philanthropic Internationalism in the Interwar Years' in Daniel Laqua (ed), *Internationalism Reconfigured: Transnational Ideas and Movements between the World Wars* (IB Tauris 2011) 55; Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (n 13) 109. On the universality of the ICIC as an organisation, see also Takashi Saikawa, 'From Intellectual Co-operation to International Cultural Exchange: Japan and China in the International Committee on Intellectual Co-operation' (2009) 1 *Asian Regional Integration Review* 83.

40 Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (n 13) 109. See also Spitra, 'Civilisation, Protection, Restitution: A Critical History of International Cultural Heritage Law in the 19th and 20th Century' (n 24) 338, who notes that 'when it came to the formulation of international legal instruments, the colonial bias of the civilisation discourse was still present'.

41 'Report by M. G. de Reynold (Rapporteur), Submitted to the Council on September 10th, 1938' (1938) 19 *League of Nations Official Journal* 918, 920. It hereby echoes some elements of 19th century preservationism, which at times called for preservation of cultural heritage *in situ*, at other times for its removal to colonial centres in order to safeguard it from destruction: cf. the differing approaches in de Quincy (n 18).

42 Ibid 923.

43 Ibid, 922-23; Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (n 13) 109.

resulted in a series of draft conventions and culminated in the 1939 Draft International Convention for the Protection of National Collections of Art and History, a predecessor of the 1970 UNESCO Convention;⁴⁴ and the protection of cultural property during armed conflicts, resulting in a Draft International Convention for the Protection of Historic Buildings and Works of Art in Time of War, a predecessor of the 1954 Hague Convention. Both of these initiatives will be dealt with in turn.

3.1.2.1 *Regulating the illicit trade in cultural property*

There were several factors which triggered international interest in the question of the export and import of cultural property, in particular the professionalization of the archaeological profession, with an accompanying desire to ensure access to sites of archaeological interest (and subsequent expatriation of artefacts to the archaeologists' countries of origin), and increasing problems arising from clandestine excavations of archaeological sites in the Middle East.⁴⁵ Simultaneously, European states affected by the First World War were experiencing the loss of their cultural heritage to collectors from abroad, as 'the products of artistic and scientific endeavours were actively sought by buyers from wealthier countries', leading to a growth in national cultural property legislation which sought to prevent the export of cultural property.⁴⁶ The IIC and OIM initiated international discussions on the issue in the early 1930s, leading to the adoption of the 1932 Resolution Concerning the Protection of Historical Monuments and Works of Art, which in turn contained a recommendation for a convention on the integrity of national art collections and the restitution of illicitly exported cultural property.⁴⁷

The first draft of this convention was prepared in 1933: the Draft Convention on the Repatriation of Objects of Artistic, Historical and Scientific Interest, which have been Lost, Stolen or Unlawfully Alienated or Exported.⁴⁸ It applied to 'movable or immovable objects of an artistic, historical or scientific character',⁴⁹ a definition notably not based upon a value or significance assessment. Numerous states objected to the draft, as it was thought to be too

44 The previous draft conventions were the 1933 Draft International Convention on the Repatriation of Objects of Artistic, Historical or Scientific Interest Which Have been Lost or Stolen or Unlawfully Alienated and Exported and the 1936 Draft Convention for the Protection of National Collections of Art and History. These draft conventions were consulted during the drafting of the 1970 Convention; see Technical and Legal Aspects of the Preparation of International Regulations to Prevent the Illicit Export, Import and Sale of Cultural Property (14 April 1962) UNESCO/CUA/115, 2-3.

45 Patrick J O'Keefe, *Protecting Cultural Objects Before and After 1970* (Institute of Art & Law 2017) 6-7.

46 Ibid 7.

47 Vrdoljak, 'International Exchange and Trade in Cultural Objects' (n 7) 125-6.

48 Ibid 126.

49 1933 Draft (n 44) art 1.

difficult to reconcile with the interests of international trade – in particular the art trade – and would have run into serious issues in implementation.⁵⁰ The 1933 Draft was followed up by a 1936 Draft Convention for the Protection of National, Historic and Artistic Treasures, which narrowed the material scope of the convention to ‘objects of remarkable palaeontological, archaeological, historic or artistic interest’.⁵¹ A final draft was produced in 1939 – the draft International Convention for the Protection of National Collections of Art and History – once again narrowing the scope of the proposed convention, requiring that the object had been inventoried by the state of origin prior to any request for restitution.⁵² This draft was not adopted due to the outbreak of the Second World War, and following the war consultations amongst states indicated that they were not willing to engage in further codification efforts.⁵³ As such, these conventions did not define the protected heritage in relation to its shared nature, but according to criteria of its relative value as determined by the state of origin.

3.1.2.2 *Preventing the destruction of cultural property during armed conflict*

The League was spurred into action with regards to the matter of wartime destruction by the start of the Spanish Civil War in 1936,⁵⁴ with proposals to safeguard the cultural property in Spain being characterised as a ‘matter of importance to civilisation as a whole’.⁵⁵ Similarly, discussions within the League on the Second Sino-Japanese War recalled that ‘artistic monuments and cultural institutions representing the high-water mark of civilisations should be spared’ during times of armed conflict.⁵⁶ 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 Directors’ Committee of the OIM, tasked with the preparation of the draft, noted that the protection of these forms of heritage was a ‘problem which is

50 UNESCO/CUA/115 (n 44) para 6.

51 1936 Draft (n 44) art 1(1).

52 Vrdoljak, ‘International Exchange and Trade in Cultural Objects’ (n 7) 128-30. However, the 1939 draft did remove the former reference to ‘objects of remarkable palaeontological, archaeological, historic or artistic interest’, merely specifying that the convention would apply in relation to objects of ‘palaeontological, archaeological, historic or artistic interest’.

53 UNESCO/CUA/115 (n 44) para 6.

54 Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict* (UNESCO Publishing 1996) 18-19.

55 O’Keefe (n 10) 53.

56 ‘Report of the Sixth Committee to the Assembly’ (A.51.1937.XII) (1937) 175 League of Nations Official Journal, Special Supplement 81, 83.

rightly a matter of concern at the present time to all Governments and peoples who care for the preservation of their common artistic and historic heritage'.⁵⁷

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',⁵⁸ phrasing which very closely mirrors the wording of the post-war 1954 Hague Convention. In its explanatory report, the Directors' Committee 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'.⁵⁹ Although it was envisaged that Contracting Parties should recognize a general duty to respect and protect monuments during wartime,⁶⁰ enhanced protection was granted by special agreement between the Contracting Parties 'to certain monuments or groups of monuments the preservation of which ... is of *fundamental importance to the international community*'.⁶¹ Interestingly, article 7(6) notes that '[m]onuments and museums shall be brought to the notice of the civil population, who shall be requested to protect them, and of the occupying troops, who shall be informed that they are dealing with buildings the preservation of which is the *concern of the entire international community*'.⁶² In contrast to the ICIC's projects seeking to regulate the illicit trade in cultural property, the proposed convention seeking to prevent the destruction of cultural property during armed conflict thus draws upon universalising language very similar to that found in post-war conventions such as the 1954 and 1972 Conventions.

Although neither of the draft conventions were adopted due to the outbreak of the Second World War, efforts to continue the ICIC's work continued in Latin America and the United Kingdom.⁶³ The lack of success of the League can be contrasted with the work of the Pan-American Union, where the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments

57 '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.

59 '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).

60 Report by the Directors' Committee (n 57) 938.

61 Ibid (emphasis added) arts 5, 6.

62 Ibid (emphasis added) art 7(6).

63 Pernet (n 37) 342.

(more popularly known as the Roerich Pact)⁶⁴ and the Treaty on the Protection of Movable Property of Historic Value⁶⁵ were adopted in 1935. The latter stands out through its explicit regional focus, being the only instrument of the period to *not* refer to the universal nature of cultural heritage in some shape or form.⁶⁶ By contrast, the aim of the Roerich Pact (which had in fact first developed in the context of the ICIC) was the preservation ‘in any time of danger [of] all nationally and privately owned immovable monuments which form the *cultural treasure of all peoples*’.⁶⁷ In doing so, it echoed what was apparently taken as a given at the time: that the protection of cultural heritage was a matter for common concern, and that there was a neutral standard by which to judge which heritage was universally valued.

Despite their lack of success, the twin projects of the ICIC surveyed above provide an illustration of early attempts within international law to position cultural heritage protection as a common interest of the international community, albeit from starkly different perspectives. Thus on the one hand, the draft conventions seeking to prevent the illicit import and export of cultural property initially provided great leeway to individual states to determine the scope of protection on the basis of their own legislation, presenting the issue as one of ‘mutual assistance’. By contrast, the project for a convention to protect cultural property during wartime provided a different emphasis, grounded in the interest of the international community to protect ‘artistic treasures’. As such, the latter draft conventions took things one step further, explicitly recalling the common concern of the international community in relation to wartime protection of particularly outstanding cultural property.

It was these drafts which invoked 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 in an area where such cooperation was far from self-explanatory. In this sense, they can be compared to the role of many universalising legal concepts from the post-war era, which effectively function as legal fictions seeking to call the ‘international community’ into being.⁶⁸ The ICIC’s conventions can be seen to be doing the same thing, albeit at a time when the concept of an international community bound by international law stood on shaky ground. Simultaneously, these instruments sought to transform cultural prop-

64 Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (adopted 15 April 1935, entered into force 26 August 1935) 167 LNTS 279 (Roerich Pact).

65 Treaty on the Protection of Movable Property of Historic Value (adopted on 14 April 1935, entered into force 1 May 1936) OASTS No. 28.

66 The Treaty on the Protection of Movable Property of Historic Value regulates the importation and exportation of, amongst others, pre-Columbian objects.

67 Roerich Pact, preamble.

68 Pierre-Marie Dupuy, ‘From a Community of States Towards a Universal Community?’ in Riccardo Pisillo Mazzeschi and Pasquale De Sena (eds), *Global Justice, Human Rights and the Modernization of International Law* (Springer 2018).

erty from a set of objects located (both physically and conceptually) within the sovereign sphere of the state into the cultural property of humankind, something which had not been attempted at the time. However, the ultimate aim of the conventions was certainly not to achieve a limitation of sovereignty – a goal that would in any event have been inappropriate for an organisation such as the ICIC.⁶⁹

3.2 THE CREATION OF UNESCO (1946) AND THE 1954 HAGUE CONVENTION

A sense of post-war optimism, imbued with humanist philosophical thought and the desire to prevent a future outbreak of war, drove the creation of UNESCO,⁷⁰ which became the institutional successor of a number of the ICIC's functions.⁷¹ There had in fact been a call from the representatives of Brazil during the drafting of the UN Charter to explicitly recognise culture as the common heritage of mankind; the proposal was rejected, but the underlying thought behind it – the creation of an international organisation for culture – was followed up rapidly with the creation of UNESCO.⁷² The destruction of the Second World War had imparted a sense of urgency to the idea that cultural property, at least in some areas of action, was too important to be left to states alone: the idea prevailed that there was 'a universal interest in other cultures'.⁷³

69 Unlike most contemporary international organisations, the ICIC provided for a curious interplay between public intellectuals of the era, experts, and diplomatic representatives. This can be seen by the fact that its work bled into a range of post-war initiatives: not only the creation of UNESCO, but also that of the International Council of Museums: Pernet (n 37) 342; O'Keefe (n 10) 15.

70 See J. P. Singh, *United Nations Educational, Scientific, and Cultural Organization (UNESCO): Creating Norms for a Complex World* (Routledge 2010); Glenda Sluga, 'UNESCO and the (One) World of Julian Huxley' (2010) 21 *Journal of World History* 393; Poul Duedahl, 'Selling Mankind: UNESCO and the Invention of Global History' (2011) 22 *Journal of World History* 101; Chloé Maurel, 'L'UNESCO entre européocentrisme et universalisme (1945-1974)' (2012) 9 *Les cahiers IRICE* 61; Aurélie Éliisa Gfeller and Jaci Eisenberg, 'UNESCO and the Shaping of Global Heritage' in Poul Duedahl (ed), *A History of UNESCO: Global Actions and Impacts* (Palgrave Macmillan UK 2016); Aurélie Éliisa Gfeller, 'Scaling the Local: Canada's Rideau Canal and Shifting World Heritage Norms' (2015) 26 *Journal of World History* 491; Astrid Swenson, 'The First Heritage International(s): Conceptualising Global Networks before UNESCO' (2016) 13 *Future Anterior* 1.

71 Vrdoljak, 'International Exchange and Trade in Cultural Objects' (n 7) 130. See Agreement between the United Nations Educational, Scientific and Cultural Organisation and the International Institute of Intellectual Co-operation (27 July 1947) Ext.Rel./7.

72 Craig Forrest, 'Cultural Heritage as the Common Heritage' (2007) 40 *Comparative and International Legal Journal of South Africa* 124 129.

73 O'Keefe (n 10) 27.

The first concrete legal expression of these universalist principles emerged upon the adoption of the 1954 Hague Convention,⁷⁴ in which a link is explicitly made between damage to cultural heritage and damage to the 'heritage of all mankind'.⁷⁵ The convention was also the first convention in which the subject of international regulation was grouped under the heading of 'cultural property' as a unified concept, as opposed to merely enumerating various forms of cultural property to be protected.⁷⁶ The manner in which this link was initially expressed within the text of the Convention led to some concerns from a range of states. Thus the United Kingdom objected to the inclusion in the draft preamble of a statement to the effect that 'the preservation of the cultural heritage is the concern of the community of States'.⁷⁷ 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'.⁷⁸ This idea was incorporated in the redrafting of the text. O'Keefe notes that the choice for the term 'peoples', as opposed to 'states' can be traced back to the realisation that the object of protection – cultural property – derives its value from a given society, rather than the 'state' as a legal construct.⁷⁹ The idea that damage to cultural property caused damage to the cultural heritage of mankind, derived from similar ideals, was also introduced by the USSR and included in the preamble during the redrafting of the text.⁸⁰ Universal ideals thus formed the impetus for international protection of cultural heritage.

However, where the 1954 Hague Convention truly distinguishes itself from earlier conventions is through its incorporation in the body of the text of notions of the universal nature of cultural property; article 1(a) defines the Convention's scope of protection as covering 'movable or immovable property of great importance to the cultural heritage of every people'. During the drafting, the United Kingdom argued that the text of article 1 should be

74 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). See John Henry Merryman, 'Two Ways of Thinking About Cultural Property' (1986) 80 *AJIL* 831, 837; Forrest, 'Cultural Heritage as the Common Heritage' (n 72) 129.

75 Characterised by Frulli as the 'culture-value' approach, in contrast to the 'civilian-use' approach which had dominated early humanitarian law instruments: see Micaela Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (2011) 22 *EJIL* 203; see also Mohamed Elewa Badar and Noelle Higgins, 'Discussion Interrupted: The Destruction and Protection of Cultural Property under International Law and Islamic Law - the Case of Prosecutor v. Al Mahdi' (2017) 17 *International Criminal Law Review* 486.

76 O'Keefe (n 10) 26. The ICIC of course made similar (unsuccessful) attempts, as discussed in the previous section.

77 Records of the Conference Convened by the United Nations Educational, Scientific and Cultural Organization (Staatsdrukkerij- en Uitgeverijbedrijf 1961) CBC/3, 371.

78 Ibid CBC/DR/37, 372.

79 O'Keefe (n 10) 94-95.

80 Records of the Hague Conference (n 77) CBC/DR/37, 372.

modified to grant protection only to cultural property of 'high cultural importance'.⁸¹ They were joined in this preference by the United States of America, which also proposed to change what was originally 'cultural value' in the draft text to 'high cultural value'.⁸² According to the American delegate, 'importance' 'gave the object's position in the cultural heritage of mankind', indicating the value of its protection.⁸³ 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 and the desire to protect cultural heritage by limiting the scope of which heritage was to be protected.⁸⁴ In contrast, the French delegation proposed that article 1(a) should protect cultural property 'of general interest as regards the ... heritage of the several peoples'.⁸⁵ They favoured a general definition, based on which national authorities could decide which cultural property 'the protection of which was absolutely necessary'.⁸⁶

Nonetheless, the majority of states preferred a definition which emphasised the universal value of the heritage protected.⁸⁷ The issue was put to a select drafting group,⁸⁸ which altered the notion of 'high cultural value or importance' in the initial draft to cultural property 'of great importance to the cultural heritage of all different peoples'.⁸⁹ This was once again adjusted in the final text, to 'movable or immovable property of great importance to the cultural heritage of every people'. O'Keefe argues that the phrase 'of every people' does not imply that the heritage is part of a shared heritage of mankind as a whole: instead, it implies that the Convention protects the cultural heritage 'of each respective people'.⁹⁰ 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 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.⁹¹ In practice, the selection of cultural heritage protected by the Convention is left to the discretion of each party to the Convention; states consider the property protected by the Convention to at least be comprised by those items protected

81 Ibid CBC/DR/31, 373.

82 Ibid CBC/DR/22, 373.

83 Ibid para 173.

84 Ibid para 151.

85 Ibid CBC/DR/36, 373.

86 Ibid para 164.

87 Ibid para 165, paras 199-200.

88 Chaired by the Netherlands, with France as rapporteur and Czechoslovakia, Denmark, Greece, Hungary, Israel, Italy, Japan, Norway, Poland, Romania, Spain, Sweden, Switzerland, Turkey, USSR, United Kingdom, United States, Yugoslavia as other members.

89 Records of the Hague Conference (n 77) CBC/DR/100, 373.

90 O'Keefe (n 10) 103-104.

91 Ibid 103-4.

under their domestic cultural heritage legislation.⁹² As such, it can be concluded that even though the goal of the Hague Convention professes universality, its commitments remain 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 the conceptualisation of cultural value in the Convention.⁹³

Even so, the Hague Convention has formed grounds for some to consider that it establishes a separate category of cultural property: the 'cultural heritage of all mankind'. Thus, speaking in 1985 on the fortieth anniversary of the Second World War and the conclusion of the 1954 Hague Convention, Manfred Lachs, then a judge at the International Court of Justice, noted that the Hague Convention established a recognition that '[i]n protecting the past culture of others we protect our own, part of the whole'; the importance of the Convention, according to Lachs, was that it 'extends the boundaries of culture into the domain of international relations, and brings the notion of the "cultural heritage of all mankind" into the legal dictionary', comparing it with similar usage of the term in relation to outer space and the deep seabed.⁹⁴ Similarly, the 1977 Additional Protocols to the Geneva Conventions prohibit the commission of acts of hostility of monuments 'which constitute the cultural or spiritual heritage of peoples';⁹⁵ and the 1999 Second Protocol to the Hague Convention re-imagined the regime of special protection in the Convention as a system of enhanced protection for 'cultural heritage of the greatest importance for humanity'.⁹⁶ More recently, the 2003 UNESCO Declaration concerning

92 Ibid 106. However, compare the statement by Cunliffe and Fox that many High Contracting Parties do not establish or distribute inventories of the cultural property to be protected pursuant to the 1954 Hague Convention, leaving this task to the work of heritage professionals or military personnel: Emma Cunliffe and Paul Fox, 'All Possible Steps? Revisiting Safeguarding in the 1954 Hague Convention' in Emma Cunliffe and Paul Fox (eds), *Safeguarding Cultural Property and the 1954 Hague Convention* (Boydell & Brewer 2022) 31.

93 However, there are indications that this practice may potentially be shifting, as was brought to the fore in the recent work of the ad hoc sub-committee on the implementation and monitoring of the 1999 Second Protocol: Committee for the Protection of Cultural Property in the Event of Armed Conflict, Reflection document on the application of Article 27(1)(c) of the 1999 Second Protocol, including the establishment of monitoring and supervision mechanisms aiming to improve the protection of cultural property in the event of armed conflict, notably in extreme emergency situations (15 June 2021) C54/21/AHS/REF/V2.REV, paras 73–4.

94 Manfred Lachs, 'The Defences of Culture' (1985) 37 *Museum International* 167, 168.

95 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I) art 53; Protocol Additional 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 609 (Additional Protocol II) art 16.

96 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 172 (Second Protocol, Hague Convention) art 10(a).

the Intentional Destruction of Cultural Heritage underlined the effect of cultural destruction 'on the international community as a whole', recalling the statement in the 1954 Convention's preamble that 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind', and sought to establish state responsibility for any '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'.⁹⁷ These developments prove that the lure of universalist rhetoric remains remarkably stubborn, despite the developments that the concept of cultural heritage has undergone within the international legal context since 1954.⁹⁸

3.3 THE CONVENTION FOR THE FIGHT AGAINST THE ILLICIT TRAFFICKING OF CULTURAL PROPERTY (1970)

The 1970 Convention⁹⁹ came into being during an era of increased concern with the illegal art trade, particularly amongst newly independent states seeking the return of objects lost during the colonial era.¹⁰⁰ The issue of illicit trafficking of cultural property was one that was clearly cut out for international regulation: so-called 'source states' cannot control the export of all cultural property at the border, particularly in situations where the property in question has been illicitly excavated without the knowledge of local authorities. As such, measures limiting the import and sale of cultural property abroad become necessary in order to limit the trade in looted or stolen cultural property;¹⁰¹ the transnational nature of the problem thus makes it an ideal

97 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, UNESCO, Records of the General Conference, 32nd Session (vol 1), 32 C/Resolution 33 (2003).

98 However, compare the view advanced by Cunliffe and Fox that in practice the practice of states with respect to heritage to be (potentially) protected during armed conflict is in fact overinclusive and has let go of significance-based assessments in favour of protecting almost all (nationally) valued heritage, and should thus return to the 'hierarchy of value' approach which dominated discussions during the drafting of the 1954 Hague Convention: Cunliffe and Fox (n 92) 17-20.

99 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 Convention).

100 Irini A Stamatoudi, *Cultural Property Law and Restitution: A Commentary to International Conventions and European Union Law* (Elgar 2011) 31; Vrdoljak, 'International Exchange and Trade in Cultural Objects' (n 7) 132.

101 Toshiyuki Kono and Stefan Wrbka, 'UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970)' in Toshiyuki Kono (ed), *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21st Century* (Martinus Nijhoff 2010) 34; O'Keefe (n 10) 112.

object of international cooperation.¹⁰² Simultaneously, the project for a convention on illicit trafficking of cultural property had to face up to significant reticence from so-called 'market states' firmly opposed to any sort of limitation on domestic imports – out of a fear of quelling their own art trade, the loss of the collections of 'universal museums' and the professed advantages of cultural interchange that result from such collections, and the perceived impossibility of imposing import regulations on the art trade in light of disparities between common and civil law states.¹⁰³

As one contemporary commentator noted, the drafters of the convention were thus required to address 'singularly delicate questions' in relation to the balance between 'state sovereignty, domestic law and international law'.¹⁰⁴ These debates between 'source' and 'market' nations developed into what has been described as a balancing act between cultural property internationalism and nationalism,¹⁰⁵ with the 1970 Convention often perceived as tilting heavily in favour of the latter: a position supporting the retention of cultural property within its country of origin, as opposed to its dissemination across the globe.¹⁰⁶

The need to balance these competing interests comes to the fore in the preamble of the 1970 Convention, which initially notes that 'the interchange of cultural property ... increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations'. However, it also notes that 'cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting'. It considers that every state has to become aware of its 'moral obligations to respect its own cultural heritage and that of all nations', concluding that the illicit trade of cultural property can only be stemmed through international cooperation.

As such, the 1970 Convention adopts a different approach to the rationalisation of international protection than the 1954 Hague Convention: unlike the Hague Convention, it does not rely upon an invocation of the position of looted heritage within the cultural heritage of humankind.¹⁰⁷ Instead, it focuses on the retention of cultural property as a facet of a state's

102 Evaluation of UNESCO's Standard-setting work of the Culture Sector. Part II – 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property (April 2014) IOS/EVS/PI/133 REV. 2, 11.

103 One important distinction relates to the privileging of the good faith owner in relation to the restitution of stolen property: UNESCO/CUA/115 (n 44) 7-8.

104 Sharon A. Williams, *The International and National Protection of Movable Cultural Property: A Comparative Study* (Oceana Publications, Inc. 1978) 179-80.

105 A distinction developed by Merryman (n 74).

106 Kono and Wrba (n 101) 35.

107 In doing so, it echoes a similar divide between the interbellum projects of the ICIC in relation to the illicit export of cultural property and protection of cultural property during armed conflicts: see Section 3.1.1. above.

sovereignty to determine its 'national culture'. In doing so, it places greater emphasis on value as determined at the national, rather than international level.

The period between the end of the Second World War and the eventual adoption of the 1970 Convention had seen a number of attempts to regulate the issue of illicit transfer of cultural property at the international level.¹⁰⁸ This evinced a growing awareness of the need for museums to ensure that the objects that they acquired had not been illicitly excavated or removed from their country of origin,¹⁰⁹ albeit with the proviso that such measures should not hamper the exchange of 'objects which are not required in the national museums'.¹¹⁰ The initial project of a convention on the illicit trafficking of cultural property was initiated in 1960 at the proposal of Mexico and Peru.¹¹¹ The preliminary feasibility study prepared by the Director-General of UNESCO and the International Council of Museums noted that the ultimate arbiter of the value of movable cultural property should lie in the hands of the territorial state, which can assess 'their true place in the national cultural heritage as a whole'.¹¹² Perhaps somewhat optimistically, the report also emphasised that 'there can be no contradiction between the legitimate desire of States to preserve their national cultural heritage in their own territory and the idea of a universal cultural heritage' and international cultural exchange.¹¹³ It called attention to what it deemed to be the clearly illegitimate nature – even if not yet illegal under international law – of the act of purchasing clandestinely excavated and exported cultural property, and the fact that states remained unaware of the importance of respecting cultural property.¹¹⁴ It concluded by stating that while a convention would 'create a network of reciprocal legal obligations which a State could invoke against other States Parties', the success of such a convention was unlikely at that moment in time.¹¹⁵ As such, the report recommended the adoption of a recommendation encouraging states to improve domestic legislation pertaining to the import and export of cultural property.¹¹⁶

Discussions within the working group created to draft the recommendation uncovered fundamental disagreements between states on whether the time

108 See e.g. the 1956 Recommendation on International Principles Applicable to Archaeological Excavations, UNESCO, Records of the General Conference, Ninth Session, 9 C/Resolution 4.32, Appendix I (1956) 40. See also Kono and Wrba (n 101) 33.

109 Vrdoljak, 'International Exchange and Trade in Cultural Objects' (n 7) 130-1.

110 1956 Recommendation (n 108) para 23(e).

111 UNESCO, Records of the General Conference, 11th Session, 11 C/Resolution 4.412 (1960); Report Concerning International Regulations Designed to Prohibit and Prevent the Illicit Export, Import and Sale of Cultural Property (27 July 1962) 12 C/PRG/10.

112 UNESCO/CUA/115 (n 44) 5.

113 Ibid.

114 Ibid 9

115 Ibid 10.

116 Ibid.

was ripe for an international convention, and more fundamentally the nature of (il)licit cultural property.¹¹⁷ Nonetheless, the 1962 General Conference decided in favour of a recommendation to be prepared for the 1964 session – albeit also expressing the desire ‘that an international convention may be adopted within the shortest possible time’.¹¹⁸ The subsequent draft recommendation and its accompanying report note that the value of cultural property is eternal, in light of its ‘status as irreplaceable evidence of bygone civilizations and cultures’.¹¹⁹ The adoption of a recommendation was considered as the first step to ‘improve the international moral climate’ and encourage states to adopt a progressive stance towards cultural property protection.¹²⁰ It was proposed that the recommendation should only apply to cultural property of ‘particular importance’ to the cultural heritage of a state, whereby the scope of ‘particular importance’ was to be determined by each state.¹²¹ However, it was to be understood that such definitions should not impede cultural exchange and should thus only apply to ‘cultural objects of such importance to the national cultural heritage that it would be appreciably impoverished by their removal’.¹²² These statements underline the view which had also predominated within the ICIC, that rules regulating the cultural property trade were more a matter of underlining national heritage than bolstering a perceived international heritage.

Discussions subsequently moved to a special committee of governmental experts. As regards the definition of cultural property, the committee was split into two groups: those who favoured the protection of all cultural property, and those who sought to limit the recommendation to cultural property ‘which is a very important element of the whole cultural heritage of each State’.¹²³ The latter view won out, with states being expected to establish ‘restrictive

117 UNESCO, Records of the General Conference, 12th Session (vol 1), Annex VI (1962) Report of the Working Parties of the Programme Commission which met during the Twelfth Session, Report of the Working Party on International Regulations Designed to Prohibit and Prevent the Illicit Export, Import and Sale of Cultural Property, CPG.63/VI.12/A, 283, para 7-9.

118 UNESCO, Records of the General Conference, 12th Session (vol 1), 12 C/Resolution 4.413 (1962) CPG.63/VI.12/A. Curiously, this initiative was reported under heading 4.41, ‘Preservation of the cultural heritage of mankind’ – despite the fact that the convention makes no reference to the fact that the cultural property it seeks to regulate is part of the cultural heritage of humankind.

119 Means of prohibiting the illicit export, import and sale of cultural property, UNESCO/CUA/123 (15 July 1963) 5.

120 Ibid 6.

121 Ibid 7; Means of prohibiting the illicit export, import and sale of cultural property, Preliminary Draft Recommendation on Means of Prohibiting the Illicit Export, Import and Sale of cultural Property, UNESCO/CUA/123, Annex I (15 July 1963) art I(1)-(2).

122 UNESCO/CUA/123 (n 119) 7.

123 Report, Special Committee of Governmental Experts to Prepare a Draft Recommendation on Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Cultural Property (29 June 1964) 13 C/PRG/17, Annex II, para 20.

criteria' in their national definition of cultural property.¹²⁴ The definition in the draft recommendation was ultimately tweaked slightly: whereas the preliminary draft described cultural property as 'property of particular importance to the cultural heritage of a country', the committee of governmental experts changed this to 'property of great importance to the cultural heritage of a country',¹²⁵ which should be 'of a very high and generally recognized standard'¹²⁶ (a criterion subsequently amended in the final recommendation to 'great importance').¹²⁷ The committee's report concluded by stating that each state's individual cultural heritage 'together make up the common treasure of mankind'.¹²⁸ Nonetheless, the General Conference ultimately adopted the draft recommendation by 80 votes, with seven abstentions.¹²⁹

Drafting for the convention returned to the agenda in 1968: in the six years between 1964 and 1970, '[t]he pace of the illicit traffic had not slowed down ... and those countries who were the most victimized, Mexico, Argentina, Brazil, Costa Rica, El Salvador, Guatemala, Guinea, India and Peru, desired research into a possible convention'.¹³⁰ In the meantime, 23 UNESCO Member States had submitted their first report on the implementation of the recommendation within their national jurisdictions: a disappointingly low amount.¹³¹ While many states indicated either that their existing domestic legislation was sufficiently in line with the recommendation, or that amendments of this existing legislation was underway, some also indicated the need for a convention on the issue, noting that they sought to '[transfer] the question from the diplomatic to the legal plane'.¹³² By contrast, other countries such as the United Kingdom and the United States noted a range of domestic legal issues which would prevent restrictions on the import or export of items of cultural property. Some states expressed hesitancy at the fast pace the Director-General was moving towards a new convention, with the fear being that the

124 Ibid. It is worth noting that later draft of the 1970 Convention watered down these selectivity requirements.

125 Draft Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Cultural Property (29 June 1964) 13 C/PRG/17, Annex I, art I(1).

126 Ibid art I(2).

127 Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property, Records of the General Conference, 13th Session (vol 1), CPG.65/VL13.A (1964) art I(2).

128 13 C/PRG/17 (n 123) para 34.

129 Records of the General Conference, 13th Session (vol 2) CFS.65/VII.13/AFSR (1964) 914. No records are retained of which states abstained during voting, as this was done by a show of hands.

130 Williams (n 104) 179.

131 Initial Special Reports by Member States on Action Taken by Them on the Recommendations Adopted by the General Conference at its Thirteenth Session (14 October 1966) 14 C/27; General Report on the Initial Special Reports by Member States on Action Taken by Them upon the Recommendations Adopted by the General Conference at its Thirteenth Session (24 November 1965) 14 C/87, Annex II, paras 9-12.

132 14 C/27 (n 131) 15.

convention would not be drafted in such a way as to make it ratifiable by the largest possible number of states;¹³³ doubts also remained about the possibility of harmonising import, export and customs regulations across all 120 UNESCO Member States.¹³⁴

Nonetheless, whereas the Secretary-General's 1962 report had expressed itself in less than unequivocal terms about the feasibility of a new convention, by 1968 the tone had changed. The Secretary-General's new report called attention to the numerous states, such as Italy and Japan, which had provided support to a future convention, the results of an Expert Meeting on the Exchange of Original Objects between Museums and the Reconstitution of Dismembered Works of Art in 1966,¹³⁵ which spoke in similarly positive terms about an international convention, and the draft of a European Convention on the Protection of the Archaeological Heritage, which had been presented to the Council of Europe in February 1968.¹³⁶ It was furthermore noted that imposing obligations at the international level was the only way forward: 'only States can exert an influence over their cultural exchange services ... only States can influence the policy of their museums, whose curators naturally try to expand their collections rather than to part with any objects belonging to them'.¹³⁷ The report underlined the importance of limiting the proposed convention to cultural property of 'great importance' to the cultural heritage of the state in order to prevent the creation of boundaries to cultural exchange.¹³⁸ The project for a new convention was subsequently approved by the 1968 General Conference.¹³⁹

In response to this, the Director-General drew up a preliminary draft, which defined cultural property according to a set of categories without any limitations in relation to the relative importance of the cultural property. The accompanying report noted that such a broad definition was justified, given that the proposed convention was not aimed at cultural property under threat during wartime. In doing so, it critiqued the limited definition of the 1962

133 Report on the Possibility of Drafting an International Convention Concerning the Illicit Import, Export and Transfer of Ownership of Cultural Property (17 July 1968) 78 EX/Decision 4.4.3.

134 Report of the Programme and External Relations Commission (12 September 1968) 15 C/15 Corr., Annex I, 1. The Members of the Executive Board in 1968 were Israel, Mali, Zambia, Switzerland, the United States of America, Brazil, Chile, Nigeria, Ivory Coast, France, Finland, the Netherlands, India, Costa Rica, Senegal, the Federal Republic of Germany, Tanzania, the United Arab Republic, Romania, Lebanon, the United Kingdom, the USSR, Japan, Panama, Peru, Argentina, Cameroon, Hungary, Italy and Iran.

135 Final Report, Expert Meeting on the Exchange of Original Objects Between Museums and the Reconstitution of Dismembered Works of Art (26 August 1966) SHC/1.

136 Report on the Possibility of Drafting a Convention Concerning the Illicit Import, Export and Transfer of Ownership of Cultural Property (22 April 1968) 78 EX/9, paras 6-19.

137 Ibid para 28.

138 Ibid paras 33-4.

139 Records of the General Conference, 15th Session (vol 1) Annex II, Report of the Programme Commission (1968) para 994

Recommendation,¹⁴⁰ noting that the illicit transfer of cultural property causes 'not only moral and material impoverishment' to the cultural heritage of the source state, but also causes harm to the 'higher interests of science'.¹⁴¹ As such, '[h]owever humble an object may be, it may be worthy of protection under the present draft'.¹⁴²

The report concluded that the 'reciprocal responsibilities and obligations' resulting from the convention would 'enable the international community to give concrete form to the idea of a world-wide cultural heritage belonging to all countries'.¹⁴³ That such phraseology would emerge again despite Member States having expressed their reticence against it in connection with the 1964 recommendation is remarkable – and perhaps an indication of fluctuating attitudes with regards to the international protection of cultural heritage as well as the changing composition of UNESCO membership in light of decolonisation. Nonetheless, the emphasis upon the reciprocal nature of the convention illustrates that states remained of the opinion that the convention would not represent an undue limitation of their sovereignty.

In their responses to the preliminary draft, states were generally positive, noting the need for an international convention on the issue of illicit export and import of cultural property.¹⁴⁴ However, some states, such as France, noted the importance of tackling the issue at its source and the need to limit any convention to cultural property 'of importance', for reasons of practicality.¹⁴⁵ Any limitation of private property rights needed to be commensurate with a need to protect 'objectives that constitute evidence of the particularly characteristic cultural heritage of a country'.¹⁴⁶ Others stressed that any convention should recognise the competence of each state to indicate which property is to be protected.¹⁴⁷ The United States, for its part, deplored the illicit movement of cultural property and called for cooperation between states, but noted that 'arrangements for international cooperation should be realistic; that international efforts should not displace the *primary responsibility* of the States directly concerned'.¹⁴⁸

A special committee of governmental experts from 61 UNESCO Member States subsequently convened in April 1970 to produce a final draft, noting the dangers imposed upon 'the world's cultural heritage' as a result of the

140 Preliminary Report, Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (8 August 1969) SHC/MD/3, para 28.

141 Ibid para 16.

142 Ibid paras 10-11.

143 Ibid paras 90-91.

144 Replies to Circular Letter CL/2041 and to document SHC/MD/3 (27 February 1970) SHC/MD/5, Annex I, 5 (Brazil).

145 Ibid, Annex I, 7 (France)

146 Ibid, Add. 1, 1 (Austria).

147 Ibid, Annex I, 11 (Italy).

148 Ibid 21 (emphasis added).

illegal trade in cultural property.¹⁴⁹ One of the key areas of focus for the special committee was the definition of cultural property.¹⁵⁰ The chapeau of article 1 was modified to include that ‘the term “cultural property” means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science’, belonging to the predetermined categories provided in article 1.¹⁵¹ As such, the definition sought to find a middle ground between those states which sought to protect effectively all cultural property situated on their territory, and those which considered it to be an unwarranted limitation of their sovereignty to have to enforce the export prohibitions of other states.¹⁵²

The most radical changes and extensive debates revolved around those articles that discussed prohibitions on the import of illegally exported cultural property,¹⁵³ in particular on the question whether there should be an absolute prohibition on both imports and exports of cultural property not in possession of the requisite certificates. Whereas an absolute import prohibition had been provided for in the initial revised draft,¹⁵⁴ the final draft removed this obligation. Broad import prohibitions were only provided in relation to cultural property which had been stolen from a museum or religious or secular public monument; the requesting state was furthermore required to pay just compensation to an innocent purchaser of the property.¹⁵⁵ While some states continued to wish to see an absolute import prohibition on illegally exported cultural property and a removal of the requirement to compensate good faith purchasers,¹⁵⁶ the draft convention was nonetheless adopted with 77 votes in favour, 1 against and 8 abstentions in the plenary session of the General Conference.¹⁵⁷

In the definitive text, the scope of protection of the 1970 Convention is limited to ‘cultural property’, defined as ‘property which, on religious or secular grounds, is specifically designated by each State as being of importance

149 Report of the Special Committee of Governmental Experts to Examine the Draft Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (13 July 1970) 16 C/17, Annex II, para 11.

150 Ibid para 17.

151 Draft Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (13 July 1970) 16 C/17, Annex I, art 1.

152 O’Keefe (n 10) 116-117.

153 16 C/17, Annex II (n 149) para 25.

154 Revised Draft Convention Concerning the means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (27 February 1970) SHC/MD/5, Annex III, art, 7(c), (f).

155 1970 Draft Convention (n 151) art 7(b)(i)-(ii).

156 Records of the General Conference, 16th Session (vol 2) CFS.71/XIII.16/A (1970) para 1091.

157 Records of the General Conference, 16th Session (vol 3) CFS.71/VII.16/AFSRAR (1970) 1238. As noted by O’Keefe (n 10), precise voting records are unavailable, as the vote was by a show of hands and no further record was made of individual votes.

for archaeology, prehistory, history, literature, art or science', belonging to a predefined set of categories.¹⁵⁸ The phrase 'specifically designated by each State' has been interpreted as an indicator that the determination of which cultural property is of importance and thus within the material scope of the Convention, ultimately falls to the discretion of the sovereign state.¹⁵⁹ It does not mean that every object needs to be specifically *listed* (e.g. on an official inventory of cultural property) as such by the state, an assertion that would be particularly problematic for objects that are yet to be excavated. As such, states are granted the freedom to recognise what constitutes 'their' cultural heritage, in recognition of the principle of sovereign equality, yet within the boundaries of the general criterion that protected cultural property nonetheless has to be of importance and must fall within one of the exhaustive categories of article 1.¹⁶⁰

One contemporary commentator considered that the 1970 Convention, despite its retreat from the concept of a 'cultural heritage of mankind' propounded in the 1954 Hague Convention, still epitomised the view 'that the accumulation of ... separate [national] heritages composes the whole heritage of mankind'.¹⁶¹ However, the 1970 Convention undeniably focuses on the retention and restitution of cultural property in the interest of the 'national culture' of states of origin, almost wholly eschewing references to any notion of the cultural heritage of humankind. In doing so, it is deferential to state sovereignty – perhaps because invocations of the 'universal nature' of cultural property were perceived by some states to have been responsible for the loss of their cultural heritage during the colonial period. The Convention thus limits its scope of application to cultural property which the state of origin sees fit to protect, rather than employing notions of universal value or relative importance to the international community. In this sense, even though the organising principles of the 1970 Convention differed radically from the Hague Convention, their conceptualisations of the role of universality in constructing cultural value are perhaps strikingly similar: individual national heritage can be seen as islands within the greater universe of all cultural heritage, rather than together being part of a unified whole (described by some as a form of 'mosaic universalism').¹⁶²

That this was the end result of the drafting process of the 1970 Convention was perhaps remarkable, as it reversed the universalist trend which could be said to mark the prevailing spirit of the era, demonstrated by the 1954 Hague Convention, the World Heritage Convention (which was being drafted nearly

158 1970 Convention, art 1.

159 Kono and Wrška (n 101) 36–8.

160 Halina Nić, 'Sovereign Rights to Cultural Property' (1971) 4 *Polish Yearbook of International Law* 239, 250; O'Keefe (n 10) 113.

161 Williams (n 104) 2.

162 Chiara De Cesari, 'World Heritage and Mosaic Universalism: A View from Palestine' (2010) 10 *Journal of Social Archaeology* 299.

simultaneously with the 1970 Convention), and its own predecessor, the 1962 Recommendation, which applied to cultural property of 'great importance'. However, it also presaged later cultural heritage instruments which sought to emphasise other forms of value than the international or which rejected the relevance of significance criteria, such as the 2001 Underwater Cultural Heritage Convention and the 2003 Intangible Cultural Heritage Convention.

3.4 THE WORLD HERITAGE CONVENTION (1972)

In the 1970s, the World Heritage Convention¹⁶³ was seen as a step on the path to creating a Global Village, with general optimism on the possibility of 'progressive unification of human interests'.¹⁶⁴ Attempts to create an international convention to support the protection of 'world heritage' dotted 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'.¹⁶⁵ 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'.¹⁶⁶ Nonetheless, despite the change in wording, one overriding element

163 Convention for 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).

164 Atle Omland, 'The Ethics of the World Heritage Concept' in Chris Scarre and Geoffrey Scarre (eds), *The Ethics of Archaeology: Philosophical Perspectives on Archaeological Practice* (Cambridge University Press 2006) 242.

165 Sarah Titchen, 'On the Construction of Outstanding Universal Value' (DPhil thesis, Australian National University 1995) 36-74; Sophia Labadi, *UNESCO, Cultural Heritage, and Outstanding Universal Value* (AltaMira Press 2013) 26-28. See e.g.: Study of Measures for the Preservation of Monuments through the Establishment of an International Fund or by Any Other Appropriate Means (28 June 1963) 65 EX/9 ('artistic value'); Report on Measures for the Preservation of Monuments of Historical or Artistic Value (16 June 1964) 13 C/PRG/15 ('historical or artistic value'); Desirability of Adopting an International Instrument for the Protection of Monuments and Sites of Universal Value (31 July 1970) 16/C/19 ('universal value', 'universal interest', 'cultural heritage of mankind'). Notably, the 1970 preliminary study on a possible instrument for the protection of monuments and sites of universal value (16/C/19, Annex) notes that '[a]lthough, by virtue of the heritage of cultural property being regarded as whole, protective measures must apply at national level to all components of that heritage, whatever their relative importance, that is not the case with international protection. Being complementary to that of Member States and applicable only to monuments, groups of buildings and sites of outstanding interest to the international community, it would intervene in favour of those of universal interest only' (para 14). The experts note that the category of 'universal value' may be compared with the category of 'centres containing monuments and other immovable cultural property of very great importance' in the 1954 Hague Convention (para 42).

166 Abdulqawi A Yusuf, 'Art. 1, Definition of Cultural Heritage' in Francesco Francioni (ed), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press 2008).

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.¹⁶⁷ The elements which made up this cultural heritage of humankind tended to be 'monuments of grand scale, dating from the great and/or ancient civilisations':¹⁶⁸ immediately recognizable sites such as Abu Simbel, Venice and Borobodur, which had been the subject of successful UNESCO funding campaigns prior to the adoption of the World Heritage Convention. 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 to – the World Heritage Convention.¹⁶⁹

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 recital 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*'; 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*'. 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*'. 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

167 See e.g. the claim by Mexico in 1950 that certain forms of heritage are part of the 'cultural patrimony of mankind': Project for an International Convention for the Protection of Historic Monuments and Art Treasures, Submitted by the Delegation of Mexico (26 May 1950) 5C/22. See also Note on the Desirability of Framing an International Convention Establishing an International Fund for the Preservation and Restoration of Monuments and Historic Sites and for the Development and Creation of Museums and Introducing a Special Tourist Tax (6 December 1950) CL/452; First Report of the Programme and External Relations Commission, Study of Measures for the Preservation of Monuments through the Establishment of an International Fund or by any other Appropriate Means (10 May 1963) 65 EX/27, 16; 16 C/19 (n 165) paras 48–49.

168 Labadi (n 165) 26–8.

169 See 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; Agreement Concerning the Voluntary Contributions to be Given for the Execution of the Project to Save the Temples of Philae (adopted 19 December 1970, entered into force 19 December 1970) 798 UNTS 3; Agreement Concerning the Voluntary Contributions to be Given for the Execution of the Project to Preserve Borobodur (adopted 29 January 1973, entered into force 29 January 1973) 865 UNTS 273; Agreement Concerning the Voluntary Contributions to be Given for the Execution of the Project to Preserve and Develop the Monumental Site of Moenjodaro (adopted 27 May 1980, entered into force 27 May 1980) 1256 UNTS 59.

heritage as a common heritage was innovative for its time in light of the incursion it represented into the *domaine réservé* of states,¹⁷⁰ a stark contrast to the 1970 Convention adopted only two years earlier.

The phrase 'world heritage' originated in contemporaneous efforts of the United States from 1965 to 1972 to create a 'World Heritage Trust', and centred on the dual protection of cultural and natural heritage of a 'unique and irreplaceable' nature.¹⁷¹ This proposal argued that certain parts of cultural and natural heritage were part of the heritage of mankind, and that 'their survival is a matter of major concern to all'.¹⁷² Along similar lines, there was an effort led by the International Union for Conservation of Nature (IUCN) to present a draft convention for adoption at the 1972 Stockholm Conference on the Human Environment.¹⁷³ Like the American proposal, the IUCN draft noted in its preamble that 'certain natural areas of outstanding interest and value to mankind and certain natural sites of unique historical, anthropological, or architectural value to mankind must be conserved as part of the World Heritage'.¹⁷⁴ It sought to protect natural areas 'of outstanding interest and value to mankind' and cultural sites 'of great importance to the cultural heritage of mankind',¹⁷⁵ by transforming the protection of these sites into a 'joint concern' of the contracting states (albeit without prejudice to the sovereignty of the territorial state).¹⁷⁶ However, the adoption of a possible IUCN convention at the 1972 Stockholm Conference was eventually shelved, as the possibility loomed that the convention would only address natural sites and not cultural heritage.¹⁷⁷ Negotiations for a convention which was to include both cultural and natural protection thus shifted back to UNESCO.¹⁷⁸

Within UNESCO, the plans for a new convention on cultural heritage were most immediately set into motion in 1966, when the General Conference authorised a study on the possibility of a new system of international protection for monuments which formed an integral part of the 'cultural heritage

170 Francesco Francioni, 'The 1972 World Heritage Convention: An Introduction' in Francesco Francioni (ed), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press 2008) 3; Michel Batisse and Gerard Bolla, *The Invention of 'World Heritage'* (Association of Former UNESCO Staff Members 2005) 14, 78.

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

172 Ibid.

173 Cameron and Rössler (n 171) 3-11; Batisse and Bolla (n 170) 13-37.

174 Draft Convention on Conservation of the World Heritage prepared by IUCN (14 September 1971) A/CONF.48/IWGC.I/2, preamble.

175 Ibid art 1.

176 Ibid art 2(6).

177 The Stockholm Conference did, ultimately, endorse the adoption of the convention in June 1972: Report of the United Nations Conference on the Human Environment (5-16 June 1972) UN Doc A/CONF.48/14/Rev.1, Recommendation 99, p 25.

178 Peter H. Stott, 'The World Heritage Convention and the National Park Service, 1962-1972' (2011) 28 *The George Wright Forum* 279, 285-286.

of mankind'.¹⁷⁹ This authorisation led to two meetings of experts in 1968 and 1969, which discussed whether it was feasible to create an international system of protection for 'monuments and sites of universal value and interest'.¹⁸⁰ Crucially, the discussions that followed revolved not only around the adoption of principles related to international protection, but also discussed the adoption of national principles for the protection of monuments and sites. The World Heritage Convention was accompanied by an oft-forgotten Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage.¹⁸¹

In the initial studies on the feasibility of the convention, the 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'.¹⁸² International protection was a moral question with chiefly technical consequences, 'carried out by the international community for the benefit of all countries'.¹⁸³ Nonetheless, they did also emphasise 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 mankind was 'collectively responsible'.¹⁸⁴ 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'.¹⁸⁵

In adopting this delineation, the expert group was bolstered by similar choices having been made in the 1954 Hague Convention, drawing upon the system of special protection established by the Convention for 'cultural property of very great importance'.¹⁸⁶ However, the expert group simultaneously questioned the relevance of earlier conventions in this regard: it

179 UNESCO, Records of the General Conference, 14th Session (vol 1), Resolution 3.3411 (1966) 60.

180 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) SHC/CS/27/8, p 4; 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) SHC/MD/4, para 3.

181 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) SHC/CS/27/8, 4; 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) para 3; UNESCO, Records of the General Conference, 17th Session (vol 1) Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage (1972).

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

183 Ibid.

184 SHC/CS/27/8 (n 181) paras 74, 78.

185 Ibid para 82.

186 Ibid para 83.

would be logical for a 'peacetime' convention to be wider in scope than the Hague Convention.¹⁸⁷ Above all, uncertainty remained about the precise scope of 'universal value'.¹⁸⁸ 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',¹⁸⁹ a position in line with the end-result of the Hague Convention negotiations.

The Director-General subsequently drew up a preliminary draft convention and draft recommendation.¹⁹⁰ This draft included much of the same language as would be found in the final version of the World Heritage Convention in relation to the status of World Heritage; the preamble noted that the 'deterioration or disappearance of any item of cultural property or any natural environment constitutes a harmful impoverishment of the heritage of all the nations of the world'; some types of heritage 'are of exceptional interest and therefore need to be preserved as part of the world heritage of mankind as a whole', and as such it is a responsibility of mankind to ensure the continued existence of these sites and areas of 'universal value'.¹⁹¹ Although the definition of cultural and natural heritage in the preliminary draft convention does not itself use the phrase 'outstanding universal value', it does contain a proviso that international protection would only be granted to heritage of 'universal value'.¹⁹² The preliminary draft also states that the property protected by the convention is 'a universal heritage, which it is the duty of the international community as a whole to protect',¹⁹³ albeit with full respect for the sovereignty of the territorial state.¹⁹⁴

By contrast, the preliminary draft recommendation on the protection of cultural heritage at the national level does not adopt any delimitation with regards to the universal interest of the cultural heritage which is to be protected, only noting that there should be some interest (such as historical or artistic interest) upon which protection can be based.¹⁹⁵ The draft recommendation also explicitly noted that national protection of cultural heritage is an obligation which the state owes to both its nationals and the international community as a whole,¹⁹⁶ lending further credence to the general universalist

187 Ibid para 86.

188 Ibid para 84.

189 SHC/MD/4 (n 180) para 70.

190 Records of the General Conference, 16th Session (vol 1) Resolution 3.412 (1970) paras 1100-7.

191 Preliminary Draft Convention Concerning the Protection of Monuments, Groups of Buildings and Sites of Universal Value (30 June 1971) SHC/MD/17/Ann. II, preamble.

192 Ibid art 2(2).

193 Ibid art 5(1).

194 Ibid art 5(2).

195 Preliminary Draft Recommendation Concerning the Protection, at National Level, of Monuments, Groups of Buildings (30 June 1971) SHC/MD/17/Ann. I, para 1.

196 Ibid para 3.

impetus present during the drafting – in which sovereignty was conceptualised as a form of trusteeship over treasures which concerned not only national communities, but the world as a whole.

The draft convention was revised in February 1972 pursuant to comments from the Member States.¹⁹⁷ Some of these comments focused on the ‘broad’ and ‘inadequately defined’ scope of protection, and requested further emphasis on the importance of state sovereignty and national property rights, a proposal which was eventually included in article 6(1) of the final text.¹⁹⁸ By contrast, Brazil attempted to propose an increased emphasis on regional heritage, but was unsuccessful.¹⁹⁹ As such, some minor adjustments were made in the sections of the convention which justify international protection and define its material scope, such as an increased emphasis on the importance of ‘universal value’ within the definition of cultural heritage.²⁰⁰ Similarly, no dramatic changes were made to the revised draft recommendation in this regard.²⁰¹

In April 1972, a Special Committee of Governmental Experts convened to finalise a revised draft convention and draft recommendation. At his opening address at the meeting of the Special Committee, then-UNESCO Director-General René Maheu emphasised that the drafts before the committee were ‘based on the principle that the cultural and natural heritage belongs to mankind as a whole, which means that it lies outside the proprietorship of States while remaining within the framework of their sovereignty’,²⁰² in a foreshadowing of the common concern principle. Fairly little was ultimately changed in these final meetings with regards to the positing of cultural and natural heritage as part of the ‘heritage of mankind’: the preamble was adopted by consensus without further discussion.²⁰³ However, one important change was adopted with regards to the definition of the scope of the convention: the addition of ‘outstanding *universal* value’ as part of the definition of cultural and natural heritage emerged in the Convention texts by virtue of proposals from the United States and United Kingdom.²⁰⁴ Whereas the previous draft texts produced within UNESCO sought to protect cultural and natural sites of ‘universal interest’, the new draft only protected sites of ‘outstanding universal

197 International Regulations for the Protection of Monuments, Groups of Buildings and Sites (21 February 1972) SHC/MD/18.

198 Ibid p 5 (France); Add 2, p 3 (Canada); Add 3, p 2 (Germany); Add 4, p 3 (Egypt).

199 Revised Draft Convention Concerning the Protection of Monuments, Groups of Buildings and Sites of Universal Value (21 February 1972) SHC/MD/18/Ann. IV, art 2(2). This proposal was initially successful but was eventually removed in a later draft.

200 Ibid art 1.

201 Revised Draft Recommendation Concerning the Protection, at National Level, of Monuments, Groups of Buildings and Sites (21 February 1972) SHC/MD/18/Ann. III.

202 Address by Mr. René Maheu (4 April 1972) DG/72/4, p 2.

203 Records of the General Conference, 17th Session (vol 2) 17 C/Reports (1972) 148, para 288.

204 Labadi (n 165) 26-28.

value' in the interest of limiting the scope of the Convention.²⁰⁵ Notably Nigeria (albeit unsuccessfully) submitted a proposal to *delete* the term 'universal' in article 1.²⁰⁶ Following these changes, this section of the convention was also adopted without discussion, with a consensus being reached on the convention as a whole on 16 November 1972.²⁰⁷

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'.²⁰⁸ 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 1978,²⁰⁹ although these criteria are often self-referential, often using 'equally undefined alternatives ("masterpiece", "important", "unique", "exceptional", "superlative", "significant", etc.)'.²¹⁰ Early listing practices were decried for being overly Eurocentric and monumentalist, to a certain extent mirroring the struggle between the universal and national interest in the drafting of the Hague Convention.²¹¹ Subsequent practice of the States Parties to the Convention suggests a certain tempering of the universalism present in the early years of the World Heritage Convention, with attempts by the World Heritage Committee to reach greater degrees of representativity and credibility, as marked by the 1994 Global Strategy.²¹² Nonetheless, the practice of the World Heritage Committee in recent years

205 Ibid. See also IUCN Background Paper, Special Expert Meeting of the World Heritage Convention: The Concept of Outstanding Universal Value (6-9 April 2005) WHC-05/29.COM/INF.9B, 151. For the revised draft, see Draft Report of the Meeting of the Special Committee of Government Experts to Prepare a Draft Convention and a Draft Recommendation (21 April 1972) SHC.72/CONF.37/19, paras 12-13.

206 SHC.72/CONF.37/DR.8; SHC.72/CONF.37/DR.9.

207 17 C/Reports (n 203) 148, para 289.

208 ICOMOS Background Paper, Special Expert Meeting of the World Heritage Convention: The Concept of Outstanding Universal Value, 6-9 April 2005, WHC-05/29.COM/INF.9B 15, 7-8.

209 See Labadi (n 165) and Yusuf (n 166) for an overview of developments throughout the years with regards to the criteria for OUV.

210 Christoph Brumann, 'The Best of the Best: Positing, Measuring and Sensing Value in the UNESCO World Heritage Arena' in Ronald Niezen and Maria Sapignoli (eds), *Palaces of Hope: The Anthropology of Global Organizations* (Cambridge University Press 2017) 248-49.

211 Cameron and Rössler (n 171) 45 ff.

212 Francioni, 'The Preamble' in Francesco Francioni (ed), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press 2008) 18-22.

suggests that national interest, rather than overarching ideals of universal heritage, are currently guiding states.²¹³

The Convention does not give shape to the more far-venturing embodiments of universality explored in the previous chapter, such as the principle of the common heritage of mankind as developed within environmental law and the law of the sea.²¹⁴ Some have argued in favour of the Convention embodying the common concern principle, a claim which certainly has some merit: like common concern regimes, the World Heritage Convention sets the boundaries of state sovereignty, establishes a system of international cooperation and burden sharing, and employs references to intergenerational equity as the ground for the establishment of an international convention.²¹⁵ In this sense, the concept of the cultural heritage of humankind can be seen as a signal of the territorial state's position as a trustee of the common interest of the international community, and the need to cooperate in order to protect this common interest.²¹⁶ However, numerous commentators have underscored that the Convention nonetheless does not create rights or establish the existence of a shared cultural heritage of all humankind in a context beyond that of state sovereignty; indeed, as Francioni notes, 'the World Heritage Convention has built its success on a careful balancing of ... sovereign rights and the public interest of the international community.'²¹⁷

Similarly, doubts have been cast about the use of the term 'universal' within the Convention and the extent to which it refers to something universal in terms of its geographical scope. Instead it has been argued that the Convention's references to 'universal' relate to the ability of a World Heritage site to on the one hand express something which is common to the human condition, yet simultaneously mirror the diversity of human culture across time and space.²¹⁸ As noted in the introduction, it is precisely these contradictory positions which lie at the heart of cultural heritage protection within international law: a balancing act between universality and particularity. Brumann notes that this 'mysticism' – the inability to pin down precisely what makes a site of outstanding universal value – might indeed be at the core of the

213 Lynn Meskell and others, 'Multilateralism and UNESCO World Heritage: decision-making, States Parties and political processes' (2015) 21 *International Journal of Heritage Studies* 423.

214 Forrest, 'Cultural Heritage as the Common Heritage' (n 72) 131, 135.

215 Titchen (n 165) 2; Jutta Brunnée, 'Common Areas, Common Heritage, and Common Concern' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2012) 564-565.

216 Internal Oversight Service, Evaluation of UNESCO's Standard-setting Work of the Culture Sector. Part III – 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (April 2014) IOS/EVS/PI/132 REV.3, 4.

217 Evaluation of UNESCO's Standard-setting Work of the Culture Sector. Part III – 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (April 2014) IOS/EVS/PI/132 REV.3, 41.

218 Francioni, 'The Preamble' (n 212) 18-22.

success of the World Heritage brand, which is able to offer a 'myth of immediately perceptible site magic'.²¹⁹

Following the adoption of the World Heritage Convention, it was to take quite some years until the organisation adopted another binding instrument on cultural heritage protection, although discussions continued throughout the 1980s and 1990s on the two topics which were to form the following two conventions which UNESCO would adopt: the 2001 Convention on the Protection of the Underwater Cultural Heritage, which entered into force in 2009, and the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, which entered into force in 2006.

3.5 THE UNDERWATER CULTURAL HERITAGE CONVENTION (2001)

The creation of a convention for the protection of underwater cultural heritage (UCH) was instigated in 'response to the opening up of the ocean floor ... as a result of advances in marine technology'.²²⁰ Until the early 1980s, the majority of underwater cultural heritage was inaccessible, with the exception of objects submerged relatively close to the coast or in a state's internal waters.²²¹ A turning point emerged in 1985 with the location and exploration of the wreck of the *HMS Titanic* at a depth of 3.8 kilometres, proving the urgency of the potential issues posed by the growing accessibility of objects on the seabed.²²²

The legal framework for such objects – initially comprised by salvage and admiralty law, and supplemented by sparse provisions in the 1982 UN Convention on the Law of the Sea (UNCLOS) – were considered to be inadequate, leaving a lacuna in the protection of cultural objects between 24 nautical miles (the regimes of the territorial sea and the contiguous zone) and the outer limit of the continental shelf, precisely the area at most risk from unauthorised salvage.²²³ Frustrations had already mounted in the 1970s during the drafting

219 Brumann (n 210) 260-2.

220 Sarah Dromgoole, 'Reflections on the Position of the Major Maritime Powers with Respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001' (2013) 38 *Marine Policy* 116, 116.

221 However, the 1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations also applied to archaeological excavations 'carried out on the bed or in the sub-soil of inland or territorial waters of a Member State'; see Records of the General Conference, 9th Session, 9 C/Resolution 4.32 (1956) Recommendation on International Principles Applicable to Archaeological Excavations, 40.

222 Dromgoole (n 220) 117; Eden Sarid, 'International Underwater Cultural Heritage Governance: Past Doubts and Current Challenges' (2017) 35 *Berkeley Journal of International Law* 219, 221, 223.

223 Anastasia G Strati, 'Protection of the Underwater Cultural Heritage: From the Shortcomings of the UN Convention on the Law of the Sea to the Compromises of the UNESCO Convention' in Anastasia G Strati, Maria Gavouneli and Nikolaos Skourtos (eds), *Unresolved Issues*

of UNCLOS with the 'low status of archaeology'²²⁴ in the negotiations. These frustrations led to two parallel developments: firstly, the adoption at the regional level of the Valletta Convention for the Protection of the Archaeological Heritage of Europe, which included underwater cultural heritage within its scope,²²⁵ and the formulation of a draft international convention on underwater cultural heritage in international waters by the Cultural Heritage Law Committee of the International Law Association (ILA).²²⁶ The ILA Committee finalised its draft in 1994, passing it on to UNESCO in order to pursue the adoption of the convention at the international level.²²⁷

Discussions within UNESCO underlined that the issue of underwater cultural heritage could not be tackled solely at the domestic level, as it was innately intertwined with the balance of jurisdiction between coastal and flag states. Nonetheless, it was also considered that the underwater cultural heritage deserved international protection in light of its status as shared cultural herit-

and New Challenges to the Law of the Sea: Time Before and Time After (Brill Nijhoff 2006) 31-2; Dromgoole (n 220) 116-8.

- 224 Janet Blake, 'The Protection of the Underwater Cultural Heritage' (1996) 45 ICLQ 819, 821. The Third United Nations Conference on the Law of the Sea, or UNCLOS III, presented the second attempt to formulate a regime for all maritime zones, and spanned from 1973 to 1982 following the failure of the Second United Nations Conference on the Law of the Sea (UNCLOS II) in 1960.
- 225 European Convention on the Protection of the Archaeological Heritage (adopted 16 January 1992, entered into force 25 May 1995) ETS No. 143 (Valletta Convention); see Craig Forrest, 'Defining "Underwater Cultural Heritage"' (2002) 31 *The International Journal of Nautical Archaeology* 3, 6-7. The Valletta Convention replaced the European Convention on the Protection of the Archaeological Heritage (adopted 6 May 1969, entered into force 20 November 1970) ETS No. 066 (London Convention). There had also been attempts in the 1970s and 1980s to adopt a Draft European Convention on the Protection of the Underwater Cultural Heritage, which was ultimately not adopted due to an objection from Turkey. See Parliamentary Assembly of the Council of Europe, Order 361 (25 January 1977); Parliamentary Assembly of the Council of Europe, 'The Underwater Cultural Heritage: Report of the Committee on Culture and Education (Rapporteur: Mr. John Roper)' (18 September 1978) Doc 4200-E; Parliamentary Assembly of the Council of Europe, Recommendation 848 (4 October 1978); Draft Convention on the Protection of the Underwater Cultural Heritage and draft explanatory report (22 June 1984) DIR/JUR (84) 1.
- 226 Blake, 'The Protection of the Underwater Cultural Heritage' (n 224) 820. Patrick O'Keefe and Lyndel Prott, involved in the drafting of the ILA Draft Convention, had also been involved as experts in the drafting of the Draft European Convention on the Protection of the Underwater Cultural Heritage; as such, the ILA draft was heavily inspired by the European draft: see Sarah Dromgoole, *Underwater Cultural Heritage and International Law* (Cambridge University Press 2013) 50.
- 227 The ILA draft boldly sought to create a 'cultural heritage zone', extending the jurisdiction of the coastal state up to 200 nautical miles from the baselines; it also sought to exclude the application of salvage law to underwater cultural heritage. See Craig Forrest, 'A New International Regime for the Protection of Underwater Cultural Heritage' (2002) 51 ICLQ 511, 515; Roberta Garabello, 'The Negotiating History of the Convention on the Protection of the Underwater Cultural Heritage' in Roberta Garabello and Tullio Scovazzi (eds), *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Martinus Nijhoff 2003) 91-3.

age:²²⁸ '[t]he international nature of shipping, for example, where a vessel may be built in one country, be sailing from a second country to a third country and have a crew made up of citizens of many countries, often leads to situations where there may be more than one nation with interests in a particular underwater archaeological site and its contents'.²²⁹ As such, underwater cultural heritage can 'serve as a reminder of our global common heritage, since they represent a complicated network of human interaction and cultural diffusion through waterways and coastal trading hubs'.²³⁰ Simultaneously, underwater cultural heritage also encompasses 'remains of early human settlements found on submerged continental shelves'.²³¹ Such heritage can carry a wealth of historical and archaeological information, frequently well preserved due to their submerged nature. To this end, the preamble of the Underwater Cultural Heritage Convention states that UCH is 'an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage', and that responsibility for its protection and preservation 'therefore rests with all States'.²³² This mirrors the universalist positions reflected in the 1954 and 1972 Conventions.

It was the division of this responsibility amongst states which proved to be one of the most difficult issues to tackle during drafting, in particular the issue of jurisdiction over underwater cultural heritage situated beyond the territorial sea.²³³ As UNESCO began its project for a new convention, UNCLOS entered into force in November 1994, adding the further complication that the future instrument would need to be compatible with UNCLOS in order to be successful. Cultural heritage is explicitly regulated in UNCLOS in articles 149 (in Part XI on the Area) and 303 (in Part XVI on 'General Provisions'), which provide for the protection of 'archaeological and historical objects', a

228 Thijs J Maarleveld, 'How and Why Will Underwater Cultural Heritage Benefit from the 2001 Convention' (2008) 60 *Museum International* 50–51.

229 Mark Staniforth, James Hunter and Emily Jateff, 'International Approaches to Underwater Cultural Heritage' in A W Harris (ed), *Maritime Law: Issues, Challenges and Implications* (Nova Science Publishers 2011) 3.

230 Internal Oversight Service, Evaluation of UNESCO's Standard-Setting Work of the Culture Sector. Part VI – 2001 Convention on the Protection of Underwater Cultural Heritage (May 2019) IOS/EVS/PI/174.REV, 1.

231 Maarleveld (n 228) 51.

232 Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009) 2562 UNTS 3 (Underwater Cultural Heritage Convention).

233 Toshiyuki Kono and Stefan Wrba, 'Convention on the Protection of the Underwater Cultural Heritage (2001)' in Toshiyuki Kono (ed), *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21st Century* (Brill Nijhoff 2010) 78.

term undefined within UNCLOS.²³⁴ The existence of these provisions was to cause significant difficulties during the drafting of the Underwater Cultural Heritage Convention, as a number of powerful maritime states feared that the convention would upset the delicate jurisdictional balance agreed upon in UNCLOS.²³⁵ A number of maritime states have thus refused to ratify the Convention because they believe that it expands the jurisdiction of the coastal state beyond what is permitted by UNCLOS.²³⁶

Another central issue during drafting related to the material scope of the convention.²³⁷ The adopted text of the Underwater Cultural Heritage Convention defines underwater cultural heritage for the purposes of the convention

234 Ibid 71-2. Forrest, 'Defining "Underwater Cultural Heritage"' (n 225) notes at 7 that it was not 'certain whether the terms should be read conjunctively, as in the Chinese, English, and French texts, or disjunctively, as in the Spanish, Arabic, and Russian texts. As the English terms refer to disciplines that, though related, are quite distinct in nature, it is submitted that the terms should be read disjunctively'.

235 Vincent P. Cogliati-Bantz and Craig J. S. Forrest, 'Consistent: the Convention on the Protection of the Underwater Cultural Heritage and the United Nations Convention on the Law of the Sea' (2013) 2 Cambridge Journal of International and Comparative Law 536 543-4. See also UNGA Res 53/32 (6 January 1999) UN Doc A/RES/53/32, para 20, which '[n]otes with interest the ongoing work of the United Nations Educational, Scientific and Cultural Organization towards a convention for the implementation of the provisions of the Convention, relating to the protection of the underwater cultural heritage, and stresses the importance of ensuring that the instrument to be elaborated is in full conformity with the relevant provisions of [UNCLOS]'. Other debates revolved around the Convention's regime for sunken warships and governmental vessels: the major maritime states believed that sovereign immunity continued to apply even after a vessel has sunk; such vessels were ultimately included within the scope of the Underwater Cultural Heritage Convention despite the reticence of the maritime states, with obligations and rights of the States Parties differing according to the maritime zone in which a vessel is found: Sarid (n 222); Dromgoole, 'Reflections on the Position of the Major Maritime Powers with Respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001' (n 220) 119.

236 These states included France, Germany, the United States, the United Kingdom, Norway, and the Netherlands: Sarid (n 222) 228; Forrest, 'A New International Regime for the Protection of Underwater Cultural Heritage' (n 227) 518; Dromgoole, 'Reflections on the Position of the Major Maritime Powers with Respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001' (n 220) 116. However, the position of a number of the vocal opponents during the drafting of the Convention appear to have begun to change their mind: thus France ratified the Convention in 2013. It has also been suggested that the Netherlands is likely to ratify the Convention within the near future, in light of its 2011 request to the *Commissie van Advies inzake Volkenrechtelijke Vraagstukken* regarding the extent to which the UCH Convention indeed modifies the jurisdictional framework of the UNCLOS such that the two conventions are incompatible, and whether the adoption of the Underwater Cultural Heritage Convention had led to 'jurisdictional creep', to which the Commission largely responded in the negative: see *Commissie van Advies inzake Volkenrechtelijke Vraagstukken, Advies over het UNESCO-Verdrag inzake Cultureel Erfgoed Onder Water* (December 2011). See further Guido Carducci, 'New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage' (2002) 96 AJIL 419, 420, 422; Cogliati-Bantz and Forrest (n 235) 537, 560-1.

237 Sarid (n 222) 228.

as 'all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years'.²³⁸ A point of contention during drafting was whether the definition of UCH should be limited based on the significance of the cultural heritage in question. Whereas civil law countries have historically granted 'blanket protection', protection in common law countries is usually on the basis of the 'significance' of a site or property.²³⁹ The distinction between blanket protection and protection based on 'significance' is also based upon differing perceptions of the most effective management system for underwater cultural heritage.²⁴⁰ The definition within the Convention finds its origins in the ILA draft convention, which in turn was heavily inspired by the 1985 Draft European Convention on the Protection of the Underwater Cultural Heritage which was drawn up within the Council of Europe.²⁴¹ Both drafts eschewed limitations based upon significance criteria, defining underwater cultural heritage broadly.²⁴²

By contrast, at the first UNESCO meeting of governmental experts on the project of a new international convention some representatives noted that 'cultural importance' should be adopted as a criterion in the definition of

238 Underwater Cultural Heritage Convention art 1(a).

239 Dromgoole, 'Reflections on the Position of the Major Maritime Powers with Respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001' (n 220) 120; see also Dromgoole, *Underwater Cultural Heritage and International Law* (n 226) 92-3. However, Dromgoole also notes at 92 that 'in the specific context of UCH, systems based on so-called 'blanket' protection have become increasingly favoured internationally and are now used even by some common law states (notably Australia)'.

240 Forrest, 'Defining "Underwater Cultural Heritage"' (n 225) 8-9.

241 The final draft of the Draft European Convention is confidential, but the near-identical 1984 draft is declassified: see Draft Convention on the Protection of the Underwater Cultural Heritage and Draft Explanatory Report (22 June 1984) DIR/JUR (84) 1.

242 The 1985 European Convention thus defines UCH as 'all remains and objects and any other traces of human existence located entirely or in part in the sea, lakes, rivers, canals, artificial reservoirs or other bodies of water, or in tidal or other periodically flooded areas, or recovered from any such environment, or washed ashore', whereas the 1994 ILA Draft defines UCH as 'all underwater traces of human existence' which had been 'submerged underwater for at least 100 years'. However, debates on the notion of significance also surfaced during debates on both drafts. In relation to the 1985 European Convention, see Forrest, 'Defining "Underwater Cultural Heritage"' (n 225) 8-9; Garabello (n 227) 106. See also Parliamentary Assembly of the Council of Europe, Recommendation 848 (4 October 1978) Annex, which provided that the potential European Convention could be limited in scope pursuant to the 'discretionary exclusion of less important objects (or of less important antiquities) once they have been properly studied and recorded'. Similarly, discussions within the ILA also raised the question whether the definition of UCH 'should be limited to "important historic" shipwrecks and related material', or whether it should 'be broader, to cover all aspects of the underwater cultural heritage': Patrick J O'Keefe and James A. R. Nafziger, 'The Draft Convention on the Protection of the Underwater Cultural Heritage' (1994) 25 *Ocean Development & International Law* 391, 392.

underwater cultural heritage, similarly to archaeological objects on land,²⁴³ arguing that the proposed definition was vague and arbitrary.²⁴⁴ Others noted that it is often impossible to assess the value of underwater heritage until it has been disturbed, calling for a system of blanket protection. It was noted, perhaps in deference to the sovereignty of the territorial state, that 'all sites are of importance and archaeologists have no right to say what is or is not important'.²⁴⁵ These doubts continued to circulate at subsequent meetings of the government experts.²⁴⁶ A compromise solution was proposed to mediate between those states in favour of blanket protection and those in favour of a significance requirement, whereby underwater cultural heritage was defined as 'all traces of human existence having a cultural, archaeological or historical character which have been partially or totally underwater, periodically or continuously, for at least 100 years'.²⁴⁷ It was ultimately this definition which was included in article 1 of the final text adopted by the fourth meeting of governmental experts and presented to the UNESCO General Conference in 2001.²⁴⁸

Whilst the inclusion of a criterion based on the 'cultural, historical, or archaeological character' of the underwater cultural heritage might at first sight appear to favour an interpretation in line with the views of the proponents of a 'significance' criterion, it has been argued that the inclusion of the word 'character' simply supplements the 100-year time-limit, as the ordinary meaning of the term is different from that of 'significance'.²⁴⁹ As such, the Convention does not provide states with leeway to exclude cultural heritage from the operation of the Convention solely on the basis of a purported lack of significance.²⁵⁰ In this sense it is comparable to the definition of underwater cultural heritage in UNCLOS, which has been interpreted by some states to apply to a wide range of underwater cultural heritage, not only that considered of

243 Report by the Director-General on the Findings of the Meeting of Experts Concerning the Preparation of an International Instrument for the Protection of the Underwater Cultural Heritage (12 March 1997) 151 EX/10, para 10.

244 Forrest, 'Defining "Underwater Cultural Heritage"' (n 225) 8-9; Garabello (n 227) 106-7.

245 151 EX/10 (n 243) paras 13-14.

246 Report of the Meeting of Governmental Experts on the Draft Convention for the Protection of the Underwater Cultural Heritage (29 June-2 July 1998) Doc CLT-98/CONF.202/7, para 10; Synoptic Report of Comments on the Draft Convention on the Protection of the Underwater Cultural Heritage (April 2000) CLT-2000/CONF.201/3, 4 (comments of Egypt and France). For the draft convention under discussion, see Draft Convention for the Protection of the Underwater Cultural Heritage (April 1998) Doc CLT-96/Conf.202/5.

247 Final Report of the Third Meeting of Governmental Experts on the Draft Convention on the Protection of Underwater Cultural Heritage (21 August 2000) CLT-2000/CONF.201/7, Annex I. Garabello (n 227) 107-8.

248 Draft Convention on the Protection of the Underwater Cultural Heritage (3 August 2001) 31 C/24, 5.

249 Dromgoole, *Underwater Cultural Heritage and International Law* (n 226) 92-3.

250 Strati (n 223) 41; Carducci (n 236) 422-3; see also Forrest, 'Defining "Underwater Cultural Heritage"' (n 225) 10.

great significance.²⁵¹ The definition furthermore formed a reason for some maritime states to refrain from adopting the Convention: thus the United Kingdom, in its explanation of vote in 2001, reiterated its preference for a management and protection system based on significance, in order to streamline resources to protect 'the most important and unique examples of underwater cultural heritage', and considered that the definition of UCH did not provide sufficient leeway to do so.²⁵² In light of its broad character, the definition of cultural heritage in the Convention can thus be contrasted against those established by the 1954 and 1972 Conventions, both of which draw heavily on notions of universal cultural value.

Further consideration of the role that universality plays within the Underwater Cultural Heritage Convention requires a brief excursion into the UNCLOS regime for underwater cultural heritage contained in articles 303 and 149, in light of the intricate connection between UNCLOS and the Underwater Cultural Heritage Convention. Article 303, which applies in all maritime zones,²⁵³ provides that 'States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose'.²⁵⁴ Although the text of article 303 is relatively broad in nature and thus would appear to be normatively weak, it has nonetheless been considered to establish minimum standards for states: thus '[a] State which knowingly destroyed or allowed the destruction of elements of the underwater cultural heritage would be responsible for a breach of the obligation to protect it', as would persistent refusal to cooperate in order to protect the underwater cultural heritage at the request of another state.²⁵⁵

With regards to the Area, article 149 states that '[a]ll objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin'. Even though article 149 references that preservation of underwater cultural heritage is carried out 'for the benefit of mankind as a whole', it is clear that underwater cultural

251 Dromgoole, *Underwater Cultural Heritage and International Law* (n 226) 30-2, 72-5; Strati (n 223) 29-31.

252 Sarid (n 222) 228; Dromgoole, 'Reflections on the Position of the Major Maritime Powers with Respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001' (n 220) 120.

253 On the basis of its location in Part XVI of UNCLOS on 'General Provisions': Dromgoole, *Underwater Cultural Heritage and International Law* (n 226) 32-4; Trpimir M Šošić, 'The Common Heritage of Mankind and the Protection of the Underwater Cultural Heritage' in Trpimir M Šošić, Budislav Vukas and Božidar Bakotić (eds), *International Law: New Actors, New Concepts, Continuing Dilemmas: Liber Amicorum Božidar Bakotić* (Brill Nijhoff 2010) 344.

254 UNCLOS art 303(1).

255 Tullio Scovazzi, 'A Contradictory and Counterproductive Regime' in Roberta Garabello and Tullio Scovazzi (eds), *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Martinus Nijhoff 2003) 4.

heritage in the Area is not to be considered part of the common heritage of mankind: the operation of the latter principle is strictly limited to the mineral resources of the Area.²⁵⁶ Similarly, the authority of the International Seabed Authority does not extend to underwater cultural heritage in the Area, leaving the matter of the management of underwater cultural heritage in the Area unsettled.²⁵⁷

Although article 149 of UNCLOS frames the protection of cultural heritage through the lens of common interests – thereby placing it within the purview of the universalist approaches adopted within cultural heritage law – the UNCLOS regime remains hampered by the fact that it only recognises that this underwater cultural heritage is to be preserved ‘for the benefit of mankind’ when it is located in the Area.²⁵⁸ It thereby leaves up in the air what the interest of international community is with respect to underwater cultural heritage located in areas under national jurisdiction (or whether such an interest even exists).²⁵⁹

The Underwater Cultural Heritage Convention partly remedies this issue. Article 2(3) thus posits that States Parties to the Convention ‘shall preserve underwater cultural heritage for the benefit of humanity in conformity with the provisions of this Convention’, indicating that the obligation is no longer limited to the Area.²⁶⁰ During the drafting process it was considered that doing so would align the Convention with earlier cultural heritage treaties employing the concept of the cultural heritage of mankind,²⁶¹ thereby also filling the ‘gap’ created by article 149 of UNCLOS.²⁶² Along similar lines, the preamble of the Underwater Cultural Heritage Convention acknowledges that

256 UNCLOS art 136; see Dromgoole, *Underwater Cultural Heritage and International Law* (n 226) 30-2. During UNCLOS III, Greece and Turkey had sought to extend the working of the common heritage of mankind principle to the underwater cultural heritage in the Area; this proposal was rejected, and the drafters deliberately chose a different wording in order to refer to the international interest in archaeological or historical objects located in the Area: Šošić (n 253) 341-2.

257 Dromgoole, *Underwater Cultural Heritage and International Law* (n 226) 30-2, 121-2; Strati (n 223) 33-4.

258 Dromgoole, *Underwater Cultural Heritage and International Law* (n 226) 121-2.

259 Strati (n 223) 33-4.

260 Nicola Ferri, ‘The Right to Recovered Underwater Cultural Heritage: The Neglected Importance of Article 149 of the UN Law of the Sea Convention’ in Silvia Borelli and Federico Lenzerini (eds), *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Brill Nijhoff 2012) 258. With regards to the draft of this article in the initial ILA Draft Convention, see O’Keefe and Nafziger (n 242) 408 (article 3).

261 Anastasia Strati, Draft Convention on the Protection of Underwater Cultural Heritage: A Commentary (April 1999) CLT-99/WS/8, 24-5; Forrest, ‘A New International Regime for the Protection of Underwater Cultural Heritage’ (n 236) 519-20, at art 3.

262 CLT-99/WS/8 (n 261) 24-5.

the underwater cultural heritage is 'an integral part of the cultural heritage of humanity', as already noted above.²⁶³

While some commentators have argued that article 2(3) of the Convention appears to be largely aspirational, as 'the interests of humanity referred to are not given any legal basis',²⁶⁴ there are nonetheless indications in the text of the Convention which could give weight to the interests of humankind in the protection of underwater cultural heritage.²⁶⁵ With respect to several of their obligations, States Parties are thus expected to act either 'for the benefit of humanity as a whole, on behalf of all States Parties'²⁶⁶ or 'for the public benefit',²⁶⁷ thereby assuming a 'stewardship role' regardless of their individual connection to the heritage in question.²⁶⁸ Nonetheless, as will be seen in the following chapter, the Convention does not remedy one of the main deficiencies of UNCLOS in relation to the management of the underwater cultural heritage: the absence of an international monitoring body which can 'act on behalf of humanity', fulfilling the same role for underwater cultural heritage as the International Seabed Authority does for the resources of the Area.²⁶⁹ Instead, this responsibility remains wholly with the States Parties of the Convention, which are expected to cooperate with one another for this purpose. The Convention simultaneously also recognises that certain states have a particular interest in the preservation of certain forms of cultural heritage, acknowledging the already existing rights of flag states and providing extended rights to states which can demonstrate a 'verifiable link' to the heritage in question,²⁷⁰ thereby somewhat tempering the universalist approach of the Convention.

All in all, this leaves the Underwater Cultural Heritage Convention in a somewhat curious position in relation to the notion of universality. While the Convention on the one hand acknowledges that certain states have a particular interest in the preservation of certain forms of underwater cultural heritage – and the Convention itself was the result of efforts by states particularly affected by unregulated access to 'their' underwater cultural heritage, such as Mediterranean states – a great deal of the heritage which the Convention seeks to preserve has an undeniably shared character. Yet by contrast to

263 Compare this to the initial emphasis in the ILA draft on 'the importance of the underwater cultural heritage as an integral part of the cultural heritage of humanity', and the statement that UCH 'belongs to the common heritage of humanity' and that responsibility for its protection is shared between 'all States and other subjects of international law': O'Keefe and Nafziger (n 242) 404. See also Garabello (n 227) 97-8.

264 Forrest, 'A New International Regime for the Protection of Underwater Cultural Heritage' (n 236) 519-20.

265 Šošić (n 253) 346-8.

266 Underwater Cultural Heritage Convention art 12(6).

267 Ibid art 18(4).

268 Dromgoole, *Underwater Cultural Heritage and International Law* (n 226) 133; Šošić (n 253) 346-8.

269 Dromgoole, *Underwater Cultural Heritage and International Law* (n 226) 126-7.

270 Ibid 133. See e.g. articles 9(5), 11(4), 18(3)-(4).

cultural heritage conventions such as the 1954 Hague Convention and the World Heritage Convention, this 'commonality' of underwater cultural heritage is not expressed directly in the definition of UCH in the Convention. The Convention's scope of protection is thus not defined by reference to the universal value or significance of the heritage to be protected; instead, it establishes a fairly broad net of protection.

However, as has been demonstrated above, in light of its position beyond the boundaries of state sovereignty, the underwater cultural heritage is simultaneously also placed within the framework of universal interest. UNCLOS establishes a general duty of cooperation and broad duty to protect objects of an archaeological and historical nature; it furthermore provides that these objects shall be preserved or disposed of for the benefit of mankind as a whole. This status has furthermore been underlined in the practice of the UN General Assembly since 2006, which has consistently '[emphasised] that underwater archaeological, cultural and historical heritage, including shipwrecks and watercrafts, holds essential information on the history of humankind and that such heritage is a resource that needs to be protected and preserved'.²⁷¹ Similarly, the Underwater Cultural Heritage Convention provides that underwater cultural is part of the cultural heritage of humanity. The responsibility of managing and preserving underwater cultural heritage is carried out by states as custodians of this heritage, and states are expected to cooperate in the interest of humanity. However, as we shall see in the next chapter, the modalities of this cooperation continue to be strictly determined by the maritime zone in which the cultural heritage is situated.

3.6 THE INTANGIBLE CULTURAL HERITAGE CONVENTION (2003)

As noted above in relation to the World Heritage Convention, subsequent practice of the States Parties to the World Heritage Convention has promoted

²⁷¹ UNGA Res 60/30 (8 March 2006) UN Doc A/RES/60/30, preamble; UNGA Res 61/222 (16 March 2007) UN Doc A/RES/61/222, preamble; UNGA Res 62/215 (14 March 2008) UN Doc A/RES/62/215, preamble; UNGA Res 63/111 (12 February 2009) UN Doc A/RES/63/111, preamble; UNGA Res 64/71 (12 March 2010) UN Doc A/RES/64/71, preamble; UNGA Res 65/37 (17 March 2011) UN Doc A/RES/65/37, preamble; UNGA Res 66/231 (5 April 2012) UN Doc A/RES/66/231, preamble; UNGA Res 67/67 (18 April 2013) UN Doc A/RES/67/78, preamble; UNGA Res 68/70 (27 February 2014) UN Doc A/RES/68/70, preamble; UNGA Res 69/245 (24 February 2015) A/RES/69/245, preamble; UNGA Res 70/235 (15 March 2016) UN Doc A/RES/70/235, preamble; UNGA Res 71/257 (20 February 2017) UN Doc A/RES/71/257, preamble; UNGA Res 72/73 (4 January 2018) UN Doc A/RES/72/73, preamble; UNGA Res 73/124 (31 December 2018) UN Doc A/RES/73/124, preamble; UNGA Res 74/19 (20 December 2019) UN Doc A/RES/74/19, preamble; UNGA Res 75/239 (5 January 2021) UN Doc A/RES/75/239, preamble; UNGA Res 76/72 (20 December 2021) UN Doc A/RES/76/72, preamble; UNGA Res 77/248 (9 January 2023) UN Doc A/RES/77/248.

a gradual shift of outright universalism towards greater representativity. The 2003 Intangible Cultural Heritage Convention can be seen as a culmination of these trends and a turning away from the outright universalism employed in projects such as the Hague Convention and the World Heritage Convention.²⁷² Unlike earlier attempts at international protection, the Intangible Cultural Heritage Convention emphasises the importance of intangible heritage to local communities, rather than to the international community as a whole – although not necessarily implying that these concepts are mutually exclusive.²⁷³ The Convention furthermore explicitly employs the common concern principle which was formulated as an alternative to the common heritage of mankind principle in the context of international environmental treaties adopted during the 1990s; it also establishes that safeguarding intangible heritage is of interest to humanity as a whole, and therefore encourages states to cooperate to achieve this goal. In doing so, it engages once again in the delicate balancing act between universality and particularity surveyed above.

However, 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, demonstrating that it is instructive to take a closer look at its drafting history. In the early activities of UNESCO on intangible heritage in the 1970s and 1980s, UNESCO was initially preoccupied with the protection of ‘folklore’, in tandem with WIPO (the World Intellectual Property Organisation).²⁷⁴ The concept of ‘folklore’ was predominantly defined from the perspective of the state, a position necessitated by the fact that the instruments and soft law documents adopted were aimed at providing model laws for national intellectual property protection. Folklore was thus, in reality, ‘national folklore’, and its value generated within the boundaries of the state.²⁷⁵ In 1989, UNESCO diverged from its cooperation with WIPO, adopting the Recommendation on the Safeguarding of Traditional Culture and Folklore.²⁷⁶ This recommendation was of a broader scope: in contrast to earlier documents, the Recommendation noted in its preamble that

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

273 Laurajane Smith and Natsuko Akagawa, ‘Introduction’ in Laurajane Smith and Natsuko Akagawa (eds), *Intangible Heritage* (Routledge 2009); Labadi (n 165) 8-9.

274 See also Lucas Lixinski, *Intangible Cultural Heritage in International Law* (Oxford University Press 2013) 29-31.

275 See ‘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 (UNESCO/WIPO 1985) preamble, section 2.

276 UNESCO, Records of the General Conference, 25th Session (vol 1) Annex I (1989) Recommendation on the Safeguarding of Traditional Culture and Folklore.

'folklore forms part of the universal heritage of humanity',²⁷⁷ although the definition of folklore itself was firmly rooted in the idea that it emerged from a given community.²⁷⁸ This stood in stark contrast to the predominantly state-driven processes of the UNESCO heritage flagship, the World Heritage Convention.

The Recommendation remained largely unimplemented;²⁷⁹ to this end, in 1993 Korea proposed to UNESCO's Executive Board the creation of a new system of 'living cultural treasures'.²⁸⁰ Within this new line of thinking, intangible heritage continued to be part of the heritage of mankind,²⁸¹ except now in combination with a similar logic to the World Heritage Convention: the establishment of a list of particularly valuable manifestations of heritage. In 1997 UNESCO took the initiative international, instituting the 'Masterpieces of Oral and Intangible Heritage of Humanity' programme.²⁸² The programme drew upon a similar framework to that of the World Heritage Convention; the initial selection criteria for the programme emphasised the 'outstanding value' of the listed heritage, and its position within the 'oral and intangible heritage of humanity'.²⁸³ This was heavily critiqued by UNESCO Member States,²⁸⁴ whereupon the definition of 'outstanding value' was tempered, being defined in light of the value to the local community and the particularity

277 A proposal which had been introduced by France: Draft Recommendation to Member States on the Safeguarding of Folklore (5 June 1989) 25 C/33, Ann. II, para 28. See also Report, Special Committee of Technical and Legal Experts on the Safeguarding of Folklore (5 June 1987) UNESCO/PRS/CLT/TPC/SPL/6, para 17.

278 Recommendation on the Safeguarding of Traditional Culture and Folklore (n 276) art A.

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

280 Establishment of a System of 'Living cultural properties' (living human treasures) at UNESCO (10 August 1993) 142 EX/18, 1; Establishment of a system of 'living cultural properties' (living human treasures) at UNESCO (10 December 1993) 142 EX/SR.12.

281 International Consultation on New Perspectives for UNESCO's Programme: The Intangible Cultural Heritage (16-17 June 1993) CLT/ACL/93/IH/01, 20.

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

283 155 EX/Decisions (n 282) 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 155 EX/15 (25 August 1998).

284 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) 154 EX/13, Annex III, para 6; 154 EX/Decisions (n 282) Decision 3.5.1; Summary Records of the 157th Session of the Executive Board of UNESCO (1999) 157 EX/SR.1-11, 133-4. See Noriko Aikawa-Faure, 'From the Proclamation of Masterpieces to the Convention for the Safeguarding of Intangible Cultural Heritage' in Laurajane Smith and Natsuko Akagawa (eds), *Intangible Heritage* (Routledge 2009) 19-20, 32.

of the tradition.²⁸⁵ Similarly, the term 'masterpieces' was stripped of any comparative value, defined as 'defying any formal rules and not measurable by any external yardstick'.²⁸⁶ In doing so, any element of universality in the implementation of the Masterpieces programme was defined away, yet the programme retained the veneer of universality in order to incentivise financial support.²⁸⁷

Simultaneously, progress was underway on the adoption of a new convention on the protection of traditional culture and folklore, where the emphasis on universality that had been present in the Masterpieces programme was notably absent.²⁸⁸ In an initial expert meeting in March 2001 in Turin on the preparation of a definition of intangible cultural heritage for a future convention, two ideas of intangible heritage circulated. On the one hand, Francesco Francioni proposed that the definition of intangible heritage should include some reference to 'importance' or 'significance', and that the 'loss or destruction of such heritage amounts to loss and impoverishment of the common cultural heritage of humanity', along the lines of the 1954 Hague Convention.²⁸⁹ However, the suitability of notions of outstanding universal value in the context of intangible heritage led to some doubts amongst the experts.²⁹⁰ Thus, by contrast, Janet Blake noted that any definition of intangible cultural heritage must not be presented as part of the common heritage of mankind (which would, according to the logic of environmental law, imply that it could not be appropriated), but rather 'as a matter of universal *interest*', an idea that was generally accepted by the other participants.²⁹¹ However, the eventual draft definition contained no reference to universal interest, merely defining intangible cultural heritage firstly by virtue of the role it plays in providing a sense of continuity and cultural identity to communities, and secondly by reference to the role it plays in safeguarding cultural diversity.²⁹² It was agreed by

285 Ibid 32. See also Final Report, International Jury for the Proclamation by UNESCO of Masterpieces of the Oral and Intangible Heritage of Humanity (18 January 2002) RIO/ITH/2002/INF/6.

286 Ibid 33.

287 Ibid 16, 19.

288 30 C/Resolution 25 (1999) para B.2(a)(iii).

289 Francesco Francioni, *Intangible Cultural Heritage – Working Definitions* (UNESCO 2001) 4.

290 Final Report, International Round Table on 'Intangible Cultural Heritage – Working Definitions', 14–17 March, Turin, Italy (UNESCO 2001) 14; Aikawa-Faure (n 284) 30.

291 Final Report, International Round Table on 'Intangible Cultural Heritage – Working Definitions', 14–17 March, Turin, Italy (UNESCO 2001) 12, 14; see also Janet Blake, *Developing a New Standard-setting Instrument for the Safeguarding of Intangible Cultural Heritage: Elements for Consideration* (UNESCO 2001). Aikawa-Faure (n 284) 28.

292 Report on the Preliminary Study on the Advisability of Regulating Internationally, Through a new Standard-Setting Instrument, the Protection of Traditional Culture and Folklore (16 May 2001) 151 EX/15, Annex, Action Plan for the Safeguarding of the Intangible Cultural Heritage, p 3; Aikawa-Faure (n 284) 31.

the General Conference of UNESCO to use this definition as a starting point for deliberations on the draft convention.²⁹³

These thoughts on the unsuitability of universalist language in the draft convention were to be echoed in the meetings that followed. It was decided that the text of the World Heritage Convention should be used as a starting point, which immediately produced one problem: should the future convention on intangible heritage also employ the criterion of 'outstanding universal value', so central to the World Heritage Convention? During the first meeting of the select drafting group of the preliminary convention, chair Mohammed Bedjaoui noted that the term 'universal value' should not be applied in the context of the draft convention for intangible cultural heritage, 'because of the very nature and the specificity of this form of heritage'.²⁹⁴ To do so would merely be 'unjust or arbitrary, or quite simply impossible ... since only comparable things should be compared'.²⁹⁵ It was even noted that intangible heritage does not have any universal elements, in and of itself.²⁹⁶ As such, it was decided to substitute the phrase 'outstanding universal value' used in the World Heritage Convention for 'outstanding *specific* value',²⁹⁷ a yet-to-be-defined term. It was furthermore decided that references to phrases such as 'universal' or 'global' were to be avoided in the work of the select drafting group.²⁹⁸

Nonetheless, the 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.²⁹⁹ However, reservations were expressed as to the use of phrases drawn from international environmental law such as 'common concern' in the preamble.³⁰⁰ Along similar lines, Bedjaoui simultaneously proposed that the preliminary draft convention could include an article which was equivalent to article 6 of the World Heritage Convention, which notes that the heritage protected by the Convention 'constitutes a world heritage for whose protection it is the duty of the international community as a whole

293 UNESCO, Records of the General Conference, 31st Session (vol 1) 31 C/Resolution 30 (2001). See also Oral report of the Chairperson of Commission IV (12 November 2001) 31 C/INF.24; Address by Mr Koïchiro Matsuura at the meeting of experts on the preliminary draft of the International Convention for the Safeguarding of the Intangible Heritage (20 March 2002) DG/2002/26, p 2-3.

294 Outline Work Plan Prepared by Mohammed Bedjaoui for the First Meeting of the Select Drafting Group of a Preliminary International Convention on Intangible Cultural Heritage (2001) 9-10.

295 Ibid 41.

296 Final Report of the First Meeting of the Restricted Drafting Group (10 June 2002) GRR2/CH/2002/WD/6, 5.

297 Outline Work Plan (n 294) 41; GRR2/CH/2002/WD/6 (n 296) 10.

298 GRR2/CH/2002/WD/6 (n 296) 10.

299 Ibid 5.

300 Ibid.

to cooperate'. In doing so, he noted that the concept of 'world heritage' could be reformulated and replaced with the concept of 'common heritage of humanity'.³⁰¹ This proposal was once again met with reservation, as it was noted that the use of the phrase 'common heritage of humanity' should be avoided and that the safeguarding of intangible heritage should not be seen as a 'common good' or as 'shared heritage'.³⁰² The participants noted that 'le qualificatif universel ne doit pas s'appliquer au patrimoine immatériel lui-même, mais à la justification de sa sauvegarde'.³⁰³

At the second meeting of the select drafting group, a preliminary draft convention was drawn up. During this meeting the experts once again reflected on the impracticalities of applying the logic of 'outstanding value' to intangible cultural heritage.³⁰⁴ One member noted that a reference to the fact that the safeguarding of intangible heritage is a common concern of humankind should also include a reference to 'the particular importance of [intangible cultural heritage] to the local community that creates it', although this proposal was not taken up.³⁰⁵ The preliminary draft contains a number of instructive elements from the perspective of examining the role of universality in the drafting debates as a whole; despite earlier misgivings, the preamble noted 'the general interest and common concern for the safeguarding of the intangible cultural heritage of humanity'.³⁰⁶ Akin to the World Heritage Convention, the draft convention provided for a system of both national safeguarding and international cooperation. With regard to the latter point, the preliminary draft noted that, while respecting state sovereignty, 'the States Parties recognize that such heritage is of general interest to humanity, and undertake to co-operate ... for its safeguarding'.³⁰⁷ Crucially, the preliminary draft called for the creation of an international list of intangible cultural heritage, the items on which should have 'outstanding specific value', with the drafting committee noting that a definition still needed to be reached on the meaning of this term, in particular the meaning of 'outstanding'.³⁰⁸

This preliminary draft was subsequently examined at the intergovernmental level by an Intergovernmental Meeting of Experts, where doubts were immediately expressed about the utility of a list of intangible heritage and the nature of the list: should it contain intangible heritage of 'specific', 'exceptional' value; should it be a list of heritage at risk; should it be a global inventory; or should

301 Outline Work Plan (n 294); GRR2/CH/2002/WD/6 (n 296) para 4.

302 GRR2/CH/2002/WD/6 (n 296) 5, 7-8.

303 Or, in other words, that 'the universal qualifier should not apply to the intangible heritage itself, but to the justification for its safeguarding': *ibid* 7-8.

304 Meeting Report of the Second Meeting of the Select Drafting Group (13-15 June 2002) 15.

305 *Ibid* 13.

306 First Preliminary Draft of an International Convention for the Safeguarding of the Intangible Cultural Heritage (26 July 2002) CLT-2002/CONF.203/3.

307 *Ibid* art 6(1).

308 *Ibid* art 11(2).

the list only specify 'best practices'?³⁰⁹ A significant number of states were of the view that there should be no list at all, as this would imply ranking the 'unrankable'. A circular letter was sent to the Member States of UNESCO, inviting comments on the consolidated preliminary text.³¹⁰ A number of the responses received touched upon the theme of universality: thus Turkey observed if the criteria of 'outstanding specific value' were to be adopted as the guideline for inclusion on an international register, it would need further definition, 'because qualification or any implication of some kind of ranking among elements could lead to uncertainty'.³¹¹

By contrast, a small number of other states emphasised the role that 'significance' should play in the convention; thus Australia noted that '[s]ignificance assessment is important because 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.³¹² Similarly, France noted that a 'convention which claimed to safeguard the whole of the intangible cultural heritage would be bound to fail ... Our conservation efforts should, logically, be applied mainly to those elements of the intangible cultural heritage that are in immediate danger'.³¹³ A number of other proposals were made to emphasise the universal nature of the intangible heritage,³¹⁴ with Indonesia even going so far as to state that:

It should be made clearer why the intangible cultural heritage is useful for humanity, and worthy of safeguarding ... Simply being "of general interest" is not going to be sufficient reason for governments to provide the funds needed to preserve the intangible cultural heritage. Even if such preservation is funded, if people from all over the world do not understand the utility of intangible culture, it will in any case die out, because people tend to give importance to those things which they preserve to be of pragmatic use, whereas things which they do not consider to be of real use, they will neglect or totally forget.³¹⁵

309 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) CLT-2002/CONF.203/5, 3.

310 Second Session of the First Intergovernmental Meeting on the Preliminary Draft Convention for the Safeguarding of the Intangible Cultural Heritage (31 January 2003) CL/3651.

311 Compilation of Amendments from Member States Concerning the Convention for the Safeguarding of the Intangible Cultural Heritage (12 February 2003) CLT-2003/CONF.203/3 Rev., 68.

312 General Comments Received from Member States (January 2003) CLT-2003/CONF.205/5, 7.

313 Ibid 29.

314 See e.g. the proposals by Benin and the Africa Group (at 4); Bolivia (at 9); Benin, Bolivia, Chile and the Africa Group (at 11) in CLT-2003/CONF.203/3 Rev (n 311).

315 Ibid 51.

Nor did the application of the common concern principle seem to attract the same level of concern amongst states as it had amongst the experts of the select drafting group, with no states addressing the utility of the application of the concept to intangible heritage.³¹⁶

At the second session of the Intergovernmental Meeting of Experts, it was ultimately agreed that while the establishment of a national inventory of intangible heritage should be the priority of the convention, there should nonetheless also be an international list, despite the fact that a significant number of countries had submitted amendments on the unsuitability of this approach for intangible heritage; such international listing 'would ensure the visibility of cultural heritage and promote cultural diversity'.³¹⁷ A proposal was made to create a 'List of Treasures of the World Intangible Cultural Heritage', with the reference to 'outstanding specific value' being deleted and the criteria for inclusion being deferred to after the approval of the convention.³¹⁸ Simultaneously, it was stressed that 'exceptional value' should not form the point of emphasis in the convention and proposed list: instead, the convention was to seek to safeguard intangible heritage of 'cultural significance'.³¹⁹ An intangible heritage fund would also be accessible to all forms of intangible heritage, not only that of 'exceptional value'.³²⁰

At the final Intergovernmental Meeting of Experts in June 2003, the phrasing of the international list was once again altered, from 'List of Treasures of the World Intangible Cultural Heritage' to a 'Representative List of the Intangible Heritage of Humanity', as 'the term "representative list" was preferred to "masterpieces" and "treasures", which had been proposed initially'.³²¹ These changes were the result of intense debates between those states which 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).³²² The latter noted that

316 Ibid 4.

317 Second Session of the Intergovernmental Meeting of Experts on the Preliminary Draft Convention for the Safeguarding of the Intangible Cultural Heritage (April 2003) CLT-2003/CONF.205/6, 5.

318 Semi-Consolidated Draft Convention for the Safeguarding of Intangible Cultural Heritage (April 2003) CLT-2003/CONF-206/1, art 11(c)

319 Report of Intersessional Working Group of Government Experts on the Preliminary Draft Convention for the Safeguarding of the Intangible Cultural Heritage (May 2003) CLT-2003/CONF.206/3, para 21.

320 Ibid para 23.

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

322 Valdimar Tr. Hafstein, 'Intangible Heritage as a List: From Masterpieces to Representation' in Anita Smith and Natsuko Akagawa (eds), *Intangible Heritage* (Routledge 2009) 97-8.

'[t]he intangible cultural heritage of any group is valuable and to them, if only to them. The convention, therefore, should not just recognize intangible cultural heritage of "exceptional" value'.³²³ 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'.³²⁴ Pragmatism once again reared its head, with the Brazilian delegate noting 'we cannot safeguard everything, and this means that we cannot value everything equally'.³²⁵ A middle ground was ultimately found by creating a list which favoured representativity, rather than excellence, and deferring the issue of selection criteria until after the adoption of the convention. The convention was ultimately approved by consensus and adopted at the 32nd session of the UNESCO General Conference in October 2003.³²⁶

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.³²⁷ In adopting local value as the criterion for establishing protection, the Intangible Cultural Heritage Convention reverses the trends established in earlier cultural heritage conventions, which sought to define value in light of the international – the Hague Convention and the World Heritage Convention – or the national – the 1970 Convention and the Underwater Cultural Heritage Convention. Rather than focusing on universal value, the only limitation imposed by the Intangible Heritage Convention is compatibility of a given form of intangible heritage with existing human rights and sustainable development.³²⁸

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 Representative List of the Intangible Cultural Heritage of Humanity at the heart of the Convention.³²⁹ Furthermore, the Intangible Cultural Heritage Convention also employs the common concern principle, despite doubts being expressed as to the utility of doing so; this entails that there is in principle some common interest and benefit in undertaking actions to protect intangible cultural heritage at the international level.³³⁰ As noted above, the principle does not entail specific substantive obligations, but does indicate that the sovereignty of states is not unfettered,³³¹ and that there is indeed a shared international interest in pro-

323 Ibid 101.

324 Ibid 103-4.

325 Ibid 104.

326 32 C/Resolution 32.

327 Intangible Heritage Convention, art 2(1).

328 Ibid.

329 Ibid art 16.

330 Brunnée (n 215) 564-5.

331 Ibid 565-7.

tection.³³² Similarly, the intangible heritage regime also showcases similar elements which are present in other common concern regimes, such as burden-sharing, international cooperation, and a degree of intergenerational equity.³³³

3.7 PARALLEL DEVELOPMENTS

Beyond the realm of the cultural heritage instruments surveyed above, a number of other instruments and legal regimes are relevant to the broader protection of culture as a phenomenon, such as international criminal law (which prohibits attacks against cultural heritage, particularly in its tangible forms), human rights law (which protects cultures, and increasingly also cultural identity and cultural heritage, in the form of cultural rights), the 2005 Convention on Cultural Diversity (which preserves states' sovereign discretion to regulate their cultural affairs). Although these regimes will not form the focus of the rest of the dissertation, it is nonetheless important to briefly mention them here in order to both compare and contrast them to the trends of universality outlined above and in the previous chapter. Whilst issues relating to cultural heritage have also been regulated in numerous regional agreements on cultural cooperation and cultural heritage protection, these treaties are beyond the scope of the present discussion;³³⁴ as such, the follow-

332 Thomas Cottier and others, 'The Principle of Common Concern and Climate Change' (2014) 52 *Archiv des Völkerrechts* 293, 307-308.

333 Brunnée (n 215) 565-7; Nadia Sánchez Castillo-Winckels, 'Why "Common Concern of Humankind" Should Return to the Work of the International Law Commission on the Atmosphere' (2017) 29 *Georgetown Environmental Law Review* 131, 144.

334 A number of these regional conventions nonetheless mirror the dynamics within cultural heritage law with regards to their engagement (or explicit rejection) of the language of universality. Within Europe, the primary developments have taken place within the context of the Council of Europe: see inter alia the European Convention on the Protection of the Archaeological Heritage (Revised) (adopted 16 January 1992, entered into force 25 May 1995) ETS No. 143 (Valletta Convention); the European Landscape Convention (adopted 20 October 2000, entered into force 1 March 2004) ETS No. 176; the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (adopted 27 October 2005, entered into force 1 June 2011) CETS No. 199 (Faro Convention). However, see also the development of the cultural policies of the European Union, such as the European Heritage Label: Andrzej Jakubowski, Kristin Hausler and Francesca Fiorentini (eds), *Cultural Heritage in the European Union: A Critical Inquiry into Law and Policy* (Brill 2019); Tuuli Lähdesmäki and others (eds), *Creating and Governing Cultural Heritage in the European Union: The European Heritage Label* (Routledge 2020). Within the Middle East, see inter alia the Charter of Arab Cultural Unity (adopted 29 February 1964, entered into force 25 July 1970), reproduced in Amos J. Peaslee and Dorothy Peaslee Xydis, *International Governmental Organizations: Constitutional Documents*, vol III/IV (3rd edn, Martinus Nijhoff 1979) 24. In relation to Latin America, see the Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3 (OAS Charter), art 48. Concerning Africa, see the Cultural Charter for Africa (adopted 5 July 1976, entered into force 19 September 1990) AHG/Res 82, arts 1, 26; Charter for African Cultural Renaissance

ing section focuses on international criminal law, international and regional human rights regimes, and the 2005 Convention on Cultural Diversity.

3.7.1 The 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD) was adopted in 2005; it notes in its preamble that 'cultural diversity is a defining characteristic of humanity', and furthermore that 'cultural diversity forms a common heritage of humanity and should be cherished and preserved for the benefit of all'.³³⁵ It emphasises the importance of cultural diversity for a range of societal issues, such as international peace and security, human rights, and sustainable and economic development. It recognises 'the need to take measures to protect the diversity of cultural expressions, including their contents, especially in situations where cultural expressions may be threatened by the possibility of extinction or serious impairment'. It firmly states that 'cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value', and calls attention to the imbalance between 'rich and poor countries' with regards to the protection of cultural diversity. To this end, the objectives of the Convention are, amongst others, 'to protect and promote the diversity of cultural expressions', 'to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning', and 'to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory'.³³⁶

As such, the goals of the Convention are different from the other cultural heritage conventions discussed above: the goal is not the protection of culture in and of itself, but the preservation of states' sovereign discretion to regulate their cultural affairs in light of increasing pressures at the global level from international economic organisations such as the World Trade Organisation (WTO); the Convention was intended to serve as a 'cultural counterbalance' in discussions on the linkages between trade and culture. However, it has simultaneously been critiqued as 'disguised protectionism' by seeking to create cultural exceptions to WTO rules, such as national treatment and the most-

(adopted 24 January 2006, not yet entered into force). In relation to Asia, see the ASEAN Declaration on Cultural Heritage (adopted 25 July 2000).

335 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005, entered into force 18 March 2007) 2440 UNTS 311 (Cultural Diversity Convention).

336 Ibid art 1(a), (g), (h).

favoured-nation clause.³³⁷ The origins of the Cultural Diversity Convention are thus fundamentally different from the five conventions surveyed above, being rooted in opposition amongst certain states to the expansion of the mandate of the WTO in the area of audio-visual services in particular.³³⁸ This opposition was able to take root within UNESCO, resulting first in the adoption in 2001 of the Universal Declaration on Cultural Diversity,³³⁹ and later the Convention itself, which entered into force in 2007 and has 153 States Parties as of 2023, including the European Union.³⁴⁰ The Convention seeks to grant states greater discretion to determine their cultural policies than was thought to be possible to achieve within other fora,³⁴¹ simultaneously raising questions on the compatibility of the Convention with WTO law.³⁴² In this sense, it is comparable to the contestation between the WTO and WIPO concerning the regulation of genetic resources, traditional knowledge and folklore.³⁴³ In light of these considerations, this dissertation shall not examine the CCD in further depth.

337 Christoph Beat Graber, 'The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?' (2006) 9 *Journal of International Economic Law* 553, 553; Sabine von Schorlemer, 'Cultural Diversity' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2009) para 20.

338 Graber (n 337) 554-555.

339 2001 UNESCO Universal Declaration on Cultural Diversity, UNESCO, Records of the General Conference, 31st Session (vol 1) 31 C/Resolution 25 (2001).

340 On the implementation of the Cultural Diversity Convention, see Mira Burri, 'The UNESCO Convention on Cultural Diversity: An Appraisal Five Years after Its Entry into Force' (2013) 20 *International Journal of Cultural Property* 357; Lilian Richieri Hanania (ed) *Cultural Diversity in International Law: The Effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Routledge 2014).

341 See e.g. arts 5, 6 of the Cultural Diversity Convention. For the background to the debate on the linkages between trade and culture, see Mary E. Footer and Christoph Beat Graber, 'Trade Liberalisation and Cultural Policy' (2000) 3 *Journal of International Economic Law* 115; Yvonne Donders, 'The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions' in Hildegard Schneider and Peter Van den Bossche (eds), *Protection of Cultural Diversity from a European and International Perspective* (Intersentia 2008).

342 See e.g. Michael Hahn, 'A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law' (2006) 9 *Journal of International Economic Law* 515; Tania Voon, 'UNESCO and the WTO: a Clash of Cultures?' (2006) 55 *ICLQ* 635; Jan Wouters and Bart de Meester, 'The UNESCO Convention on Cultural Diversity and WTO Law: A Case Study in Fragmentation of International Law' (2008) 42 *Journal of World Trade* 205; Hélène Ruiz Fabri Fabri, 'Games within Fragmentation: the Convention on the Protection and Promotion of the Diversity of Cultural Expressions' in Sarah Joseph and David H. Kinley (eds), *The World Trade Organization and Human Rights: Interdisciplinary Perspectives* (Elgar 2009).

343 See e.g. Ruth L. Okediji, 'WIPO-WTO Relations And The Future Of Global Intellectual Property Norms' (2008) 39 *Netherlands Yearbook of International Law* 69; Sun Thathong, 'Lost in Fragmentation: The Traditional Knowledge Debate Revisited' (2014) 4 *Asian JIL* 359.

3.7.2 International criminal law

As noted in Chapter 2, cultural heritage has also increasingly featured in the work of international criminal courts and tribunals such as the ICC and ICTY.³⁴⁴ Thus the ICTY Statute prohibits violations of the laws or customs of war, 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'.³⁴⁵ The Rome Statute, for its part, prohibits the war crime of '[i]ntentionally 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'.³⁴⁶ The Rome Statute furthermore prohibits persecution against groups or collectivities on cultural grounds,³⁴⁷ defined as 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity',³⁴⁸ thereby not necessarily protecting tangible manifestations of cultural heritage in and of themselves, but instead the cultural identities that underlie the existence of a given group.

While the cultural heritage jurisprudence of the ICTY and the ICC is not the focus of the present dissertation, these developments nonetheless indicate how pervasive ideas of cultural heritage universalism are even outside the realm of cultural heritage law. Both the ICC and ICTY have thus at times relied upon the logic that not only individual communities are affected by the destruction of cultural heritage, but also the international community – or indeed humanity – as a whole.³⁴⁹ In doing so, they frequently draw upon ideas of

344 For an overview of this jurisprudence, see inter alia Federico Lenzerini, 'The Role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage' in Francesco Francioni and James Gordley (eds), *Enforcing International Cultural Heritage Law* (Oxford University Press 2013); Serge Brammertz and others, 'Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY' (2016) 14 *Journal of International Criminal Justice* 1143; Micaela Frulli, 'International Criminal Law and the Protection of Cultural Heritage' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020).

345 UNSC Res 827 (25 May 1993) UN Doc S/RES/827, art 3(d).

346 1998 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 8(2)(b)(ix), 8(2)(e)(iv).

347 Ibid art 7(1)(h).

348 Ibid art 7(2)(h).

349 See e.g. Brammertz and others (n 344) 1161 (recalling the statement by the *Kordić and Čerkez* Trial Chamber that attacks against cultural property '[a]mount] to an attack on the very ... 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'). See also Drazewska (n 19) 212-6; Yaron Gottlieb, 'Attacks Against Cultural Heritage as a Crime Against Humanity' (2020) 52 *Case Western Reserve Journal of International Law* 287, 302-8.

universality which were originally put forward within the realm of cultural heritage law, such as in the 1954 Hague Convention. Simultaneously, both institutions have (to varying degrees of success) also underlined the impact of cultural heritage destruction upon *local* communities alongside the international community,³⁵⁰ mirroring the same shift towards community-centric heritage within the UNESCO instruments outlined in the introduction.

The most recent example of the approach within international criminal law to cultural heritage is the *Al Mahdi* case at the ICC. In its judgment, the Trial Chamber relied upon the World Heritage status of the mausoleums and mosques which had been targeted by the *Hesbah* in order to indicate their status as protected buildings, recalling that ‘UNESCO’s designation of these buildings reflects their special importance to international cultural heritage’,³⁵¹ more broadly, the Trial Chamber relied not only on the impact of the destruction of the buildings for the community of Timbuktu, but also upon the international community as a whole.³⁵² Furthermore, at the reparations phase, the Chamber noted as a preliminary observation that ‘[t]he international community has recognised in various legal instruments the importance of the human rights to cultural life and its physical embodiments’, including in the 1954 Hague Convention.³⁵³ It further noted that ‘[w]orld cultural heritage is a most important category. Greater interest vested in an object by the international community reflects a higher cultural significance and a higher degree of international attention and concern’.³⁵⁴ It also drew attention to the fact that ‘[i]nscription on the World Heritage List requires a very strict procedure whereby it must be shown, *inter alia*, that the object or site at stake has an exceptional quality that transcends national borders’.³⁵⁵ In its Reparations Order, the Trial Chamber explicitly indicated that the international community was a victim of Al Mahdi’s crimes, granting it a symbolic \$1 in reparations; this amount was presented to UNESCO as a representative of the international

350 Janine Natalya Clark, ‘The Destruction of Cultural Heritage in Armed Conflict: The “Human Element” and the Jurisprudence of the ICTY’ (2018) 18 *International Criminal Law Review* 36; Ciara Laverty, ‘Making Crimes Mean: A Normative Analysis of the Acts that Constitute International Crimes’ (PhD dissertation, Leiden University 2022) 53–114.

351 *Prosecutor v. Ahmad Al Faqi Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15 (27 September 2016) para 46.

352 *Ibid* para 46, 80. See also Paige Casaly, ‘Al Mahdi before the ICC’ (2016) 14 *Journal of International Criminal Justice* 1199, 1213–14, 1216.

353 *Prosecutor v. Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15 (17 August 2017) para 14. The Chamber further referred to article 53 of Additional Protocol I to the Geneva Conventions and article 16 of Additional Protocol II to the Geneva Conventions, article 4 of the 1954 Hague Convention and article 15 of the Second Protocol to the 1954 Hague Convention.

354 *Ibid* para 17.

355 *Ibid* para 20.

community.³⁵⁶ This was because the destruction of heritage at Timbuktu was seen to ‘harm all’, in light of the attack it represented on cultural diversity.³⁵⁷

3.7.3 Human rights law

International law also touches upon issues relating to the protection of cultural heritage with respect to the cultural rights enshrined in a range of international and regional human rights treaties, in particular through the right to take part in cultural life.³⁵⁸ At the international level, the right to take part in cultural life is protected by a range of instruments: most prominently in article 27(1) of the Universal Declaration of Human Rights and article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and in comparable articles in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),³⁵⁹ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),³⁶⁰ the Convention on the Rights of the Child (CRC),³⁶¹ the Convention on the Rights of Persons with Disabilities (CRPD),³⁶² and the Migrant Workers Convention,³⁶³ as well as provisions on minority and Indigenous rights in instruments such

356 Ibid para 53, 106-7.

357 Oumar Ba, ‘Who are the Victims of Crimes Against Cultural Heritage?’ (2019) 41 HRQ 578, 582.

358 For a comprehensive overview of cultural rights, see Elsa Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (Brill 2007); Pok Yin S. Chow, *Cultural Rights in International Law and Discourse: Contemporary Challenges and Interdisciplinary Perspectives* (Brill Nijhoff 2018). Other cultural rights include the right of each individual ‘[t]o enjoy the benefits of scientific progress and its applications’ and the right ‘[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author’: International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 15(1)(b)-(c). The following section will however focus on the right to take part in cultural life. In addition it is increasingly common to also group the right to education, freedom of expression and association, and the rights of minorities and Indigenous peoples under the heading of cultural rights: Julie Ringelheim, ‘Cultural Rights’ in Daniel Moeckli and others (eds), *International Human Rights Law* (4th edn, Oxford University Press 2022) 286-7, 290-1.

359 1966 International Covenant on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (ICERD) art 5(e)(iv).

360 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 13(c).

361 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 31.

362 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) art 30.

363 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (Migrant Workers Convention) art 43(1)(g), 45(1)(d).

as the International Covenant on Civil and Political Rights (ICCPR), ILO Convention No. 169, and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).³⁶⁴ The right is furthermore explicitly protected at the regional level in the Arab Charter on Human Rights,³⁶⁵ the African Charter on Human and Peoples Rights,³⁶⁶ the 1948 American Declaration on the Rights and Duties of Man and the San Salvador Protocol to the American Convention on Human Rights.³⁶⁷ Of these regional rights, only those enshrined in the African Charter have given rise to judicial practice,³⁶⁸ as the statute of the Arab Court of Human Rights has yet to enter into force and neither the American Declaration nor the San Salvador Protocol can give rise to individual petitions before the Inter-American Court.

However, cultural rights have nonetheless been implicitly protected by both the European Court of Human Rights (ECtHR) and the Inter-American Court on Human Rights (IACtHR), indicating the cross-cutting nature of cultural

364 E.g. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 1(1), 27; 1989 ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 26 June 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO Convention No. 169) arts 2(2)(b), 5(a), 7; UNGA Res 61/295, United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007) UN Doc A/RES/61/295, arts 3, 5, 8, 11, 12, 31

365 Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) art 42(1).

366 1981 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (African Charter) art 17(2). The individual right to take part in the cultural life of the community (grouped in the same article as the right to education and the promotion of morals and traditional values) is paired with the concomitant duty '[t]o preserve and strengthen positive African values' (art 29(7)), although it remains unclear what these 'African values' are. Such duties can potentially be owed not only 'towards his family and society', but also to 'the State and other legally recognized communities and the international community' (art 27): see Blake, *International Cultural Heritage Law* (n 10) 315.

367 The 1948 Declaration provides in its preamble that 'culture is the highest social and historical expression of ... spiritual development', and that 'it is the duty of man to preserve, practice and foster culture by every means within his power': American Declaration of the Rights and Duties of Man (adopted 2 May 1948) OEA/Ser.L/VI/1.4. In addition, Article XIII of the 1948 Declaration provides that '[e]very person has the right to take part in the cultural life of the community'. Finally, article 14 of the San Salvador Protocol provides for the right to take part in the 'cultural and artistic life of the community': Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 17 November 1988, entered into force 16 November 1999) 28 ILM 156 (San Salvador Protocol) art 14.

368 ACmHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (4 February 2010) Application No. 276/2003; ACtHPR, *African Commission on Human and Peoples' Rights v. Republic of Kenya* (Judgment of 26 May 2017) Application No. 006/2012. On the interpretation of article 17(2), see Folarin Shyllon, 'Collective Cultural Rights as Human Rights Simpliciter: The African and African Charter Example' in Andrzej Jakubowski (ed), *Cultural Rights as Collective Rights: An International Law Perspective* (Brill 2016); Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford University Press 2019) 452-6.

issues across all human rights.³⁶⁹ In the case of the ECtHR, cultural rights have thus been discussed by the Court in the context of the right to private and family life, the freedom of thought, conscience and religion, and the freedom of expression.³⁷⁰ In the case of the Inter-American system, cultural rights have been brought before the IACtHR under the scope of the right to property of Indigenous peoples,³⁷¹ and under the heading of article 26 of the American Convention on Human Rights, which provides for the progressive development of economic, social and cultural rights.³⁷²

While, as Donders argues, it is important to distinguish between regimes aimed at the safeguarding of cultural heritage and cultural rights under human rights law – in light of the fact that ‘the international legal underpinning these concepts is different and the international legal instruments protecting one

369 Kristin Hausler, ‘Collective Cultural Rights in the Inter-American Human Rights System’ in Andrzej Jakubowski (ed), *Cultural Rights as Collective Rights: An International Law Perspective* (Brill 2016) 237. However, as Donders points out, it remains important to distinguish between ‘[r]ights that explicitly refer to culture’, ‘[r]ights that have a direct link with culture’, and rights which merely have a ‘cultural dimension’: Yvonne Donders, ‘Foundations of Collective Cultural Rights in International Human Rights Law’ in Andrzej Jakubowski (ed), *Cultural Rights as Collective Rights: An International Law Perspective* (Brill 2015) 90-2. The elusive nature of cultural rights has similarly formed a ground of critique for certain authors, who argue that the all-encompassing definition of ‘culture’ means that it is arguably possible to view *all* human rights as cultural rights: see e.g. Céline Romainville, ‘Defining the Right to Participate in Cultural Life as a Human Right’ (2015) 33 *Netherlands Quarterly of Human Rights* 405, who proposes a more stringent definition.

370 Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (Oxford University Press 2014) 1178; European Court of Human Rights, Research Division, *Cultural Rights in the Case-law of the European Court of Human Rights* (Council of Europe 2017); Andrzej Jakubowski, ‘Cultural Heritage and the Collective Dimension of Cultural Rights in the Jurisprudence of the European Court of Human Rights’ in Andrzej Jakubowski (ed), *Cultural Rights as Collective Rights: An International Law Perspective* (Brill 2016). See e.g. *Khurshid Mustafa and Tarzibachi v. Sweden*, App. No. 23883/06 (2008); *Sargsyan v. Azerbaijan*, App. No. 40167/06 (2017).

371 Hausler (n 369); Ludovic Hennebel and Hélène Tigroudja, *The American Convention on Human Rights: A Commentary* (Oxford University Press 2022) 795. See IACtHR, *Moiwana Community v. Suriname* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 124 (15 June 2005); IACtHR, *Yakye Axa Indigenous Community v. Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 125 (17 June 2005); IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 79 (31 August 2005); IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador* (Merits and Reparations) Inter-American Court of Human Rights Series C No. 245 (27 June 2012).

372 IACtHR, *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 400 (6 February 2020) paras 231-6, 241-2. As Hennebel and Tigroudja (n 371) note, this approach has not gone without criticism: 762-4.

or the other are of a different character³⁷³ – a number of important similarities nonetheless remain between the two regimes. Thus the origin of the recognition of the right to take part in cultural life was originally aimed at the enjoyment of certain forms of ‘high culture’ belonging to the elite,³⁷⁴ and ensuring universal access to these ‘manifestations of national and international cultural life’,³⁷⁵ the ‘*oeuvres capitales de l’Humanité*’,³⁷⁶ with a notable emphasis in the Universal Declaration on Human Rights on the community of the ‘Nation State’.³⁷⁷ In this sense, the early approach to the definition of ‘culture’ in human rights law mirrors the early universalist impulses of cultural heritage law, as reflected in the development of the 1954 Hague Convention and the World Heritage Convention.

The current approach to culture within human rights instruments diverges from this initial universalist approach. Thus in later years, the initial focus on ‘elite’ culture was expanded to incorporate a broader understanding of the concept, as not only including the various external manifestations of popular culture but also more broadly culture as a ‘way of life’.³⁷⁸ No further qualification is given with regards to the ‘type’ of culture to be protected by cultural rights – in terms of prominence – beyond that the exercise of the right to take part in cultural life must be compliant with other human rights.³⁷⁹ In this sense, this development can simultaneously be mirrored against a similar shift within cultural heritage law towards a relativisation of the notion of cultural value and the recognition of the intrinsic value of cultural diversity, as well as the shift towards community-centric approaches to cultural heritage. In addition, the right to take part in cultural life has also been interpreted in such a manner as to extend protection to cultural heritage, with states being called upon to safeguard cultural heritage from intentional destruction or to

373 Yvonne Donders, ‘Protection and Promotion of Cultural Heritage and Human Rights through International Treaties: Two Worlds of Difference?’ in Charlotte Waelde and others (eds), *Research Handbook on Contemporary Intangible Cultural Heritage: Law and Heritage* (Elgar 2018) 54, 56.

374 Roger O’Keefe, ‘The “Right to Take Part in Cultural Life” Under Article 15 of the ICESCR’ (1998) 47 ICLQ 904.

375 Saul, Kinley and Mowbray (n 370) 1180, referring to the *travaux préparatoires* of article 15(1)(a) of the ICESCR.

376 Romainville (n 369) 420.

377 Ibid 420.

378 Ringelheim (n 358) 288-9; Saul, Kinley and Mowbray (n 370) 1180-2; Roger O’Keefe, ‘Cultural Life, Right to Participate in, International Protection’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2020) para 7. See also CESCR, General Comment No. 21 (21 December 2009) UN Doc E/C.12/GC/21, para 13; CESCR, Report on the Seventh Session (1993) UN Doc E/1993/22. For a recent illustration of this approach in the context of climate change by the Human Rights Committee, see e.g. *Daniel Billy et al. v. Australia* (22 September 2022) UN Doc CCPR/C/135/D/3624/2019, paras 8.12-14.

379 CESCR General Comment 21 (n 378) para 19. See also Saul, Kinley and Mowbray (n 370) 1210-2.

ensure access to cultural heritage within the context of their human rights obligations.³⁸⁰ As such, the approaches between human rights law and cultural heritage law could arguably also be seen as converging.³⁸¹

Nonetheless, despite the broadening of the concept of culture within the scope of the right to take part in cultural life, universalist considerations (in the sense of the term as it is employed within the context of cultural heritage instruments) remain, particularly with respect to the application of cultural rights to cultural heritage. Thus the Committee on Economic, Social and Cultural Rights (CESCR) occasionally draws upon the language of the 'heritage of mankind' with respect to states' obligations under the Covenant, emphasising the need for states to protect this heritage on behalf of the international community,³⁸² as has the Special Rapporteur in the field of cultural rights in her reports, particularly those relating to intentional destruction.³⁸³ The current reporting guidelines under the CESCR furthermore ask states to indicate whether any measures have been taken '[t]o enhance access to the cultural heritage of mankind'.³⁸⁴ At the regional level, the ECtHR has notably also

380 Yvonne Donders, 'Cultural Heritage and Human Rights' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020) 380; O'Keefe, 'The "Right to Take Part in Cultural Life" Under Article 15 of the ICESCR' (n 374) 909. See also Human Rights Council, Report of the Independent Expert in the Field of Cultural Rights (21 March 2011) UN Doc A/HRC/17/38 (on the right of access to and enjoyment of cultural heritage); UN General Assembly, Report of the Special Rapporteur in the Field of Cultural Rights (9 August 2016) UN Doc A/71/317 (on the intentional destruction of cultural heritage). See also CESCR General Comment No. 21 (n 378) para 50.

381 See e.g. Donders, 'Cultural Heritage and Human Rights' (n 380) 382-3. As Murray notes, the obligation in the African Charter on the duty to preserve and strengthen African values has frequently been interpreted by states 'as imposing duties on themselves ... through ratifying relevant international treaties protecting cultural heritage' and promoting programmes aimed at the safeguarding of cultural heritage: Murray (n 368) 595, on the basis of periodic reports submitted to the African Commission on Human and Peoples' Rights.

382 O'Keefe, 'The "Right to Take Part in Cultural Life" Under Article 15 of the ICESCR' (n 374) 909, fn 35. Compare also the approach taken by the CESCR, which considers that an element of states' obligations under article 15(1)(a) of the Covenant also includes the obligation to '[r]espect and protect cultural heritage in all its forms, in times of war and peace, and natural disasters', for the reason that '[c]ultural heritage must be preserved, developed, enriched and transmitted to future generations as a record of human experience and aspirations': CESCR General Comment No. 21 (n 378) para 50(a).

383 'While in the Special Rapporteur's view, specific aspects of heritage may have particular resonance for and connections to particular human groups, all of humanity has a link to such objects, which represent the "cultural heritage all [hu]mankind": Human Rights Council, Report of the Special Rapporteur in the Field of Cultural Rights (3 February 2016) UN Doc A/HRC/31/59, para 48, see also para 89; UN Doc A/71/317 (n 380) para 5, 8.

384 CESCR, Guidelines on Treaty-specific Documents to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights (24 March 2009) UN Doc E/C.12/2008/2, para 67. These guidelines replaced the earlier Revised Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and

called upon notions of (universal) cultural heritage value and the general or public interest in order to underscore the legitimacy of limitations of certain human rights by the state, such as the right to property, mirroring the similar dynamics which are at play in cultural heritage regimes.³⁸⁵ While it is not possible to provide an exhaustive account of these developments in the present work, the above indicates that some of the more problematic deployments of universality in relation to cultural heritage law have thus also travelled to certain human rights regimes.

3.8 CONCLUSION

The previous chapter defined the notion of universality in international law as ‘the process whereby international legal instruments designate certain regulatory issues as being subject to the common interest of the community’, thereby transforming them from issues within the sphere of a state’s sovereignty into issues subject to cooperation in the interest of the international community. It surveyed the development of common interest regimes in international law across time, pinpointing the increasing recourse within public international law to notions such as ‘common concern’, the ‘common heritage of mankind’, and ‘common’, ‘community’ or ‘universal’ interests. The present chapter has sought to place cultural heritage law within the context of these developments, focusing on the invocation of concepts such as universal importance, universal value and the cultural heritage of (hu)mankind or humanity.

The chapter began by examining the emergence of initial considerations of universality in popular discourse surrounding cultural property in the 19th century, mirrored by the increasing adoption of domestic cultural property legislation around the globe. Simultaneously, these developments were accompanied by the imperial extraction of cultural property, also in the interests of a purported universal culture. While the emergence of the first international conventions aimed at the protection of cultural property – the 1899 and 1907 Hague Conventions – evinced a shared international concern, these conventions did not explicitly draw upon notions of universality or common interest. The

Cultural rights (17 June 1991) E/C.12/1991/1, which asked states to describe measures relating to the ‘[p]reservation and presentation of mankind’s cultural heritage’ (at 20).

385 European Court of Human Rights, Research Division, *Cultural Rights in the Case-law of the European Court of Human Rights* (Council of Europe 2017) 31-2; see also Jakubowski (n 370); Jan Malir, ‘Public Interest before the ECtHR: Protection of Cultural Heritage and the Right to Property’ in Luboš Tichý and Michael Potacs (eds), *Public Interest in Law* (Intersentia 2021). See e.g. *Beyeler v. Italy*, App. No. 33202/96 (2000); *Chapman v. United Kingdom*, App. No. 27238/95 (2001); *SCEA Ferme de Fresnoy v. France*, App. No. 61093/00 (2005); *Debelianovi v. Bulgaria*, App. No. 61951/00 (2007); *Kozacıoğlu v. Turkey*, App. No. 2334/03 (2009); *Fürst von Thurn und Taxis v. Germany*, App. No. 26367/10 (2013). Cases of individuals or groups calling upon that same cultural value have been less successful, however: compare *Ahunbay and Others v. Turkey*, App No. 6080/06 (2019).

interbellum period subsequently saw several unsuccessful attempts to further codify international legal rules with respect to cultural property within the context of the ICIC, including a draft convention on the protection of cultural property during armed conflict. In this context, it seems to have been widely accepted that the protection of cultural property from destruction was a matter of international concern, providing the necessary momentum for international cooperation and regulation.

This idea found its first expression in positive law upon the adoption of the 1954 Hague Convention, where the potential impact on a nebulous 'cultural heritage of mankind' as the result of the destruction of cultural property formed the impetus for the adoption of the Convention. The notion of universal value was also explicitly incorporated within the Hague Convention's definition of protected cultural property, although the construction of this universal value mainly occurs at the national level. The 1972 World Heritage Convention further codified the idea of a 'cultural heritage of mankind', giving weight to the argument that the protection of certain forms of cultural heritage is a matter of common interest, not only for states but for the international community at large, calling upon ideas of universal interest and value. The use of the phrase 'cultural heritage of mankind' hereby becomes shorthand for states' position as a trustee of the common interest of the international community, and the need to cooperate at the international level to protect this interest – yet still clearly doing so within the boundaries of state sovereignty, as the territorial state remains in many ways the ultimate arbiter of 'outstanding universal value'.

The 1970 Convention adopts a different approach to the 1954 and 1972 Conventions, as the justification for its adoption is more clearly rooted in the transboundary nature of the problem of illicit cultural property trafficking, which required the adoption of an international convention in order to facilitate international coordination amongst a web of conflicting domestic legislation. Simultaneously, the controversy of the adoption of an international convention on the issue is demonstrated by the relative paucity of references to ideas of common interest in the convention – it almost wholly eschews references to the cultural heritage of mankind and ideas of universal importance – and the fact that it mainly establishes reciprocal obligations. As such, the 1970 Convention bucked the prevailing trends of the time; however, it also presaged later treaties which sought to emphasise other forms of value than the international or which rejected the relevance of significance criteria in determining their scope of protection.

Thus the 2001 Underwater Cultural Heritage Convention defines underwater cultural heritage broadly, without any references to notions of universal value or significance. While the Convention nonetheless affirms that the underwater cultural heritage is part of the cultural heritage of humanity and that responsibility for its protection therefore rests with all states, requiring international cooperation, it also acknowledges that certain states will have

a particular interest in the protection of certain forms of underwater cultural heritage, for example on the basis of historical links. However, given that states' obligations with respect to underwater cultural heritage are determined by the maritime zone in which it is located, states remain the chief actors tasked with its preservation – acting as stewards of the common interest embodied within the underwater cultural heritage, along similar lines to other cultural heritage conventions.

Finally, the 2003 Intangible Cultural Heritage Convention also eschews a significance-based definition of the intangible cultural heritage to be safeguarded under the aegis of the Convention, emphasising the value of the intangible cultural heritage from the perspective of the communities, groups and individuals who practice it. Yet the Intangible Cultural Heritage Convention continues to draw upon universalist language, emphasising that the safeguarding of the intangible cultural heritage is of interest to humanity as a whole, and more broadly drawing upon the principle of common concern. Discussions during drafting showed the remarkably stubborn nature of universalist language, and the difficulty of wholly avoiding it when setting out to adopt an international convention on cultural heritage.

Phrases drawing upon the universal nature of heritage thus form a common thread in cultural heritage law-making, yet the question remains whether they form anything more than a rhetorical device.³⁸⁶ As the above illustrates, similarly to other common interest regimes in international law, we see within cultural heritage treaties that there is a transformation of an area considered to fall within the purview of national sovereignty into a common interest – albeit a common interest in which the sovereignty of the territorial state remains a decisive factor. A certain sense of pragmatism thus 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',³⁸⁷ and will involve choices that are made in the interests of the sovereign state upon whose territory the heritage is located rather than necessarily a shared interest of the international community, or a local interest of individuals or local communities.³⁸⁸

This pragmatism has expressed itself in the limitations imposed upon the types of heritage which the international can and should seek to protect. As the discussions have shown across each of the instruments surveyed above, negotiations repeatedly show a gradual narrowing of the ambition and goals of the convention in question, towards a recognition that all cultural heritage

386 Compare, with respect to environment law, Duncan French, 'Common Concern, Common Heritage and Other Global(-ising) Concepts: Rhetorical Devices, Legal Principles or a Fundamental Challenge?' in Michael Bowman, Peter Davies and Edward Goodwin (eds), *Research Handbook on Biodiversity and Law* (Elgar 2016).

387 Hafstein (n 322) 93.

388 Lucas Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination* (Oxford University Press 2019) 67, 71.

is valuable, but that only a specific segment of this heritage can be protected by virtue of international law.³⁸⁹ A great degree of discretion is often granted to the territorial state in this regard to determine which heritage will ultimately be selected for preservation pursuant to the international legal regime.

Nonetheless, the starting point in cultural heritage law-making has remained a 'recognition of the cultural heritage as the common concern of humankind'.³⁹⁰ Over the course of the past century, the idea that cultural heritage is a common interest of humankind has prevailed, with a gradual recognition that shared protection of cultural heritage is often unavoidable – and in many cases will produce more desirable results than unilateral efforts.³⁹¹ Similarly, it 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 'cultural heritage of humankind' – a concept with unclear legal implications, but which has thus far avoided from impinging upon the sovereignty of the territorial state.³⁹² In this sense, it could be argued that the idea of the cultural heritage of humankind functions as an important legal fiction at the heart of cultural heritage law, similarly to the role played by the concept of the 'international community' in general international law. 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.

Some scholars have argued that the invocation of the concept of the cultural heritage of mankind indicates agreement amongst the members of the international community that the matter is not solely the purview of an individual

389 Forrest, *International Law and the Protection of Cultural Heritage* (n 10) 389-90. However, this trend has been partially bucked by the 1970 Convention and the 2001 Convention, both of which eschew a significance-based definition of cultural heritage, an in fact seek to draw the net wider in terms of their proposed scope of protection.

390 Ibid 405.

391 Konstantin Parkhomenko, 'Taking Transnational Cultural Heritage Seriously: Towards a Global System for Resolving Disputes over Stolen and Illegally Exported Art' (2011) 16 *Art, Antiquity and Law* 145, 147-8, 152. See also Lyndel V Prott, 'International Control of Illicit Movement on the Cultural Heritage: The 1970 UNESCO Convention and Some Possible Alternatives' (1983) 10 *Syracuse Journal of International Law & Commerce* 333, 333; Prott suggests that '[t]his movement has created some difficult issues for governments where cultural matters have traditionally not been a subject for government regulation. Most common law countries are in this group. Nevertheless, the use of legislative controls in new areas is an inevitable phenomenon: it is not so long, after all, since governments have been active in the field of public health. Indeed, there are many other areas, traditionally considered as matters for the internal policy-making processes of a state, that have now become matters of international law and have created obligations for states to act within their borders, in ways which may or may not be in conformity with their historic methods of resolving problems in the area'.

392 Forrest, *International Law and the Protection of Cultural Heritage* (n 10) 410.

state, but that it is a shared heritage of humanity as a whole.³⁹³ However, as we shall see in the next chapter, while the intentions of the treaties surveyed above are certainly universal in design, their implementation is often overwhelmingly national and state-focused in nature.³⁹⁴ At the core of these conventions is a *delimitation* of state sovereignty, rather than a limitation thereof.³⁹⁵ 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.³⁹⁶ In this sense, the territorial state becomes a trustee of the cultural heritage situated within its territory.³⁹⁷ In particular, in the context of the Intangible Cultural 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.

The following chapter will focus on the development of protection, monitoring and implementation mechanisms in cultural heritage law, as the counterpart of this chapter's focus on the position of cultural heritage law as a common interest regime. It will thus seek to place these mechanisms within the context of the broader discussion in the previous chapter on the tools adopted by other common interest regimes in public international law, such as the principle of the common heritage and mankind and the principle of common concern, as well as discussions on the role of reciprocity in international legal obligations relating to the protection of cultural heritage. In doing so, it seeks to examine cultural heritage law through the lens of doctrinal discussions identified in Chapter 2 on the tension between 'form and function' in common interest regimes in international law.

393 Parkhomenko (n 391) 152.

394 Forrest, *International Law and the Protection of Cultural Heritage* (n 10) 410.

395 Lixinski (n 388) notes that the cultural conventions 'rather than creating rights in international law (and thus eroding sovereignty), seem to create cooperation mechanisms that reinforce sovereign prerogatives' (at 244).

396 Forrest (n 10) 412-3.

397 Ibid 410-2.

The previous chapter examined the invocation of notions of universal importance and interest within cultural heritage law over time. In doing so, it asked whether it was possible to identify a common approach towards the definition of cultural heritage as it is protected by virtue of public international law. The chapter concluded that the idea that cultural heritage is a common interest is a leitmotif of contemporary cultural heritage law. Simultaneously, while the intentions of these treaties are certainly universal in design, the power to decide what constitutes 'universal' heritage is often overwhelmingly granted to states.

The present chapter examines the implementation of these conventions, by focusing on the mechanisms of protection which they employ in order to protect this heritage of 'universal importance'. It does so against the background of the broader discussion of common interest regimes established in Chapter 2. It enquires whether there is a common approach within international law towards the protection of cultural heritage, in terms of the types of obligations as well as the monitoring and implementation mechanisms employed to achieve this goal. In doing so it seeks to answer the following overarching question: is it possible to identify the same tension between 'form and function' in cultural heritage law which was outlined in Chapter 2 with respect to common interest regimes in public international law?

As noted in Chapter 2, scholars have generally argued that contemporary international law has undergone a radical shift, transforming from a body of rules focused on international coexistence to one centred around the facilitation of international cooperation in the common interest. In terms of their substance, the obligations established by common interest regimes thus frequently invoke the importance of international cooperation, or draw upon concepts such as the principle of common concern or the principle of the common heritage of humankind. In the case of treaty regimes established for the protection of common interests, the goal of such regimes is often to facilitate state compliance rather than punishing non-compliance; as such, they frequently do not establish absolute obligations.

These regimes are furthermore often associated with a range of legal characteristics, including the modified role of notions of reciprocity, whereby states' obligations are frequently inward-looking and are not dependent on the mutual exchange (and performance) of rights and obligations between states; the different operation of certain types of secondary rules, such as those

on reservations and denunciation, treaty interpretation, or the invocation of state responsibility; and the presence of *jus cogens* norms or obligations *erga omnes*.

Finally, common interest regimes frequently establish institutions in which states are expected to answer to the international community with respect to their management of the common interest under their protection, ranging from an assembly of fellow States Parties; independent expert bodies; judicial bodies with the jurisdiction to examine individual complaints against the State Party; and sometimes even an independent international body tasked with the management of the common interest instead of States Parties. These institutions are also frequently tasked with the adoption of guidelines which further specify the content of the obligations contained in a given convention, allowing the management of the common interest to evolve in line with changing insights.

Against this background, the present chapter begins by outlining the methods adopted for the protection of cultural heritage, the nature of the legal norms through which this is achieved, and the extent to which notions of common interest are reflected in the types of substantive and procedural obligations employed within cultural heritage treaties. It subsequently outlines the main monitoring and implementation mechanisms employed in each of the conventions. In the final section, the chapter focuses on the mechanisms currently employed within the conventions which seek to foster individual and community participation in processes related to the international protection of cultural heritage, in order to lead up to a discussion in the next chapter on the shortcomings of cultural heritage law from the perspectives of these two key stakeholders.

The chapter concludes that whilst cultural heritage law unmistakably acknowledges that the protection of cultural heritage is a common interest, it also showcases many of the same limitations faced more broadly by common interest regimes in public international law. This is because the positive obligations which cultural heritage treaties establish are often fairly weak and remain centred around states, rather than the common interest in and of itself. This illustrates that international law-making is limited when it comes to the protection of common interests – developed, as it is, around ideas of reciprocity and self-help.

4.1 COMMON PROTECTION MECHANISMS

As noted in the introduction to the dissertation, since the 2000s numerous scholars have approached the cultural heritage conventions of UNESCO as representing a common set of international obligations, as is evident in the

growth of handbooks treating these conventions as a group,¹ and which speak of 'cultural heritage law' or 'international heritage law'.² In this body of work, there appears to be a general consensus that international law acknowledges the special position of cultural heritage, as distinct from ordinary property (or, in the case of intangible cultural heritage, practices) and that the development of the law is guided by a principle of cooperation.³ The findings of the previous chapter also support this conclusion. As is often the case, the identification of a treaty regime is coupled with the identification of not only a set of common principles but also common methods of protection and enforcement. Lixinski thus identifies three core safeguarding mechanisms across the cultural heritage conventions: 'listing, heritage funds, and international cooperation'.⁴ As demonstrated in the following sections, these international governance mechanisms have indeed assumed an increasingly central role in the shaping of international legal norms for the protection of cultural heritage. However, they have not been universally applied in all treaty regimes, with certain regimes, such as the 1954 Hague Convention and the 1970 Convention, representing exceptions to this trend. The following section discusses each of the conventions in turn, concluding with a brief analysis of the role of *jus cogens* norms and obligations *erga omnes* within cultural heritage law.

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- 1 See e.g. Abdulqawi A Yusuf (ed) *Standard-setting at UNESCO: Essays in Commemoration of the Sixtieth Anniversary of UNESCO* (Martinus Nijhoff 2007); Toshiyuki Kono, *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21st Century* (Martinus Nijhoff Publishers 2010); Craig Forrest, *International Law and the Protection of Cultural Heritage* (Routledge 2012); Janet Blake, *International Cultural Heritage Law* (Oxford University Press 2015).
 - 2 See e.g. Francesco Francioni and James Gordley (eds), *Enforcing International Cultural Heritage Law* (Oxford University Press 2013); Blake (n 1); Marina Lostal, *International Cultural Heritage Law in Armed Conflict* (Cambridge University Press 2017); Lucas Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination* (Oxford University Press 2019); Anne-Marie Carstens and Elizabeth Varner (eds), *Intersections in International Cultural Heritage Law* (Oxford University Press 2020); Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020). See also, for example, the creation of a committee within the International Law Association on 'Cultural Heritage Law' (1988-2016).
 - 3 See e.g. Francesco Francioni, 'A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage' in Abdulqawi A Yusuf (ed), *Standard-setting at UNESCO: Essays in Commemoration of the Sixtieth Anniversary of UNESCO* (Martinus Nijhoff 2007) 222; Forrest (n 1) 388; Lostal (n 2) 50-1, 62-3.
 - 4 Lixinski (n 2) 196. See also Francesco Francioni, 'Custom and General Principles of International Cultural Heritage Law' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020) 548, who similarly identifies international cooperation as a core principle of cultural heritage law.

4.1.1 1954 Hague Convention

Unlike other subsequent cultural heritage conventions, listing, funding or international cooperation is not the primary *modus operandi* of the 1954 Convention. In this sense, the Hague Convention reflects the nature of the Convention as embedded simultaneously within cultural heritage law and a separate international legal regime – international humanitarian law – where the main method of protection is the establishment of rules of conduct during armed conflict. The provisions of the Hague Convention are supplemented by those of the 1954 First Protocol, which contains provisions on the protected of movable cultural property during times of occupation, and the 1999 Second Protocol, which sought to update the provisions of the 1954 Convention in light of the changing nature of armed conflict.

While the Hague Convention is chiefly aimed at the protection of cultural property during times of armed conflict, the Convention also acknowledges that this protection can only be achieved effectively if measures are taken during peacetime.⁵ To this end, for the purposes of the Convention, ‘protection’ entails ‘the safeguarding of and respect’ for cultural property.⁶ Safeguarding is primarily intended as a peacetime measure, and entails several inward aimed obligations of due diligence for States Parties. In order to meet their obligation to safeguard cultural property, States Parties are expected to undertake measures as they consider appropriate to prepare for the effects of armed conflict on cultural property situated in their territory.⁷ The 1999 Second Protocol further elaborates upon possible safeguarding measures which can be taken by the parties.⁸

Other measures, primarily intended to be implemented during peacetime, but whose operation is of crucial importance to respect for cultural property during armed conflicts, include the marking of cultural property with the Blue Shield emblem,⁹ the introduction of provisions in a state’s military regulations

5 Emma Cunliffe and Paul Fox, ‘All Possible Steps? Revisiting Safeguarding in the 1954 Hague Convention’ in Emma Cunliffe and Paul Fox (eds), *Safeguarding Cultural Property and the 1954 Hague Convention* (Boydell & Brewer 2022) 31.

6 1954 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) art 2. On the implementation of such safeguarding measures in practice, see the contributions in Emma Cunliffe and Paul Fox (eds), *Safeguarding Cultural Property: All Possible Steps* (Boydell & Brewer 2022).

7 1954 Hague Convention, art 3.

8 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 172 (1999 Second Protocol) art 5.

9 1954 Hague Convention, arts 6, 10. Practice has however showed that many of the parties to the 1954 Convention neglect this obligation, with the Blue Shield emblem falling into increasing desuetude. See, for example, the statement of the Dutch Minister of Culture that the Netherlands will no longer make use of the emblem: ‘Kamerbrief met beleidsreactie op advies Nederlandse Unesco Commissie over cultureel erfgoed’ (*Rijksoverheid*, 13 Septem-

ensuring respect for the Convention, and broadly the fostering of a 'spirit of respect for the culture and cultural property of all peoples' in their armed forces.¹⁰ The parties must further undertake to establish specialist personnel within their armed forces, whose task is the securing of respect for cultural property.¹¹

These peacetime obligations are non-reciprocal, in the sense that the obligations are inward-looking and do not hinge on a mutual exchange of rights and obligations between the States Parties to the convention; states are expected to fulfil these obligations regardless of whether other States Parties do so. In other words, if a state does not adequately establish peacetime measures for the protection of cultural property, this does not lessen the scope of obligations that another State Party will have with regards to cultural property situated on its territory during peacetime. They are also solely applicable for each State Party in relation to its territory. Nor do the provisions established in the 1954 Convention and the 1999 Second Protocol establish absolute obligations: instead of establishing obligations of result, these provisions provide guidelines for appropriate action by states.¹² In this sense they are comparable to many of the provisions established by other common interest regimes in international law.

The parallel to states' obligations to safeguard cultural property is that of respect for cultural property, which primarily operates in the context of armed conflicts. By contrast to peacetime measures, the majority of norms established by the convention with regards to protection of cultural property during armed conflict constitute absolute obligations which prohibit certain actions, rather than providing guidance for the actions to be undertaken by states. Unlike obligations relating to safeguarding, these obligations of respect operate both within the territory of the parties as well as with respect to the cultural property located in the territory of other parties to the Convention, if the State Party is engaged in an armed conflict on that territory.¹³

In order to ensure respect for cultural property, States Parties must undertake to refrain from using the property and its 'immediate surroundings' in a manner 'likely to expose it to destruction or damage'.¹⁴ They must further

ber 2021) <<https://www.rijksoverheid.nl/documenten/kamerstukken/2021/09/13/beleidsreactie-advies-nederlandse-unesco-commissie-een-wapen-in-vredestijd-de-uitvoering-van-het-unesco-haags-verdrag-en-het-gebruik-van-het-blauw-witte-schildje>>.

10 1954 Hague Convention, art 7(1).

11 Ibid art 7(2).

12 Articles 3 and 7 of the 1954 Hague Convention thus merely state that the High Contracting Parties are expected to 'undertake' safeguarding measures; article 6 establishes that cultural property 'may' bear the Blue Shield emblem (however, compare article 10). Article 5 of the 1999 Second Protocol is phrased in similarly hortatory language, which provides that '[p]reparatory measures ... shall include, as appropriate'.

13 1954 Hague Convention, art 4(1). See also Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge University Press 2006) 121.

14 1954 Hague Convention, art 4(1).

refrain from directing acts of hostility against it.¹⁵ These obligations can only be waived 'in cases where military necessity imperatively requires such a waiver'.¹⁶ The Second Protocol establishes a stricter regime regarding the permissibility of attacks against cultural property.¹⁷ Further obligations also operate within the Convention with respect to illicit trafficking of cultural property and the protection of cultural property during times of occupation,¹⁸ which are supplemented by the provisions in the First Protocol.¹⁹

Pursuant to the Convention, states are expected to accord respect to the designation of certain property as cultural property for the purposes of the Convention by another State Party. Practically speaking, respect for cultural property during an armed conflict is enhanced if a state has taken adequate peacetime measures. Nonetheless, the obligations flowing from the Convention concerning respect for cultural property remain non-reciprocal, like most norms of international humanitarian law.²⁰ The guaranteeing of respect for cultural property by a belligerent is thus not dependent upon such property having been marked or otherwise designated as such by the state during peacetime.²¹ Furthermore, if a state breaches the actions prohibited under the heading of respect for cultural property – for example by occupying a heritage site – then this does not permit the other state to disregard its obligations, clearly indicating their non-reciprocal character.²² Another indication of the non-reciprocal nature of the norms on respect for cultural property contained in the Hague Convention and the Second Protocol is the fact that they have been interpreted as also applying to actors who have not ratified either instrument but who are nonetheless parties to a given armed conflict, such as armed non-state actors.²³

15 Ibid art 4(1).

16 Ibid art 4(2).

17 1999 Second Protocol, arts 6(a)-(b), 7.

18 1954 Hague Convention, arts 4(3), 5.

19 Protocol for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240 (1954 First Protocol) arts 1-2.

20 On the Hague Convention, see O'Keefe (n 13) 126. On international humanitarian law in general, see, for example, Rule 140 of the ICRC's Customary International Humanitarian Law database: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule140. But compare e.g. Bryan Peeler, *The Persistence of Reciprocity in International Humanitarian Law* (Cambridge University Press 2019).

21 Article 6 determines that cultural property 'may' bear the distinctive emblem; use of the emblem is not obligatory. Furthermore, article 4(5) states that '[n]o High Contracting Party may evade the obligations incumbent upon it under the present Article, in respect of another High Contracting Party, by reason of the fact that the latter has not applied the [peacetime] measures of safeguard'. See also O'Keefe (n 13) 110-11.

22 Ibid 125-6.

23 1954 Hague Convention, art 19(1). See e.g. Jean-Marie Henckaerts, 'New Rules for the Protection of Cultural Property in Armed Conflict: the Significance of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed

In addition to the designation of certain forms of cultural property by individual States Parties, both the 1954 Convention and the 1999 Second Protocol establish additional protective obligations with regards to a privileged category of cultural property which is called into being as the result of an internationalised process rather than on the basis of self-judgment by the State Party; in this sense, the Hague Convention thus mirrors later cultural heritage conventions by providing for a rudimentary form of international listing.

The 1954 Convention thus provides for a regime of 'special protection', through which property can be entered into an International Register of Cultural Property under Special Protection upon the request of a State Party in relation to cultural property situated on its territory;²⁴ property entered into the International Register enjoys a higher standard of protection.²⁵ If no other State Party objects to this registration, the property is entered onto the Register.²⁶ This regime can be applied to refuges of movable cultural property; centres containing monuments; and 'immovable cultural property of very great importance'.²⁷ Designation hinges on two criteria: the location of the refuge, centre, or property ('at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point'),²⁸ and the prohibition of its use for 'military purposes'.²⁹

The Second Protocol establishes an additional system of 'enhanced protection', akin to the 1954 Convention's system of special protection. Cultural property under such enhanced protection enjoys a more stringent level of immunity from attack during armed conflict.³⁰ Three criteria must be met for inscription: the property must constitute 'cultural heritage of the greatest importance for humanity'; it must be subject to adequate protection measures at the domestic level; and it must not be 'used for military purposes or to shield military sites'.³¹ While inscription can be recommended by actors other than the territorial state, including other States Parties or relevant NGOs,

Conflict' (1999) 12 *Humanitäres Völkerrecht* 147. However, compare on this point Andrew Clapham, 'Focusing on Armed Non-State Actors' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 776-7.

24 Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, art 13(1).

25 1954 Hague Convention, art 9. However, this status can be withdrawn: see arts 11(1)-(2).

26 Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, arts 14-15.

27 1954 Hague Convention, art 8(1).

28 1954 Hague Convention, art 8(1)(a). An exception is made for refuges, which can be designated regardless of location, 'if it is so constructed that, in all probability, it will not be damaged by bombs': art 8(2).

29 *Ibid* art 8(3) – although the article technically only defines use for military purposes in relation to centers containing monuments.

30 1999 Second Protocol, arts 12-14.

31 *Ibid* art 10.

inscription can only take place with the consent of the territorial state.³² Inscription is granted by the Committee for the Protection of Cultural Property in the Event of Armed Conflict, a body comprised of twelve States Parties to the Second Protocol, elected by the Meeting of the Parties of the Second Protocol.³³ As such, this procedure is clearly modelled on the listing practices of the World Heritage Convention.

The Guidelines for the implementation of the Protocol adopted by the Meeting of Parties expand further upon the criteria for inscription; of particular interest for the present discussion is the elaboration of the criterion of 'greatest importance for humanity'. This criterion can be assessed according to three possible values: the exceptional cultural significance of the property; its uniqueness; and whether its destruction 'would lead to irretrievable loss for humanity'.³⁴ The latter is presumed to be fulfilled if the immovable cultural property is inscribed on the World Heritage List, or, in the case of documentary heritage, on the Memory of the World Register.³⁵ The question whether the loss of the property 'would lead to irretrievable loss for humanity' is assessed according to an analysis whether damage or destruction 'would result in the impoverishment of the cultural diversity or cultural heritage of mankind',³⁶ thereby appearing to give greater credence and materiality to the concept of the 'cultural heritage of mankind'. Perhaps most critically, the criteria relating to the 'exceptional cultural significance' of the property are modelled very closely on the criteria for outstanding universal value of cultural heritage under the World Heritage Convention. All but one of the current inscriptions (as of August 2023) on the Enhanced Protection List are also included on the World Heritage List.³⁷

As noted in the previous chapter, the universality of heritage is thus primarily expressed in relation to the definition of heritage itself, in particular for the definition of cultural property that falls within the scope of the special and enhanced protection regimes. Otherwise, the common interest which the Hague Convention seeks to protect generally does not find any direct expression in the positive law of the Convention, neither in the type of protection adopted nor in the methods through which this protection is achieved. However, what can be seen is development in this direction over time, largely due

³² Ibid art 11.

³³ Ibid art 24.

³⁴ 1999 Second Protocol: Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (16 December 2021) C54/21/9.SP/Resolutions, Resolution 9.SP 9 (Second Protocol Guidelines) para 32.

³⁵ Ibid paras 36-37.

³⁶ Ibid para 35.

³⁷ The exception is the inscription of the National Central Library in Florence by Italy, which, whilst located in the World Heritage Site of Florence, was inscribed on the Enhanced Protection List pursuant to paragraph 33 of the Guidelines to the Second Protocol.

to the adoption of the Second Protocol in 1999: whereas inscriptions on the list of special protection pursuant to the Convention can only occur with the consent of the territorial state, inscription on the list of enhanced protection pursuant to the 1999 Protocol has been shaped in such a way as to give greater expression to the common interests at stake by delegating this decision to the Committee and facilitating recommendations for inscription by actors other than the territorial state, although the latter's consent ultimately remains necessary.

Overall, the Hague Convention nonetheless represents a clear example of a 'law-making' treaty, in the classical sense of the term. It contains a number of non-reciprocal obligations, in which performance is mandated in the interest of the international community and not that of individual States Parties. Its status as an instrument of international humanitarian law is reflected in the fact that both the Hague Convention and its two Protocols contain a number of absolute obligations, prohibiting states from undertaking certain actions. In this sense, they can be distinguished from many of the cultural heritage law treaties examined below, which usually contain hortatory obligations rather than absolute prohibitions of action (comparable to the Hague Convention's provisions on peacetime safeguarding). As such, upon its adoption, the Hague Convention represented the more traditional modes of international law-making of the time: while later cultural heritage conventions could perhaps more appropriately be termed framework conventions, the Hague Convention seeks to establish a comprehensive regime for the protection of cultural property during armed conflicts.³⁸

However, this boundary has been blurred over time, in particular since the adoption of the 1999 Second Protocol. The Protocol places greater emphasis on the traditional tools of cultural heritage law: the adoption of lists of protected heritage, such as the abovementioned Enhanced Protection List; the provision of international funding and technical assistance to protect this heritage, through the vehicle of the Fund for the Protection of Cultural Property in the Event of Armed Conflict;³⁹ and a greater emphasis on the importance of international cooperation to resolve the issues facing cultural heritage protection in this area,⁴⁰ *inter alia* through the regularisation of Meetings of States Parties and the creation of permanent bodies tasked with monitoring the implementation of the Second Protocol such as the Committee for the Protection of Cultural Property in the Event of Armed Conflict, as will be seen in section 4.2.⁴¹

38 Brölmann refers to this as the 'normative completeness' of a convention: Catherine Brölmann, 'Typologies and the "Essential Juridical Character" of Treaties' in Dino Kritsiotis and Michael J. Bowman (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018).

39 1999 Second Protocol, art 29, 31-3.

40 Ibid art 31.

41 Ibid art 24, 27.

4.1.2 1970 Convention

In comparison to many of the other cultural heritage conventions of UNESCO, the issue at the heart of the 1970 Convention is 'by definition transnational in nature', requiring the adoption of an international convention to coordinate action between states and give force to domestic cultural property laws overseas.⁴² Pursuant to the 1970 Convention, States Parties are expected to 'undertake to oppose [the illicit import, export and transfer of ownership of cultural property] 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'.⁴³ Article 3 of the Convention subsequently declares that '[t]he import, export or transfer of ownership of cultural property effected contrary to the provisions [of the Convention] shall be illicit'.⁴⁴

Member States are expected to adopt predominantly national measures to combat the illicit trade in cultural property. These obligations are, by and large, normatively weak in the sense that they establish mostly hortatory obligations for states. Member States are thus expected to 'undertake, as appropriate for each country, to set up within their territories one or more national services ... for the protection of cultural heritage'; these national services are expected to carry out functions such as the drafting of laws to protect a country's cultural heritage, the creation and maintenance of a register of protected property, and the supervision of archaeological excavations.⁴⁵ The 1970 Convention also provides for a number of cooperative efforts amongst its States Parties, such as 'concerted international effort[s]' to respond to crises of pillage in a State Party,⁴⁶ and the ability of the member states to call upon UNESCO for technical assistance.⁴⁷ Similar methods of international cooperation are also called for in later soft-law instruments adopted by UNESCO, such as the 1976 Recommendation on the International Exchange of Cultural Property and the 1978 UNESCO Recommendation for the Protection of Movable Cultural Property.⁴⁸

42 Internal Oversight Service, Evaluation of UNESCO's Standard-setting work of the Culture Sector. Part II – 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property (April 2014) IOS/EVS/PI/133 REV. 2, 11, 22.

43 1970 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 Convention) art 2.

44 Ibid art 3.

45 Ibid art 5.

46 Ibid art 9.

47 Ibid art 17.

48 Records of the General Conference, 19th Session (vol 1) 19 C/Resolutions (1976) Annex I, Recommendation on the International Exchange of Cultural Property; Records of the General Conference, 20th Session (vol 1) 19 C/Resolutions (1978) Annex I, Recommendation for the Protection of Movable Cultural Property.

The core obligations of the Convention are reciprocal, in that it creates corresponding sets of rights and obligations between States Parties.⁴⁹ A state's national service must, for example, undertake (insofar as this can be achieved in accordance with its domestic law) 'to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners' and to recognise the right of other States Parties to declare certain forms of property as inalienable, making their presence in another state *ipso facto* illicit, as they cannot be legally exported from the state of origin.⁵⁰ States are further expected to (once again, 'undertake to') introduce a certification system for the export of cultural property from their territory; they must also undertake 'to prohibit the exportation of cultural property' in the absence of the requisite certificate.⁵¹ The corresponding obligation to the establishing of export certification systems in the country of origin, is the obligation upon so-called 'market states' to give effect to this designation in their domestic legal system by establishing an absolute import prohibition, provided that the property was 'stolen from a museum or a religious or secular public monument or similar institution in another State Party'.⁵² Although return of illicitly exported cultural property must be facilitated by the market state, the state of origin must provide 'just compensation to an innocent purchaser or to a person who has valid title to that property'.⁵³

The successful operation of these obligations depends on the indication by the state of origin which property has been illicitly exported; the market state is then expected to give effect to this status in its domestic laws, hence leading to the reciprocal nature of the treaty norms. This point was noted in a 2014 internal oversight report by UNESCO on the implementation of the Convention, which stated that the importance of Convention stems from its role as 'a multilateral instrument, which promoted reciprocity through mutual recognition of domestic laws of other States and international cooperation in their effective implementation by facilitating return, was imperative ... By its nature, the 1970 Convention rises or falls on mutual recognition, reciprocity and international cooperation'.⁵⁴ However, implementation remains wanting in the adoption and enforcement of many of these domestic laws; such domestic laws are critical to give force to the 1970 Convention, as its provisions are not self-executing.⁵⁵

49 Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (May 2015) C70/15/3.MSP/Resolutions, Resolution 3.MSP 11 (1970 Convention Operational Guidelines) para 9.

50 1970 Convention, arts 13(c)-(d).

51 Ibid art 6.

52 Ibid art 7(b)(i).

53 Ibid art 7(b)(ii).

54 IOS/EVS/PI/133 REV. 2 (n 42) 22.

55 Ibid.

As is evident from the above, the intended goal of the Convention was the establishing of a framework at the bilateral level between individual source and market states to regulate the illicit trafficking of cultural property through reciprocal measures. It is perhaps the inability of the convention to attract ratification from important market states which has led to a letting go of the more traditional contractual approach of the Convention as drafted, to the development of measures similar to other 'framework' cultural heritage conventions. Similarly to the other cultural heritage treaties surveyed in the present chapter, we see protection achieved through listing – in the broadest sense – of protected objects, the indication of the importance of international cooperation, and the provision of (limited) funding, provided by the international community to individual states in need of assistance to protect their cultural heritage from the effects of illicit trafficking.⁵⁶

Ultimately, the Convention does not give a great deal of expression to the principle that the cultural property under protection is part of a potential cultural heritage of humankind: as we shall see further on in the chapter, its mechanisms of international cooperation have remained wanting for a long period of time, and have remained relatively weak compared to other institutional mechanisms of cultural heritage cooperation. This is perhaps only logical, as the 1970 Convention is widely perceived as seeking to counter these universalist trends within cultural heritage laws, by placing the national value of cultural property at its centre.⁵⁷ In many ways, the 1970 Convention thus represents the most far-reaching inroad into domestic state sovereignty, as it does not allow the state to designate which heritage is to be protected within its own territory (under the guise of the 'heritage of humankind'), but instead requires it to be willing to recognise the designation of an object as cultural property and to subsequently enforce this in their own domestic laws – indicating why many states have been reticent to effectively implement the 1970 Convention.

4.1.3 1972 World Heritage Convention

By contrast to the 1970 Convention, the World Heritage Convention predominantly establishes international, rather than national protection mechanisms.⁵⁸ Nonetheless, the Convention does establish a number of obligations aimed solely at establishing national measures of protection; these obligations

⁵⁶ Ibid ii.

⁵⁷ John Henry Merryman, 'Two Ways of Thinking About Cultural Property' (1986) 80 AJIL 831.

⁵⁸ At the time of adoption, a Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage was simultaneously adopted; this recommendation was intended to supplement the international measures of the World Heritage Convention.

are chiefly obligations of due diligence or of effort, according to the resources available to the state. The exception to this would seem to be the obligation contained in article 6(3) of the Convention, which notes that each State Party should '[undertake] not to take any deliberate measures which might damage directly or indirectly' cultural and natural heritage as defined for the purposes of the Convention 'situated on the territory of other States Parties' to the convention, regardless of the inscription of this heritage on the World Heritage List. This obligation thus operates between states; however, it has also been interpreted as applying within the territory of the state in respect of its 'own' heritage.⁵⁹

The core domestic duty of States Parties is outlined in article 4, which provides that each State Party 'recognizes that the duty of ensuring the identification, protection, conservation, presentation, and transmission to future generations' of cultural heritage, regardless of international recognition by virtue of the World Heritage List, 'belongs primarily to that State'. However, as the article continues, it notes that the state will do so, 'where appropriate, with any international assistance and co-operation ... which it may be able to obtain'. In doing so, the article neatly encapsulates the ambition of the World Heritage Convention: to assist states in performing the act of heritage protection by providing a framework of international cooperation which can provide the necessary financial support and technical expertise in situations where states do not possess these resources themselves. The Convention furthermore establishes, in article 5, that 'each State Party ... shall endeavour, in so far as possible, and as appropriate for each country' to take a number of national measures, such as the creation of a service for the protection of cultural and natural heritage within its territory, 'to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community',⁶⁰ and to stimulate scientific expertise in relation to heritage protection.

By contrast to these inward-looking obligations, the Convention defines 'international protection' as 'the establishment of a system of international cooperation and assistance designed to support States Parties to the Convention in their efforts to conserve and identify that heritage'.⁶¹ This system of international cooperation takes the shape of the establishment of the World Heritage List, and its counterpart, the List of Heritage in Danger; both lists are administered by the governing body of the Convention, the World Heritage Commit-

59 On the basis of a reading of article 6(3) in tandem with article 4 in light of the object and purpose of the World Heritage Convention. See e.g. Lostal (n 2) 159.

60 1972 Convention for 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) art 5(a).

61 Ibid art 7.

tee. Since 1992, the World Heritage Committee is assisted in the discharge of its duties by the World Heritage Centre, the secretariat of the Convention.

States Parties are expected to ‘undertake ... to give their help in the identification, protection, conservation and presentation’ of heritage included in the World Heritage List and the List of World Heritage in Danger.⁶² Sites included on the list can receive international assistance, which is distributed by the World Heritage Committee. Such requests for assistance must be made by ‘States Parties ... with respect to property forming part of the cultural or natural heritage, situated in their territories’, either already included in the World Heritage List, amenable to inclusion on the list, or in order to provide assistance in the identification of potential sites on the List.⁶³ Such assistance is provided by virtue of the World Heritage Fund, to which States Parties must make regular contributions.⁶⁴ Assistance can furthermore take a range of forms.⁶⁵

In short, the World Heritage Convention perhaps typifies the model of a cultural heritage convention and the common set of heritage obligations in international law: the creation of a list of protected heritage, to be protected through internationally sourced and administered funding, achieved under the banner of international cooperation, as brought to life in the governing institutions of the Convention: the World Heritage Committee and the World Heritage Centre. The World Heritage Convention is moreover not a static legal instrument; it has undergone a great deal of development since its adoption in 1972, primarily through the successive adoption of operational guidelines.⁶⁶ The fact that the Convention has been developed over time through the elaboration of additional policy guidelines, for example by the World Heritage Centre, the General Assembly of States Parties, or the World Heritage Committee, as well as the periodic revision of the Operational Guidelines by the World Heritage Committee, further indicates that the Convention should perhaps not necessarily be indicated as a ‘law-making’ treaty as such, but rather as a framework convention, a clearing house for cooperation.

The obligations elaborated upon in the Convention are furthermore non-reciprocal,⁶⁷ as is often the case for obligations taken to represent a common interest rather than a bilateral interest between individual states. The focus

62 Ibid art 6(2).

63 Ibid art 13(1)-(2).

64 Ibid arts 15-16.

65 Ibid arts 22-3.

66 The Operational Guidelines of the Convention have been extensively revised throughout the course of the fifty years of the Convention’s existence, from 28 paragraphs in 1977 to 290 paragraphs in 2021.

67 UNESCO, Internal Oversight Services, ‘Evaluation of UNESCO’s Standard-setting Work of the Culture Sector – Part III – 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage’ (April 2014) IOS/EVS/PI/132 REV.3, 46. The report was prepared by the Internal Oversight Service and written by Francesco Francioni, amongst others.

of the World Heritage Convention is thus on the state in respect of its own territory, rather than on regulating the relations between states. However, these obligations are also 'largely voluntary';⁶⁸ they are generally also not seen to be self-executing,⁶⁹ and they do not create enforceable rights for individuals, but establish a system of international governance to facilitate national action. While there is a *prima facie* commitment to the ultimate beneficiaries of heritage protection – local communities – through an increasing emphasis on their participation in World Heritage governance, as we shall see in section 4.3, these commitments remain similarly unenforceable. While the World Heritage Convention limits the scope of permissible state action, it ultimately does not 'usurp the authority of State Parties in their own domestic decision-making'.⁷⁰

4.1.4 2001 Underwater Cultural Heritage Convention

Similarly to many of the cultural heritage conventions discussed in this chapter, the Underwater Cultural Heritage Convention has a dual function. The Convention firstly establishes international cooperation as a general principle.⁷¹ To this end, the parties to the Convention are encouraged to engage in the drafting of bilateral, regional and multilateral agreements to further the purposes of the Convention.⁷² The Convention also has an Annex, providing technical rules for activities directed at underwater cultural heritage; the Rules privilege *in situ* conservation of underwater cultural heritage and consider commercial exploitation of UCH as fundamentally incompatible with its proper protection and management. The Rules are an 'integral part' of the Convention.⁷³

In light of the cooperative character of the Convention, a number of subsidiary bodies are created by the Convention, including a regular Meeting of States Parties (MSP) and a Scientific and Technical Advisory Body (STAB), tasked with assisting the MSP 'in questions of a scientific or technical nature

68 Ibid.

69 Ibid 2.

70 Evan Hamman, 'The Role of NGOs in Monitoring Compliance under the World Heritage Convention: Options for an Improved Tripartite Regime' in Christina Voigt (ed), *International Judicial Practice on the Environment: Questions of Legitimacy* (Cambridge University Press 2019) 426.

71 2001 Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009) 2562 UNTS 3 (Underwater Cultural Heritage Convention) art 2(2).

72 Ibid art 6.

73 The trade-off for the privileged position of the Rules in the legal framework of the Convention is that they are subject to the same amendment procedures as provisions of the Convention itself; as such, they cannot be easily amended to adjust to technological or scientific developments: Sarah Dromgoole, *Underwater Cultural Heritage and International Law* (Cambridge University Press 2013) 58-9.

regarding the implementation of the Rules';⁷⁴ section 4.2 will return to a discussion of these bodies. The Operational Guidelines of the Convention also contain a number of pointers aimed at increasing awareness of and support for underwater cultural heritage protection, such as the publication of information of activities relating to underwater heritage, and capacity-building efforts such as training related to conservation of underwater cultural heritage or in underwater archaeology.⁷⁵

However, the second – and primary – function of the Convention is the establishing of jurisdictional competence for states over underwater cultural heritage according to the maritime zone in which the heritage is located. As a general principle, a state is expected to 'use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage'.⁷⁶ More generally, states are expected to take a number of measures in relation to persons or places under their jurisdiction,⁷⁷ such as measures aimed at the prevention of the trade of illicitly excavated underwater cultural heritage on their territory, and the '[imposing] of sanctions for violations of measures it has taken to implement' the Convention.⁷⁸ They must also establish a competent authority charged with the implementation of the Convention.⁷⁹

Of particular interest is the following 'general remark' in the Operational Guidelines to the Convention, not included in so many words in the Convention itself, that '[w]hile fully respecting the sovereignty or jurisdiction of the States or territories where the underwater cultural heritage is situated, States Parties to the Convention recognize the collective interest of the international community to cooperate in the protection of this heritage'.⁸⁰ From this recognition flow the duties of protection of the underwater heritage and cooperation to this end, as well as the prevention of activities which seek to commercially exploit underwater cultural heritage.⁸¹

Akin to the regulation of maritime zones in UNCLOS, the nature of the coastal state's exercise of sovereignty under the Convention changes the further one gets from the coast, with the most dramatic shift occurring at the boundary between the contiguous zone and the continental shelf and the EEZ. As a general principle, a state is expected to 'use the best practicable means at its

74 Underwater Cultural Heritage Convention, art 23(5).

75 2001 Underwater Cultural Heritage Convention: Operational Guidelines for the Convention on the Protection of the Underwater Cultural Heritage (August 2015) CLT/HER/CHP/OG 1/REV (Underwater Cultural Heritage Operational Guidelines) paras 50-56.

76 Underwater Cultural Heritage Convention, art 5.

77 Ibid arts 14-18.

78 Ibid art 17(1).

79 Ibid art 22.

80 Underwater Cultural Heritage Convention Operational Guidelines, para 10.

81 Ibid para 10(i)-(iii).

disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage'.⁸² In relation to the protection of underwater cultural heritage located in a state's internal waters and territorial sea, States Parties have the 'exclusive right to regulate and authorize activities', but 'shall require' the application of the Rules located in the Annex of the Convention to activities taking place in these zones and which are directed at underwater heritage.⁸³ In relation to heritage located in their archipelagic waters and territorial sea, they are furthermore expected to inform Flag States Parties and other states with a 'verifiable link' of the discovery of 'State vessels and aircraft'.⁸⁴ States Parties can further regulate underwater cultural heritage in the contiguous zone, but must require the application of the Rules to such activities.⁸⁵

A shift occurs between on the one hand the territorial sea and contiguous zone, where the coastal state has the right to regulate underwater cultural heritage, and on the other hand the continental shelf and Exclusive Economic Zone (EEZ), where '[a]ll States Parties have a responsibility to protect underwater cultural heritage'.⁸⁶ The obligations of states in this regard are divided into obligations related to reporting and notification, and obligations relating to protection of underwater heritage. With regards to the former, states must ensure that when 'its national, or a vessel flying its flag, discovers or intends to engage in activities directed at underwater cultural heritage' located in either its own EEZ or continental shelf, or that of another State Party, that they will report this to the relevant State Party. However, if it concerns discoveries or activities in the EEZ or continental shelf of another State Party, states may choose to opt for direct reporting by nationals or flagged vessels to that State Party, or for reporting to their own State Party which shall subsequently be relayed to the second State Party.⁸⁷ The Convention further provides that no authorisation is permitted of activities directed at underwater cultural heritage in the EEZ or continental shelf unless the activity is in conformity with the Convention;⁸⁸ to this end the coastal state has the right to prohibit or authorise activities directed against underwater heritage in these zones.⁸⁹ If activity is indeed undertaken, then the coastal state must consult with other States Parties that have declared an interest in its protection, and are granted the responsibility of coordinating these activities as the Coordinating State.⁹⁰ As Coordinating State, the state must 'implement measures of protection', 'issue

82 Underwater Cultural Heritage Convention, art 5.

83 Ibid art 7(1)-(2).

84 Ibid art 7(3).

85 Ibid art 8.

86 Ibid art 9(1).

87 Ibid art 9(1).

88 Ibid art 10(1).

89 Ibid art 10(2).

90 Ibid art 10(3)-(5).

all necessary authorizations for such agreed measures', and 'may conduct any necessary preliminary research'.⁹¹ In taking these actions, the Coordinating State is presumed to 'act on behalf of the States Parties as a whole and not in its own interest'.⁹²

A similar but separate regime exists for the Area. As noted in the previous chapter, UNCLOS establishes certain minimum standards for the protection of underwater cultural heritage, guided by the general duty of states 'to protect objects of an archaeological and historical nature found at sea', which is applicable in all maritime zones.⁹³ This duty is supplemented by the specific obligation in relation to underwater cultural heritage found in the Area to preserve or dispose of such heritage 'for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin'.⁹⁴ The obligation to protect archaeological and historical objects located in the Area has been further elaborated by the International Seabed Authority, which has adopted exploration regulations in respect of polymetallic nodules, polymetallic sulphides, and cobalt-rich ferromanganese crusts, as well as a draft regulation on the exploitation of these mineral resources. Each of these regulations establishes obligations for prospectors operating in the Area to notify the Secretary-General of the International Seabed Authority (who in turns informs the Director General of UNESCO) of archaeological and historical objects, after which 'no further prospecting or exploration shall take place' until after a decision by the Council of the ISA.⁹⁵

The UNCLOS regime for underwater cultural heritage located in the Area is thus fairly open-ended and is supplemented by the provisions on the Area in the Underwater Cultural Heritage Convention. According to the latter, States

91 Ibid art 10(5).

92 Ibid art 10(6).

93 1982 UN Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 303.

94 Ibid art 149.

95 Assembly of the International Seabed Authority, Decision of the Assembly of the International Seabed Authority relating to the regulations on prospecting and exploration for polymetallic sulphides in the Area (15 November 2010) ISBA/16/A/12/Rev. 1, Regulation 8 and 37; Assembly of the International Seabed Authority, Decision of the Assembly of the International Seabed Authority relating to the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (22 October 2012) ISBA/18/A/11, Regulation 8 and 37; Council of the International Seabed Authority, Decision of the Council of the International Seabed Authority relating to amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters (22 July 2013) ISBA/19/C/17, Regulation 8 and 35; Council of the International Seabed Authority, Draft regulations on exploitation of mineral resources in the Area (22 March 2019) ISBA/25/C/WP.1, Regulation 35. See also Tullio Scovazzi, 'Underwater Cultural Heritage as an International Common Good' in Federico Lenzerini and Ana Filipa Vrdoljak (eds), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature* (Hart Publishing 2014) 217-8.

Parties are expected to require their nationals or flagged vessels to report discoveries of underwater cultural heritage located in the Area, and also if they plan to undertake any activity in relation to it. The State Party is subsequently expected to notify this information to the Director-General of UNESCO and the Secretary-General of the International Seabed Authority, of which the former must communicate this in turn to all other States Parties to the UCHC. States Parties can subsequently declare to the Director-General that they have an interest in being consulted on the protection of this underwater heritage on the basis of a 'verifiable link ... particular regard being paid to the preferential rights of States of cultural, historical or archaeological origin',⁹⁶ similarly to the UNCLOS regime. Once again, authorisation of any activities directed at underwater cultural heritage in the Area may only be carried out in conformity with the Rules annexed to the Convention,⁹⁷ and States Parties must 'take all practicable measures ... to prevent any immediate danger to the underwater cultural heritage'.⁹⁸ The States Parties may again appoint a Coordinating State, which is tasked with implementing measures of protection as agreed by the States Parties with a particular interest in the heritage in question;⁹⁹ once again, this is carried out 'for the benefit of humanity as a whole, on behalf of all States Parties', rather than for its own benefit.¹⁰⁰

Measures such as those taken by Coordinating States, are, according to the Operational Guidelines of the Convention, ideally subject to common financing by the States Parties to the Convention.¹⁰¹ To this end, the Guidelines also establish an Underwater Cultural Heritage Fund, which can be used to support the cooperative mechanisms of the Convention, capacity-building efforts, the financing of the STAB, and more broadly 'the enhancement of the protection of the underwater cultural heritage'.¹⁰²

The Underwater Cultural Heritage Convention is thus, perhaps, the most diverse legal instrument within international cultural heritage law. On the one hand, the Convention establishes a number of jurisdictional competences of States Parties over underwater cultural heritage. These obligations are not reciprocal in character, but are intended to create a common jurisdictional framework. The Convention also establishes, as noted above, a range of co-operative mechanisms and international financing of activities carried out by states in their implementation of the Convention. Perhaps most fundamentally, the 2019 Internal Oversight Service (IOS) report on the 2001 Convention noted that '[t]he 2001 Convention and the Rules in its Annex have become the world

96 Underwater Cultural Heritage Convention, art 11(4).

97 Ibid art 12(1).

98 Ibid art 12(3).

99 Ibid art 12(4).

100 Ibid art 12(6).

101 Underwater Cultural Heritage Convention Operational Guidelines, para 61.

102 Ibid para 65(e).

reference for underwater archaeologists. Indeed, they are implemented by archaeologists around the world, regardless of whether their countries have ratified the Convention or not'.¹⁰³ This indicates that the function of the Convention is, once again, not a 'law-making' convention *pur sang* – that is, in the sense of establishing international 'legislation'. Instead it establishes a framework which delegates the competence of adopting this legislation to the body of States Parties. The Convention thus functions as a clearing-house for the exchange of information amongst states and other stakeholders, by establishing rules which are not obligatory in and of themselves (although states must require their application in relation to operations taking place within their jurisdiction when authorising these operations).

Ultimately, universal interests find limited expression in the positive law of the Convention, often remaining at the level of an overall guiding principle.¹⁰⁴ Any potential universalist approach of the Convention is furthermore tempered by the fact that it recognises that certain states have a particular interest in the preservation of certain forms of underwater cultural heritage, acknowledging the existing rights of flag states and providing extended rights to states which can demonstrate a 'verifiable link' to the heritage in question.¹⁰⁵ Nonetheless, this does not mean that the Convention's potential status as a common interest regime is wholly negligible.¹⁰⁶ This status can be demonstrated, for example, by the fact that the Convention prohibits the commercial exploitation of underwater cultural heritage,¹⁰⁷ and the obligation with respect to recovered underwater cultural heritage that this heritage 'shall be deposited, conserved and managed in a manner that ensures its long-term preservation', although the precise modalities of such preservation and the actors responsible is left up in the air.¹⁰⁸ The Convention's notification requirements and protection regimes in the EEZ, continental shelf and the Area – the latter of which grants states the ability to exercise rights of consultation

103 UNESCO, Internal Oversight Services, 'Evaluation of UNESCO's Standard-Setting Work of the Cultural Sector – Part VI – 2001 Convention on the Protection of Underwater Cultural Heritage' (May 2019) IOS/EVS/PI/174.REV, ii.

104 Craig Forrest, 'A New International Regime for the Protection of Underwater Cultural Heritage' (2002) 51 ICLQ 511, 519-20.

105 Dromgoole (n 73) 133. See e.g. Underwater Cultural Heritage Convention, arts 9(5), 11(4), 18(3)-(4).

106 Trpimir M Šošić, 'The Common Heritage of Mankind and the Protection of the Underwater Cultural Heritage' in Trpimir M Šošić, Budislav Vukas and Božidar Bakotić (eds), *International Law: New Actors, New Concepts, Continuing Dilemmas: Liber Amicorum Božidar Bakotić* (Brill Nijhoff 2010) 346-8.

107 Underwater Cultural Heritage Convention art 2(7). See also, by comparison, Scovazzi (n 95) 217 on UNCLOS.

108 Underwater Cultural Heritage Convention art 2(6). See Nicola Ferri, 'The Right to Recovered Underwater Cultural Heritage: The Neglected Importance of Article 149 of the UN Law of the Sea Convention' in Silvia Borelli and Federico Lenzerini (eds), *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Brill Nijhoff 2012) 254-5.

in the managing of underwater cultural heritage in the Area – furthermore underline the common interest of all states in the effective protection of this heritage. Moreover, on several occasions the Convention explicitly acknowledges that activities are undertaken in the interests of all States Parties (or variably the 'benefit of humanity'), rather than the national (economic) interest.¹⁰⁹ As such, even though the Convention does not explicitly reference the existence of a 'cultural heritage of humanity', its presence can nonetheless be implied.¹¹⁰

4.1.5 2003 Intangible Cultural Heritage Convention

The purposes of the Intangible Cultural Heritage Convention are fourfold, as outlined in article 1 of the Convention: the safeguarding of intangible cultural heritage (ICH); the ensuring of respect for ICH; raising awareness of its importance; and the provision of international cooperation and assistance. 'Safeguarding' is hereby defined as 'measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage'.¹¹¹ Similarly to the World Heritage Convention, the Intangible Cultural Heritage Convention establishes both a plenary body, the General Assembly, and an Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, which is tasked with the examination of requests for inscription and the granting of international assistance.¹¹²

Although the Convention recognises that 'the safeguarding of intangible cultural heritage is of general interest to humanity'¹¹³ and requires cooperation at all levels, the obligations of the Convention are primarily aimed at states in relation to their own heritage, rather than that of other states. To this end, each State Party 'shall ... take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory', and also 'identify and define the various elements of the intangible cultural heritage present in

109 Šoščić (n 106) 346-8. See e.g. Underwater Cultural Heritage Convention arts 12(6), 18(4).

110 Ibid 346-8.

111 2003 Convention for the 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(3).

112 Ibid art 7.

113 Ibid art 19(2). Principle 12 of the 2015 Ethical Principles furthermore notes that '[t]he safeguarding of intangible cultural heritage is of general interest to humanity and should therefore be undertaken through cooperation among bilateral, subregional, regional and international parties; nevertheless, communities, groups and, where applicable, individuals should never be alienated from their own intangible cultural heritage': Intergovernmental Committee, Decision 10.COM 15.A (2015).

its territory'.¹¹⁴ This duty of identification and subsequent safeguarding is primarily carried out through the compilation of national inventories of intangible cultural heritage; although doing so is compulsory, states can undertake this activity 'in a manner geared to [each state's] own situation'.¹¹⁵ Supplementary measures, which states must 'endeavour' to carry out, include the adoption of national policies aimed at safeguarding intangible heritage, the creation of national services for its safeguarding, and the adoption of 'appropriate legal, technical, administrative and financial measures'.¹¹⁶

The international measures envisaged by the Convention are limited to the establishment of two international lists – the Representative List of the Intangible Cultural Heritage of Humanity and the List of Intangible Cultural Heritage in Need of Urgent Safeguarding – and the provision of international assistance.¹¹⁷ The latter can be provided to states in order to safeguard heritage on one of the two lists; to prepare national inventories; or to support activities aimed broadly at safeguarding ICH.¹¹⁸ The Committee is furthermore granted the discretion to grant assistance for 'any other purpose [it] may deem necessary'.¹¹⁹ Requests must be submitted by States Parties,¹²⁰ but the Committee will take into account in the granting of assistance whether '[t]he community, group and/or individuals concerned participated in the preparation of the request and will be involved in the implementation of the proposed activities, and in their evaluation and follow-up as broadly as possible'.¹²¹ International measures also encompass the establishing of international cooperation amongst States Parties. Article 19 of the Convention establishes a baseline presumption of international cooperation amongst States Parties, defined as including, 'inter alia, the exchange of information and experience, joint initiatives, and the establishment of a mechanism of assistance to States Parties in their efforts to safeguard the intangible cultural heritage'.¹²²

Above all, the function of the Intangible Heritage Convention is thus the facilitation of national, rather than international, protection. In this sense, the Convention is intended to be complementary to already existing efforts being undertaken by the state within its territory; it also epitomises the orthodox protection mechanisms employed within cultural heritage law through its focus

114 Intangible Heritage Convention, art 11(a)-(b).

115 Ibid art 12.

116 Ibid art 13(d).

117 Ibid arts 16-17.

118 Ibid art 20(a)-(c).

119 Ibid art 20(d).

120 Ibid art 23.

121 General Assembly, Resolution 9.GA 9 (July 2022) Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage (Intangible Cultural Heritage Convention Operational Directives) para I.4.12.A.1.

122 Intangible Heritage Convention, art 19(1).

on the use of heritage lists, supported by the provision of (international) funds and guided by a principle of international cooperation.¹²³ The obligations established by the Convention are not reciprocal in character, and are – as is the case for the majority of the cultural heritage obligations surveyed above – aimed inwards, at the territory of the state. They also largely establish normatively weak obligations for the States Parties, indicating that the chief goal of the Convention is not the prohibiting of certain forms of action with regards to intangible heritage.

At the international level, the primary aim of the Convention is thus the facilitating of international cooperation and the provision of funding to those states which are not able to foresee in protection of their intangible heritage on the basis of their own resources. The common interest in the protection of intangible cultural heritage is thus not necessarily reflected clearly within the obligations contained in the Convention itself, beyond the fact that intangible cultural heritage is inscribed on the List pursuant to the decision of the Intergovernmental Committee, which accordingly provides for the possibility of international monitoring of the protection of intangible heritage inscribed on the List; this will be further discussed in section 4.2.

4.1.6 Utilisation of *jus cogens* norms and *erga omnes* obligations

As noted in Chapter 2, a frequent element of common interest regimes in public international law is the characterisation of certain norms contained within these regimes as *jus cogens* or peremptory norms or as obligations *erga omnes* (*partes*). While it is questionable whether any *jus cogens* norms can be identified within cultural heritage law, either on the basis of treaty or customary law,¹²⁴ the protection of cultural heritage has in many cases been identified as contributing to the realisation of *jus cogens* norms, such as the 'prevention and punishment of war crimes, crimes against humanity and genocide'.¹²⁵

By contrast, it is arguably possible to identify *erga omnes partes* obligations within each of the cultural heritage conventions examined above (with the perhaps notable exception of the 1970 Convention).¹²⁶ Of these, the prohi-

123 Lixinski (n 2) 196.

124 Forrest, *International Law and the Protection of Cultural Heritage* (n 1) 52; Francioni, 'Custom and General Principles of International Cultural Heritage Law' (n 4) 548.

125 Francioni, 'Custom and General Principles of International Cultural Heritage Law' (n 4) 550. See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment of 26 February 2007) [2007] ICJ Rep 43, para 344.

126 On cultural heritage law more broadly, see Annalisa Ciampi, 'Identifying and Effectively Protecting Cultural Heritage' (2014) 97 *Rivista di Diritto Internazionale* 699, 702-3, 724. As previously noted, the 1970 Convention more closely mirrors a reciprocal exchange of rights

bition of the destruction of cultural heritage during times of armed conflict, as codified in the 1954 Hague Convention, is a prime example; in light of the recent state practice beyond the scope of the Hague Convention, such as that of the UN Security Council, this norm can debatably even be considered as an *erga omnes* norm of customary status.¹²⁷ Another norm which can be potentially identified as *erga omnes partes* is the duty established by articles 4 and 6 of the World Heritage Convention to protect cultural heritage of outstanding universal value¹²⁸ – and, *a contrario*, the prohibition of damage or destruction to such heritage by parties to the World Heritage Convention with respect to such heritage located within their territory.¹²⁹ Similarly, the duty to safeguard and ensure respect for intangible cultural heritage established by article 1 of the 2003 Convention could potentially also be seen as an *erga omnes partes* obligation when read in the context of the overall object and purpose of the convention, as established by the invocation in the preamble

and obligations between the parties to the convention than a common interest of the international community.

- 127 On the practice of the Security Council, see e.g. Kristin Hausler, 'Cultural heritage and the Security Council: Why Resolution 2347 Matters' (2018) 48 *Questions of International Law* 5; Andrzej Jakubowski, 'Resolution 2347: Mainstreaming the Protection of Cultural Heritage at the Global Level' (2018) 48 *Questions of International Law* 21. On the potential *erga omnes* and customary character of this norm, see Francesco Francioni and Federico Lenzerini, 'The Destruction of the Buddhas of Bamiyan and International Law' (2003) 14 *EJIL* 619, 634; George Rodrigo Bandeira Galindo, 'The UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage' in James A R Nafziger and Tullio Scovazzi (eds), *The Cultural Heritage of Mankind* (Brill 2008) 448; Yaron Gottlieb, 'Attacks Against Cultural Heritage as a Crime Against Humanity' (2020) 52 *Case Western Reserve Journal of International Law* 287, 311; Federico Lenzerini, 'Intentional Destruction of Cultural Heritage' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford Academic, Oxford University Press 2020); Ana Filipa Vrdoljak, 'Cultural Heritage as "Common Concern": Role of International Organizations and States' in Massimo Iovane and others (eds), *The Protection of General Interests in Contemporary International Law* (Oxford University Press 2021) 316. However, compare Roger O'Keefe, 'World Cultural Heritage: Obligations to the International Community as a Whole?' (2004) 53 *ICLQ* 189.
- 128 O'Keefe, 'World Cultural Heritage: Obligations to the International Community as a Whole?' (n 127) 190. See also Gionata P. Buzzini and Luigi Condorelli, 'Art.11, List of World Heritage in Danger and Deletion of a Property from the World Heritage List' in Francesco Francioni and Federico Lenzerini (eds), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press 2008) 178-9; Forrest, *International Law and the Protection of Cultural Heritage* (n 1) 277; Berenika Drazewska, 'The Human Dimension of the Protection of the Cultural Heritage from Destruction during Armed Conflicts' (2015) 22 *International Journal of Cultural Property* 205, 219. By contrast, Carducci is more doubtful as to the *erga omnes partes* nature of these obligations: Guido Carducci, 'Articles 4-7, National and International Protection of the Cultural and Natural Heritage' in Francesco Francioni and Federico Lenzerini (eds), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press 2008) 143-4.
- 129 On the basis of a reading of article 6(3) of the World Heritage Convention in tandem with article 4 in light of the object and purpose of the World Heritage Convention. See e.g. Lostal (n 2) 159.

of the 'common concern to safeguard the intangible cultural heritage of humanity', as well as the connection of the convention's obligations to the realisation of human rights (similarly reaffirmed in the first recital of the preamble).¹³⁰ The same can be held with respect to states' duty to preserve underwater cultural heritage for the benefit of humanity, as established by article 2(3) of the Underwater Cultural Heritage Convention; the upholding of the jurisdictional framework of the Convention can be considered to be in the interest of all States Parties and therefore, insofar as the Convention establishes obligations in this regard, as *erga omnes partes*.¹³¹ This status would seem to be particularly the case with respect to states' responsibility to protect underwater cultural heritage in the Area.¹³²

Beyond the prohibition of the destruction of cultural heritage during times of armed conflict, it seems unlikely that any other *erga omnes* norms have been developed; the main contribution of cultural heritage law has thus been to establish the protection of cultural heritage as a common interest, and emphasise that international concern for issues relating to cultural heritage within the territory of a state does not amount to a violation of the principle of non-intervention.¹³³ In other words, as aptly put by Roger O'Keefe: '[t]he world's cultural heritage is the proper concern of the international community as a whole but it is not yet, in peacetime, the object of obligations owed to

130 The ICJ noted in *Barcelona Traction* that *erga omnes* obligations include 'the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination': *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Preliminary Objections) [1970] ICJ Rep 3, para 34. Similarly, respect for the right to self-determination has been held to constitute an *erga omnes* norm: *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, para 180. Some scholars argue that human rights should generally be seen as establishing *erga omnes* obligations: see Erika De Wet, 'The International Constitutional Order' (2006) 55 ICLQ 51, 55; Yvonne Donders, 'Protection and Promotion of Cultural Heritage and Human Rights through International Treaties: Two Worlds of Difference?' in Charlotte Waelde and others (eds), *Research Handbook on Contemporary Intangible Cultural Heritage: Law and Heritage* (Elgar 2018) 58. See also Human Rights Council, General Comment No. 31 (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add. 13, para 2. However, as Chow notes, the question arises whether all obligations contained in human rights treaties could indeed be characterised as *erga omnes*: Pok Yin S. Chow, 'On Obligations Erga Omnes Partes' (2021) 52 *Georgetown Journal of International Law* 469, 492. The question is thus whether the human rights guaranteed by the Intangible Cultural Heritage Convention would meet the standard established by bodies of the ICJ, which has thus far limited itself to ascertaining the *erga omnes* status of certain fundamental human rights, such as the prohibition of torture or the right to self-determination.

131 Ciampi (n 126) 703.

132 UNCLOS, art 149; Underwater Cultural Heritage Convention, arts 11-12.

133 O'Keefe, 'World Cultural Heritage: Obligations to the International Community as a Whole?' (n 127) 205; Francioni, 'A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage' (n 3) 222, 236.

that community'¹³⁴ as a matter of customary international law. That being said, peacetime obligations with respect to the protection of the cultural heritage of minorities or Indigenous peoples might represent an exception to this general trend.

Furthermore, even in the case of those obligations in cultural heritage law which can be identified as *erga omnes partes*, there are important reasons to doubt the utility of this designation in practice for the protection of common interests, given that the identification of *erga omnes* obligations is often employed to open up additional routes of establishing state responsibility and subsequently the enforcement of a given obligation at the international level. The first hurdle in this case is the frequently discretionary nature of the obligations contained in cultural heritage treaties, creating obligations of means or conduct rather than of result within a common framework centred around international cooperation and assistance.¹³⁵ The normatively soft content of treaty obligations in cultural heritage law thus 'makes it difficult to establish wrongfulness that could be invoked by non-injured states for the breach of concrete standards of conduct'.¹³⁶ As such, even if the requirement of establishing the existence of an internationally wrongful act by a given state may be proven, many states will be reluctant to take the step of subsequently invoking the wrongfulness of such an act.

Moreover, even if it is possible to clearly identify *erga omnes (partes)* obligations with respect to cultural heritage, enforcing these obligations remains difficult in practice.¹³⁷ While the identification of a norm as *erga omnes* facilitates the invocation of state responsibility by non-injured states,¹³⁸ entailing the cessation of the internationally wrongful act and the performance of reparation,¹³⁹ the law of state responsibility remains a blunt tool for enforcing

134 O'Keefe, 'World Cultural Heritage: Obligations to the International Community as a Whole?' (n 127) 207. See also Alessandro Chechi, 'Cultural Heritage Losses in Peacetime: Challenges and Lingering Questions' in Amy Strecker and Joseph Powderly (eds), *Heritage Destruction, Human Rights and International Law* (Brill Nijhoff 2023).

135 Ibid 190; Lucas Lixinski and Vassilis P Tzevelekos, 'The World Heritage Convention and the Law of State Responsibility: Promises and Pitfalls' in Anne-Marie Carstens and Elizabeth Varner (eds), *Intersections in International Cultural Heritage Law* (Oxford University Press 2020) 252.

136 Lucas Lixinski and Vassilis P Tzevelekos, 'The Strained, Elusive and Wide-Ranging Relationship between International Cultural Heritage Law and the Law of State Responsibility: From Collective Enforcement to Concurrent Responsibility' in Alessandro Chechi and Marc-André Renold (eds), *Cultural Heritage Law and Ethics: Mapping Recent Developments* (Schulthess 2017)

137 Ciampi (n 126) 724.

138 UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83, Annex, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, art 48(1).

139 Ibid art 48(2). Such reparation is to be performed with respect to 'the interest of the injured State or of the beneficiaries of the obligation breached' (art 48(2)(b)).

obligations for the protection of cultural heritage.¹⁴⁰ While the invocation of state responsibility can occur through diplomatic fora, the main added value of identifying an obligation as *erga omnes (partes)* is the ability for non-injured states to file a claim before an international dispute settlement body.¹⁴¹ However, as will be seen in the following section, most cultural heritage treaties do not contain dispute settlement clauses; even if such a body were to have jurisdiction over a given dispute – such as the International Court of Justice on the basis of declarations recognising the compulsory jurisdiction of the Court¹⁴² – states are notoriously reticent in initiating disputes concerning cultural heritage before such bodies.¹⁴³ In addition, it is difficult to assess appropriate forms of reparation in response to acts which have resulted in damage to or destruction of cultural heritage, as *restitutio in integrum* frequently is not possible and other forms of reparation will not do justice to the harm caused.¹⁴⁴ Finally, insofar as international law recognises the right of non-

140 O'Keefe, 'World Cultural Heritage: Obligations to the International Community as a Whole?' (n 127) 207; Lixinski and Tzevelekos, 'The Strained, Elusive and Wide-Ranging Relationship between International Cultural Heritage Law and the Law of State Responsibility: From Collective Enforcement to Concurrent Responsibility' (n 136); Jakubowski (n 127) 26; Patrizia Vigni, 'Cultural Heritage and State Responsibility' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020) 640-1.

141 An emerging trend with respect to the enforcement of common interests: see Section 2.2 in Chapter 2.

142 Statute of the International Court of Justice (entered into force 24 October 1945) XV UNCIO 335 (ICJ Statute) art 36(2).

143 To date, the ICJ has only decided one dispute concerning matters related to cultural heritage: *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Judgment of 15 June 1962) [1962] ICJ Rep 6. However, see the recent twin applications by Armenia and Azerbaijan, both of which seek to bring claims concerning the destruction of cultural heritage under the heading of the CERD: *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)* (Application Instituting Proceedings containing a Request for Provisional Measures) General List No 180 [2021]; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)* (Application Instituting Proceedings) General List No 181 [2021]. The Court notably granted Armenia's request for the indication of provisional measures with respect to the destruction of Armenian cultural heritage by Azerbaijan: *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)* (Request for the Indication of Provisional Measures: Order of 7 December 2021) [2021] ICJ Rep 361, para 98.

144 Lixinski and Tzevelekos, 'The Strained, Elusive and Wide-Ranging Relationship between International Cultural Heritage Law and the Law of State Responsibility: From Collective Enforcement to Concurrent Responsibility' (n 136). More broadly, on the notion of reparation in relation to cultural heritage, see Elisa Novic, 'Remedies' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020). The Articles on State Responsibility establish several modalities of reparation: restitution, compensation, and satisfaction: ARSIWA arts 34-37.

injured states to take countermeasures,¹⁴⁵ identifying proportional countermeasures is complex,¹⁴⁶ making it more likely that states will prefer to resort to diplomatic means of dispute settlement.

4.1.7 Conclusion

The above overview of the five core conventions of the international law of cultural heritage demonstrates that the primary method of law-making is indeed not through the adoption of traditional *traités-contrats* but through the form of *traités-lois*. This is comparable to other areas of international law which seek to safeguard common interests. An important caveat is that these conventions do not necessarily seek to establish 'the' law with regards to cultural heritage protection under international law; instead, they seek to establish methods of international cooperation which can assist states in taking action within the scope of their own jurisdiction. As such, it is perhaps inappropriate to equate them with international 'legislation', as is indeed the driving force behind the distinction between law-making and contract treaties discussed in Chapter 2. Nonetheless, each of the conventions surveyed above consist of largely non-reciprocal obligations, with a largely inward-facing character, focusing upon areas or activities within the jurisdiction of the states in question.¹⁴⁷ This non-reciprocal character of the norms in question has also been acknowledged beyond the field of cultural heritage law.¹⁴⁸ Many of the norms

145 The question of the permissibility of such countermeasures was deliberately left open in the Articles on State Responsibility. See Denis Alland, 'Countermeasures of General Interest' (2002) 13 EJIL 1221 (tentatively arguing in favour of such permissibility); Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005) 250 (arguing in favour of the permissibility of countermeasures 'in response to systematic or large-scale breaches of obligations *erga omnes*'); Marco Longobardo, 'Genocide, Obligations Erga Omnes, and the Responsibility to Protect: Remarks on a Complex Convergence' (2015) 19 The International Journal of Human Rights 1199, 1206 (pointing out state practice does not yet support the conclusion that forcible countermeasures in response to *erga omnes* violations are permissible); Martin Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge University Press 2017) (arguing in favour of the existence of a customary norm recognising the permissibility of countermeasures by non-injured states, particularly in the context of breaches of communitarian norms).

146 See O'Keefe, 'World Cultural Heritage: Obligations to the International Community as a Whole?' (n 127) 207, who notes that 'simple reciprocity, in the form of damage by other States to cultural heritage found on their respective territories, would be preposterous and simply impossible.'

147 Exceptions to this are the 1970 Convention and, for certain maritime zones, the 2001 Convention.

148 Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 EJIL 907, 917. See also Brilmayer, who equates the World Heritage Convention to a 'pledge', similar to human rights agreements; the underlying normative value which the Convention seeks to conserve is decisive in granting

contained in cultural heritage law can moreover be characterised as *erga omnes partes* as is often the case for common interest regimes in international law, although it is unlikely that any *erga omnes* norms or *jus cogens* obligations have emerged with respect to cultural heritage protection in customary international law (with the exception of obligations relating to the prohibition of the destruction of cultural heritage during times of armed conflict, as noted above).

Furthermore, many of these conventions clearly have links to other regimes besides cultural heritage law: the 1954 Convention to international humanitarian law; the 2001 Convention to the law of the sea; and the 1972 and 2003 Conventions to regimes for the protection of the environment and human rights. But the baseline which has developed over time and can now be considered a common factor tying these regimes together is the establishing of the importance of international cooperation as a guiding principle in cultural heritage protection. There is a recognition that cultural heritage is important to all, but that not all states have sufficient means or knowledge to safeguard it. As a consequence of this realisation, the conventions facilitate the use of cultural heritage lists. As it is not self-explanatory which heritage the international community values, this is a deliberative process through which the international community can seek to constitute itself through the vehicle of international cultural heritage law. In addition, the majority of the conventions establish (limited) funding to support states in their protection of heritage which has been recognised as internationally valued by virtue of its recognition in the respective conventions.

4.2 MONITORING AND IMPLEMENTATION MECHANISMS

Having considered these common methods of protection employed within cultural heritage law, the following section now turns to the monitoring and implementation mechanisms which have been developed in these conventions over time. It will examine in turn the establishment of statutory bodies; the creation of operational guidelines; the establishment of periodic reporting mechanisms; the establishment of monitoring and non-compliance mechanisms; and finally, the role of dispute settlement procedures.

4.2.1 Establishment of statutory bodies

Since the early 2000s, cultural heritage law has undergone an increasing institutionalisation at the international level, predominantly through the regularisation of the meetings of plenary bodies of the respective cultural

it this character: Lea Brilmayer, 'From 'Contract' to 'Pledge': The Structure of International Human Rights Agreements' (2007) 77 *British Yearbook of International Law* 163, 174.

heritage conventions and the establishment of subsidiary bodies with a rotating membership based on geographical representation. These subsidiary bodies have in turn become largely responsible for the monitoring of the implementation of their respective conventions by the States Parties, for example by examining periodic reports, responding to urgent problems, and formulating recommendations on implementation for their respective plenary bodies.

The High Contracting Parties to the 1954 Hague Convention for example only held one meeting until the 1990s,¹⁴⁹ and the Meeting of States Parties to the 1970 Convention only held its first session in 2003.¹⁵⁰ Since the 2000s, the situation for both conventions has radically changed. Thus in the case of the Hague Convention, the adoption of the 1999 Second Protocol led to the regularisation of the monitoring process of the implementation of the Hague Convention.¹⁵¹ The Protocol does so through the establishment of a regular Meeting of the Parties, which takes place every two years in tandem with the Meeting of the High Contracting Parties to the Hague Convention, as well as through the establishment of an intergovernmental Subsidiary Committee for the Protection of Cultural Property in the Event of Armed Conflict, which meets every year.¹⁵²

The Subsidiary Committee is responsible for most tasks related to the day-to-day running of the Second Protocol, such as the development of operational guidelines; the management of the enhanced protection system established by the Second Protocol; monitoring the implementation of the protocol, *inter alia* by considering periodic reports; and the granting of international assistance through the Fund established by the Second Protocol.¹⁵³ The Meeting of the Parties of the 1999 Second Protocol is in turn responsible for the election of the members of the Subsidiary Committee, adopting the operational guidelines proposed by the Committee, and reflecting more broadly on implementation of the Convention and the Protocol.¹⁵⁴ The Meeting of the High Contracting Parties of the Hague Convention carries out similar tasks, with its main task being 'to study problems concerning the application of the Convention and of the Regulations for its execution, and to formulate recommendations in

149 The 1954 Hague Convention merely provides in art 27(1) that a meeting of the High Contracting Parties may be convened by the Director-General of UNESCO. The first meeting was in 1962; subsequent meetings took place in 1995, 1997, 1999, 2001, and 2005. Since 2005 the meetings are held every two years.

150 Subsequent meetings took place in 2012, 2013, 2015, 2017, and 2019.

151 1999 Second Protocol: Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (16 December 2021) C54/21/9.SP/Resolutions, Resolution 9.SP.9 (Second Protocol Guidelines) para 120.

152 1999 Second Protocol, art 24.

153 Ibid art 27; Second Protocol Guidelines para 19.

154 1999 Second Protocol, art 23; Second Protocol Guidelines para 17.

respect thereof'.¹⁵⁵ The main distinction is that, unlike the Second Protocol, it does not have a subsidiary body.

Similarly, in the case of the 1970 Convention, the Meeting of States Parties has taken place every two years since 2003;¹⁵⁶ a Subsidiary Committee was established in 2012 by the Meeting of Parties, which meets every year. The Meeting of States Parties is the 'sovereign organ' of the 1970 Convention,¹⁵⁷ and 'gives strategic orientations for the implementation of the Convention'.¹⁵⁸ By contrast, the Subsidiary Committee is responsible for a wide range of tasks relating to the implementation of the 1970 Convention, including the review of periodic reports, the exchange of best practices, and more broadly to 'identify problem areas, trends and challenges arising from the implementation of the Convention', and to report on these issues to the Meeting of States Parties.¹⁵⁹ Indirectly linked to the governance of the 1970 Convention is the creation in 1978 of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, a stand-alone intergovernmental body which seeks to facilitate the restitution of illicitly trafficked cultural property through bilateral negotiations and mediation and conciliation between states.¹⁶⁰ However, as the ICPRCP is not strictly speaking a body established by the 1970 Convention, it is beyond the scope of the present discussion.¹⁶¹

155 1954 Hague Convention, art 27(2).

156 IOS/EVS/PI/133 REV. 2 (n 42) 6.

157 Rules of Procedure, Meeting of States Parties to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (2021) C70/21/6.MSP/15.FINAL, para 1.1.

158 Ibid para 1.2. The 1970 Convention does not contain an explicit provision on the Meeting of States Parties.

159 Rules of Procedure, Subsidiary Committee of the Meeting of States Parties to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (2021) C70/21/9.SC/3b.bis, para 1.

160 Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (October–November 1978) 20 C/Resolution/4/7.6/5, art 3(2), 4(1). The Statute was amended in 2005 by the General Conference of UNESCO: see Alessandro Chechi, *The Settlement of Cultural Heritage Disputes* (Oxford University Press 2014) 33, 104–5. The Rules of Procedure for such mediation and conciliation procedures are set out in the Rules of Procedure for Mediation and Conciliation in Accordance with Article 4, Paragraph 1, of the Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (October 2010) CLT-2010/CONF.203/COM.16/7.

161 Moreover, the ICPRCP has been seen as largely ineffective due to the fact that it is limited to inter-state disputes and does not have the ability to issue binding decisions, which requires it to be reliant on the good-will of states: *ibid* 103. However, as Chechi (n 160) adds: 'the ICPRCP cannot be judged by its docket. On the contrary, it has been rightly pointed out that the tens of thousands of returns that had taken place without its direct involvement since 1978 attest its authority. States and public institutions have been persuaded by the ICPRCP to make restitutions – through bilateral negotiations, voluntary acts by the possessor, or other solutions, such as loans or production of replicas – but also to

The World Heritage Convention is characterised by a similar structure: a plenary body, the General Assembly; and a subsidiary body, the World Heritage Committee. However, the World Heritage Convention does not contain a stand-alone provision on the General Assembly, demonstrating the relative importance of the World Heritage Committee in the governance of the Convention. Nonetheless, this does not mean that the General Assembly is wholly without import, as it elects the members of the World Heritage Committee and determines the percentage of contributions which States Parties must make to the World Heritage Fund.¹⁶² In the past, it has also adopted general policies relating to the implementation of the World Heritage Convention and the governance of the Committee on an *ad hoc* basis, such as the Declaration on the Conservation of Historic Urban Landscapes,¹⁶³ the Policy for the Integration of a Sustainable Development Perspective into the Processes of the World Heritage Convention (or the Sustainable Development Policy),¹⁶⁴ and the Declaration of Principles to Promote International Solidarity to Preserve World Heritage.¹⁶⁵

By contrast, the tasks of the World Heritage Committee are extensively set out in Chapter III of the Convention; the Committee is responsible for the critical task of inscribing sites on the World Heritage List and the maintenance of the List of World Heritage in Danger, as well as for the granting of international assistance to States Parties and the use of the World Heritage Fund.¹⁶⁶ It is also responsible for the monitoring mechanisms of the Convention: reactive monitoring and periodic reporting.¹⁶⁷ In addition to this, the Committee is tasked with the review and evaluation of the implementation of the Convention;¹⁶⁸ thus, similarly to the General Assembly, the Committee has also adopted a wide range of policies which have influenced the development of the Convention, such as the Global Strategy for a Representative, Balanced and Credible World Heritage List¹⁶⁹ and the Budapest Declaration

improve national legislations and produce legal and non-legal tools such as import controls, databases, and codes of ethics' (at 104).

162 World Heritage Committee, Operational Guidelines for the Implementation of the World Heritage Convention (31 July 2021) WHC.21/01 (World Heritage Convention Operational Guidelines) para 18; see also World Heritage Convention, arts 8(1), 16(1), 29.

163 General Assembly of the World Heritage Convention, Adoption of a Declaration on the Conservation of Historic Urban Landscapes (2005) Resolution 15 GA 7.

164 General Assembly of the World Heritage Convention, Policy for the Integration of a Sustainable Development Perspective into the Processes of the World Heritage Convention (2015) Resolution 20 GA 13.

165 General Assembly of the World Heritage Convention, Declaration of Principles to Promote International Solidarity and Cooperation to Preserve World Heritage (2021) Resolution 23 GA 10.

166 World Heritage Convention, arts 11, 13.

167 World Heritage Convention Operational Guidelines, para 24(b).

168 Ibid para 24(i).

169 World Heritage Committee, Decision 18 COM X.10 (1994).

on World Heritage.¹⁷⁰ Finally, the World Heritage Committee is responsible for the revision of the Operational Guidelines.¹⁷¹

The World Heritage Committee is assisted in its tasks by the advisory bodies to the Convention: ICOMOS, IUCN, and ICCROM.¹⁷² The primary tasks of the advisory bodies are the evaluation of nominations to the World Heritage List, the monitoring of the state of conservation at World Heritage sites, and the reviewing of requests for international assistance,¹⁷³ however they can also more broadly 'advise on the implementation of the World Heritage Convention in their field of expertise'.¹⁷⁴

By contrast to earlier conventions such as the 1954 Hague Convention and 1970 Convention, the more recent cultural heritage conventions – the 2001 and 2003 Conventions – have had regular meetings of their statutory bodies since their inception. In comparison to the World Heritage Convention, where much of the power for managing the implementation of the Convention rests with the World Heritage Committee, in the case of the 2003 Convention, the General Assembly of the Intangible Cultural Heritage Convention is explicitly described as the 'sovereign' body of the Convention;¹⁷⁵ the Intergovernmental Committee thereby assumes a 'subordinate' role and is 'answerable to the General Assembly' and thus 'shall report to it on all its activities and decisions'.¹⁷⁶ The General Assembly elects members to the Intergovernmental Committee,¹⁷⁷ and determines the contributions to be made by States Parties to the Fund of the Convention.¹⁷⁸ While the Intergovernmental Committee is in turn responsible for the majority of tasks under the Convention, such as the inscription of elements on the Lists and the granting of international assistance,¹⁷⁹ in many situations it merely makes a recommendation to the General Assembly, which is ultimately responsible for the adoption of the decision.¹⁸⁰

A further distinction between the World Heritage Convention and the 2003 Convention is that the latter does not have official 'advisory bodies' which assess nominations to its lists. Instead, this task is fulfilled by the Evaluation

170 World Heritage Committee, Decision 26 COM 9 (2002).

171 World Heritage Convention Operational Guidelines, para 24(j).

172 World Heritage Convention, art 8(3). IUCN and ICOMOS are international NGOs; ICCROM is an intergovernmental organisation.

173 World Heritage Convention Operational Guidelines, para 31.

174 Ibid para 31(a).

175 Intangible Cultural Heritage Convention, art 4(1).

176 Ibid art 8(1). See Guido Carducci, 'Art.4–8: Organs of the Convention' in Janet Blake and Lucas Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (Oxford University Press 2020).

177 Intangible Cultural Heritage Convention, art 6.

178 Ibid art 26(1).

179 Ibid art 7(g).

180 This is the case, for example, for the adoption and revision of the Operational Directives (art 7(e)), the examination of states' periodic reports (art 7(f)), and the accreditation of advisory organisations to the Committee (art 9).

Body,¹⁸¹ which is appointed by the Intergovernmental Committee. The Evaluation Body is composed of 'six experts qualified in the various fields of the intangible cultural heritage representatives of States Parties non-Members of the Committee and six accredited non-governmental organizations'.¹⁸² While the Operational Directives stipulate that the members of the Evaluation Body 'shall act impartially in the interests of all the States Parties and the Convention',¹⁸³ strictly speaking the Evaluation Body can be seen as less independent than the advisory bodies to the World Heritage Committee: firstly due to its members being directly elected by the Intergovernmental Committee, and secondly due to the fact that half of the Evaluation Body is comprised of representatives of States Parties (albeit expert representatives who are not necessarily career diplomats or otherwise affiliated to the state apparatus).

The Underwater Cultural Heritage Convention only establishes a Meeting of States Parties, which meets every two years.¹⁸⁴ The Meeting of States Parties is responsible for the adoption of the Operational Guidelines, the examination of periodic reports submitted by states, and is in charge of charting the course of the future development of the Convention.¹⁸⁵ That being said, as noted above, the Convention also establishes an expert body, the Scientific and Technical Advisory Body (STAB), which meets on a yearly basis and '[assists] the Meeting of States Parties in questions of a scientific or technical nature regarding the implementation of the Rules';¹⁸⁶ it can do so by making recommendations to the Meeting of States Parties or through the carrying out of missions to States Parties upon the request of the Meeting of States Parties.¹⁸⁷ Similarly to the Intangible Cultural Heritage Convention's Evaluation Body, the STAB is a subsidiary *expert* body and not an intergovernmental body, as its members are required to have 'a scientific, professional and ethical background at the national and/or international level'.¹⁸⁸ While the members of the STAB 'shall work impartially',¹⁸⁹ by comparison to the World Heritage Convention's advisory bodies the STAB is also not strictly speaking wholly independent: its members are nominated by a State Party to represent them in the STAB and are elected by the Meeting of States Parties.¹⁹⁰ The Meeting of States Parties is furthermore responsible for the adoption and amendment

181 Ibid art 8(3); Intangible Cultural Heritage Convention Operational Directives, para 27.

182 Intangible Cultural Heritage Convention Operational Directives, para 27.

183 Ibid para 28.

184 Underwater Cultural Heritage Convention, art 23(1).

185 Rules of Procedure of the Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage (2019) CLT/CEM/UCH/2019/1, Rule 3.

186 Underwater Cultural Heritage Convention, art 23(5).

187 Statutes of the Scientific and Technical Advisory Body to the Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage (2019) CLT/CEM/UCH/2019/2, art 1.

188 CLT/CEM/UCH/2019/1 (n 185) Rule 22.1.

189 CLT/CEM/UCH/2019/2 (n 187) art 2(b).

190 CLT/CEM/UCH/2019/1 (n 185) Rule 3(b), 21, 23.

of the statutes of the STAB and can therefore exert an influence on its working methods.

4.2.2 Operational guidelines

A similar state of affairs exists with respect to the adoption of operational guidelines: whereas the 'older' cultural heritage conventions historically did not rely upon operational guidelines, their use has been regularised across the conventions from the 2000s onwards. The subsidiary bodies of the respective conventions are usually responsible for the adoption and revision of the operational guidelines of the conventions, although the ultimate adoption of these operational guidelines tends to remain the prerogative of the plenary body. The adoption of these operational guidelines can be seen as a way of ensuring the progressive development of the cultural heritage conventions in order to ensure their continuing relevance.

Whereas the 1954 Hague Convention included a set of Regulations for the Execution of the Convention, these Regulations formed an 'integral part' of the Convention and were subject to the same revision procedures as the Hague Convention itself and thus do not form operational guidelines as they are commonly known today.¹⁹¹ The Meeting of High Contracting Parties has not yet established any operational guidelines for the 1954 Hague Convention. By contrast, the 1999 Second Protocol provides for the development of operational guidelines by the Second Protocol Committee, which can subsequently be endorsed by the Meeting of the Parties.¹⁹² Similarly, operational guidelines for the 1970 Convention were not adopted until 2015;¹⁹³ these operational guidelines are also developed by the Subsidiary Committee and subsequently submitted for adoption to the Meeting of States Parties.

The World Heritage Convention is the only convention of which the operational guidelines are not adopted by its plenary body. The first version of the Operational Guidelines of the World Heritage Convention was adopted in 1978; the guidelines have been revised on a regular basis since then.¹⁹⁴ The Operational Guidelines are directly adopted by the World Heritage Committee.¹⁹⁵ By contrast, the Operational Directives of the Intangible Cultural Heritage Convention are formulated by the Intergovernmental Committee and

191 1954 Hague Convention, arts 20, 39.

192 1999 Second Protocol, arts 23(3)(b), 27(1)(a).

193 Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (May 2015) C70/15/3.MSP/Resolutions, Resolution 3.MSP 11 (1970 Convention Operational Guidelines), Annex.

194 Operational Guidelines for the Implementation of the World Heritage Convention (1978) WHC/2.

195 World Heritage Convention Operational Guidelines, para 24(j).

submitted to the General Assembly for adoption;¹⁹⁶ as the Underwater Cultural Heritage Convention does not have a subsidiary intergovernmental body, its operational guidelines are both developed and adopted by the Meeting of States Parties.¹⁹⁷

4.2.3 Periodic reporting

Periodic reports are an integral part of the monitoring of the cultural heritage conventions, with the exception of the 2001 Convention. Thus in the case of the 1954 Hague Convention and the 1999 Second Protocol, both instruments establish periodic reporting mechanisms in which States Parties must submit a report on the implementation of the instrument to the Director-General of UNESCO or the 1999 Protocol Committee.¹⁹⁸ In practice, both the reports of the 1954 Convention and the 1999 Protocol are examined by the 1999 Protocol Committee,¹⁹⁹ which can comment on states' reports and seek clarification if necessary; it subsequently prepares a report on the implementation of the Second Protocol and can also make recommendations based upon its findings.²⁰⁰ While for many years a large number of states failed to submit their periodic reports,²⁰¹ these submissions have significantly increased in the last few years.²⁰²

The main monitoring mechanism of the 1970 Convention involves the submission of periodic reports every four years by the States Parties.²⁰³ These periodic reports are reviewed by the Subsidiary Committee, which is also tasked with the function of '[identifying] problem areas, trends and challenges arising from the implementation of the Convention, including issues relating

196 Intangible Cultural Heritage Convention, art 7(e).

197 CLT/CEM/UCH/2019/1 (n 185) Rule 3(a).

198 1954 Hague Convention, art 26(2); 1999 Second Protocol, art 37(2). See also Second Protocol Guidelines, para 121.

199 Committee for the Protection of Cultural Property in the Event of Armed Conflict, Report on the Best Practices in the Implementation of the 1954 Hague Convention and its two (1954 and 1999) Protocols (23 October 2019) C54/19/14.COM/INF.5.I, para 5. See also 1999 Second Protocol, art 27(1)(c).

200 Second Protocol Guidelines, para 126.

201 An overview is available at: <https://en.unesco.org/node/343239>.

202 Committee for the Protection of Cultural Property in the Event of Armed Conflict, Analytical Report on Good Practices in the Implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and/or its two (1954 and 1999) Protocols (3 November 2022) C54/22/17.COM/INF.8.I, para 5. For an analysis of the reports submitted by States Parties, see *inter alia* Committee for the Protection of Cultural Property in Armed Conflict, Consideration of National Reports on the Implementation of the 1954 Hague Convention and/or its two (1954 and 1999) Protocols (29 November 2021) C54/21/16.COM/11.Rev.

203 1970 Convention, art 16; Records of the General Conference, 32nd Session (vol 1), 32 C/Resolution 38 (2003) para 3.

to the protection and return of cultural property'.²⁰⁴ While the Convention currently has 141 States Parties, in its most recent cycle of periodic reports only 68 States Parties submitted reports,²⁰⁵ leading UNESCO's Internal Oversight Service to conclude that the convention's monitoring mechanism 'has not been particularly effective',²⁰⁶ particularly as there is no mechanism to verify the accuracy of the information submitted by states and there is no procedure to follow-up on potential issues flagged in the periodic reports.²⁰⁷

The World Heritage Convention has a number of monitoring mechanisms which have developed since the adoption of the Convention,²⁰⁸ one of which is the submission of periodic reports to the World Heritage Committee by States Parties on the basis of article 29 of the Convention. These periodic reports are a form of self-reporting by States Parties,²⁰⁹ intended to outline 'the legislative and administrative provisions they have adopted and other actions which they have taken for the application of the Convention, including the state of conservation of the World Heritage properties located on their territories'.²¹⁰ According to the current Operational Guidelines, States Parties submit their periodic reports every six years on the basis of a regional cycle.²¹¹ These periodic reports are subsequently collated into regional reports by the World Heritage Centre and assessed by the World Heritage Committee, and lead to the develop of a regional Action Plan which sets objectives for States Parties for the next six years with respect to the management of World Heritage in the region.²¹² At the end of each six-year cycle, the World Heritage Committee moreover reflects on possible revisions to the periodic reporting procedure on the basis of feedback from States Parties and other stakeholders involved in the process in order to ensure its efficacy.²¹³

In the current version of the periodic reporting form, states are required to report on a wide variety of questions, including the level of involvement of a range of stakeholders (including local communities, residents and Indi-

204 C70/21/9.SC/3b.bis (n 159) para 1(d).

205 Although this is a marked increase from the situation in the early 2000s: in 2003, only 19 reports were submitted, for example. An overview of all reports is available at https://en.unesco.org/fighttrafficking/1970/national_reports. UNESCO's IOS noted in 2014 that '[i]n none of the seven rounds of reporting since the Convention was adopted have more than 50% of State Parties responded': IOS/EVS/PI/133 REV. 2 (n 42) 81.

206 Ibid iv.

207 Ibid 81.

208 See e.g. Christina Cameron and Mechthild Rössler, *Many Voices, One Vision: The Early Years of the World Heritage Convention* (Ashgate 2013).

209 World Heritage Convention Operational Guidelines, para 200.

210 Ibid para 199.

211 Ibid para 203.

212 Ibid para 208-10.

213 See World Heritage Committee, Reflection on the Preparation of the Next Cycle of Periodic Reporting (30 June 2006) WHC-06/30.COM/11G; World Heritage Committee, Follow-up of the Second Cycle of the Periodic Reporting Exercise for the Other Regions and General Reflection on Periodic Reporting (15 May 2015) WHC-15/39.COM/10B.

genous peoples) in the preparation of Tentative Lists and nomination dossiers (ranging from 'not applicable', 'none', 'poor', 'fair', and 'good'), whether there are national policies which give cultural and natural heritage a function in the life of communities, and whether the state is using policies such as the Sustainable Development Policy. The State Party is subsequently requested to identify the top ten issues which require action with respect to their implementation of the World Heritage Convention; the issues which can be selected are automatically populated based on the answers provided elsewhere in the periodic reporting form. In turn, the State Party is requested to indicate what actions it will take to address these issues, which authorities are responsible within the state, the timeframe for the action to be taken, and whether international assistance from the World Heritage Fund will be required.²¹⁴ With respect to the state's World Heritage sites, the periodic reporting form asks the state to indicate, amongst other questions, the 'factors affecting the property'.²¹⁵

As already noted above, the 2001 Convention is the only cultural heritage convention which does not provide for a periodic reporting system, leading UNESCO's Internal Oversight Service to conclude that it is difficult to assess how successful the convention has been. While some States Parties have submitted information on their implementation of the Convention to the Secretariat of the Convention on an *ad hoc* basis, these reports are few and far between.²¹⁶ However, as noted in the previous chapter, the 2001 Convention does establish a number of reporting and notification obligations, such as in relation to underwater cultural heritage in the EEZ and on the continental shelf of one of the States Parties or in the Area; States Parties must thus notify the Director-General of UNESCO of discoveries or planned activities directed at the underwater cultural heritage.²¹⁷ The Director-General subsequently makes this information available to all States Parties,²¹⁸ after which any State Party can declare its interest on being consulted on ensuring the protection of the underwater cultural heritage in question.²¹⁹ However, once again, the

214 A template for the current periodic reporting format can be accessed via <https://whc.unesco.org/en/368/?page=draft&did=5154&pageNum=17>.

215 A list of these factors can be found at: <https://whc.unesco.org/en/factors/>. The factors include 'buildings and development' (including 'housing'); 'biological resource use/modification' (including 'fishing', 'livestock farming/grazing', 'subsistence wild plant collection', and 'subsistence hunting'); and 'social/cultural uses of heritage' (including 'ritual/spiritual/religious and associative uses' and 'indigenous hunting, gathering and collecting').

216 IOS/EVS/PI/132 REV.3 (n 67) 41.

IOS/EVS/PI/174.REV (n 103) 23, on the basis of Rule 3(d) of the Rules of Procedure of the MSP.

217 Underwater Cultural Heritage Convention, art 9(3), 11(2).

218 Ibid art 9(4), 11(3).

219 Ibid art 9(5), 11(4).

Convention contains no provisions on ensuring that these reporting obligations are indeed implemented.

Finally, in the case of the 2003 Convention, States Parties are required to submit periodic reports on the implementation of the Convention every six years; these reports cover both national measures of implementation as well as the 'current status' of all elements on the Representative List which are located in its territory.²²⁰ The same requirement exists with regards to elements on the Urgent Safeguarding List, although reports must be submitted every four years instead of six and the Committee can also request additional reports 'in cases of extreme urgency'.²²¹ Pursuant to a major revision of the Operational Directives of the Convention in 2018, states now report every six years on a regional basis, rather than – as initially required – on the basis of the date upon which they ratified, accepted or approved the Convention.²²² As a result, no reports were examined in 2019 and 2020; the first set of these new reports was examined in 2021, for Latin America and the Caribbean; after which Europe, the Arab States, Africa, and Asia and the Pacific will follow in 2022, 2023, 2024, and 2025.

The entire reporting structure was moreover reoriented around a new 'overall results framework'. States Parties are now expected to report on 24 indicators which are each in turn divided into a number of assessment factors,²²³ intended to 'represent an agreed consensus about what information can be considered as a sign of success or progress in the implementation of the Convention'.²²⁴ In line with these assessment factors, States Parties are expected to report on the implementation of the Convention in their territory in a wide range of ways, ranging from the establishment of competent bodies for safeguarding, the creation of inventorying systems, the adoption and implementation of policies and legal and administrative measures, to more pragmatic issues, such as awareness raising of the importance of ICH through the media. In the reporting form, states respond to questions related to each assessment factor on the basis of multiple-choice questions, and are able to provide a short elaboration on their chosen answer. On the basis of their answers to the questions for the assessment factors, the reporting form generates a 'baseline' for future reporting, based on the extent to which each of the 24 indicators is met (either 'not satisfied', 'partially', 'largely' or 'satisfied');

220 Intangible Cultural Heritage Convention Operational Directives, paras 152-7.

221 Ibid paras 160-1.

222 General Assembly of the States Parties to the Convention, Revision of the Operational Directives for the Implementation of the Convention (31 May 2018) ITH/18/7.GA/10 Rev., Annex.

223 The entire Overall Results Framework is comprised of 26 indicators, with 86 factors. Of the 26 indicators, two are only to be assessed at the global level.

224 General Assembly of the States Parties to the Convention, Draft Overall Results Framework (4 May 2018) ITH/18/7.GA/9, para 7; see annex for the Overall Results Framework.

subsequently, the State Party is allowed to voluntarily set a target for their next periodic report in six years, and explain how they plan to reach this target.

However, as Blake and Nafziger note, in the past many states have failed to meet their obligations to submit their periodic reports, either submitting reports late or not at all; in addition, 'there is a great variety in the quality of the reporting and the information set provided.'²²⁵ Moreover, due to the restructuring of the reporting procedure, some states have not yet submitted a single periodic report on their implementation of the Convention, even though some have been parties to the Convention for more than ten years – whereas other states may have submitted one or even two previous periodic reports.²²⁶

4.2.4 Monitoring

Many critiques of the monitoring mechanisms employed within cultural heritage law focus on the limitations of a system which is heavily reliant upon state reporting, as it requires states to carry out their reporting obligations in good faith and prevents an independent assessment by the supervisory bodies of the veracity of the information which has been submitted.²²⁷ However, with the exception of the 1970 Convention, each of the conventions surveyed above have actually developed a range of mechanisms which allow for the gathering of information on the implementation of the convention independently of the information submitted by the State Party in its periodic reports. Notably, each of these mechanisms have been established on the basis of the progressive development of the operational guidelines of their respective conventions.²²⁸

These procedures can be divided into two types: firstly, the sending of (expert) advisory missions upon the request of a State Party, often in order

225 Janet Blake and James A. R. Nafziger, 'Art. 29-30: Reports by the States Parties and the Committee' in Janet Blake and Lucas Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (Oxford University Press 2020) 406.

226 As of 2023, Afghanistan, Angola, Benin, Brunei Darussalam, Cabo Verde, Cameroon, Chad, Comoros, Congo, Cook Islands, DRC, Equatorial Guinea, Eritrea, Eswatini, Fiji, Gambia, Guinea, Guinea-Bissau, Kiribati, Lao PDR, Lesotho, Malaysia, Marshall Islands, Micronesia, Myanmar, Nauru, Nepal, Niger, Palau, Papua New Guinea, Rwanda, Samoa, San Marino, Sao Tome and Principe, Singapore, Solomon Islands, Somalia, South Sudan, Tajikistan, Thailand, Timor-Leste, Togo, Tuvalu, United Republic of Tanzania, Vanuatu.

227 Laurence Boisson de Chazournes, 'Monitoring, Supervision and Coordination of the Standard-Setting Instruments of UNESCO' in Abdulqawi A Yusuf (ed), *Standard-setting at UNESCO: Essays in Commemoration of the Sixtieth Anniversary of UNESCO* (Martinus Nijhoff 2007) 71.

228 The following section is limited to a discussion of monitoring bodies with respect to the cultural heritage conventions of UNESCO. On the monitoring and supervision bodies within UNESCO more generally, see *ibid*.

to provide technical assistance on the implementation of the convention in question with respect to a specific issue. The possibility of requesting such missions has been established by the 1972 Convention, the 1999 Second Protocol, and the 2001 Convention – although, in the case of the other conventions the possibility of such missions potentially remains possible on an *ad hoc* basis, given that they are carried out with the consent of the state. In the case of the second type of procedure, the state can be subjected to an enhanced monitoring procedure on a non-voluntary basis; this enhanced monitoring procedure is usually paired with the sending of an expert mission to the state in question in order to gather information on the implementation of the convention. This type of procedure has been established with respect to the 1972 Convention, the 1999 Second Protocol, and the 2003 Convention; in the case of the 1999 Second Protocol and the 2003 Convention, these procedures are of relatively recent vintage (2023 and 2022, respectively) and have been explicitly modelled upon similar procedures developed in the context of the World Heritage Convention.

4.2.4.1 Voluntary advisory missions

In the case of the 2001 Convention, the Statutes of the STAB provide a possibility for states to request a mission from the STAB upon the approval of the Meeting of States Parties or the Bureau of the Meeting of States Parties; the cost of the mission is usually borne by the State Party requesting it.²²⁹ The modalities of the mission are decided upon by the Chairperson of the STAB in consultation with the Secretariat of the Convention and the State Party which requested assistance.²³⁰ Following the mission, the Secretariat drafts a report which is subsequently adopted by the members of the STAB.²³¹ These missions are intended to help States Parties by providing them with scientific and technical advice on the implementation of the Rules annexed to the 2001 Convention.²³² Five missions have been carried out to date in relation to the investigation of potentially historically significant shipwrecks or underwater archaeological sites, including on one occasion an examination whether a commercial salvage company had respected the Rules.²³³

229 CLT/CEM/UCH/2019/2 (n 187) art 5(a).

230 Ibid art 5(b).

231 Ibid art 5(e).

232 Ibid art 1(c).

233 Report and Evaluation, Mission of the Scientific and Technical Advisory Body to Haiti (3 October 2014); Report of the mission to Panama (6-14 July and 21-29 October 2015) to evaluate the Project related to the wreck of the *San José* (7 December 2015) UCH/16/7.STAB/5; Report and Evaluation, 16-24 June 2015 Mission of the Scientific and Technical Advisory Body to Madagascar (16 January 2016) UCH/16/7.STAB/4; Advisory mission Report of the World Heritage Property of the Ancient City of Nessebar, Bulgaria (2017); Report on STAB Mission to Guatemala (9 October 2019) UCH/19/1.EXT.STAB/INF.2.2;

Similarly, States Parties to the World Heritage Convention can request an advisory mission in order to receive ‘expert advice ... on specific matters’, such as ‘evaluating [the] possible impact of a major development project on the Outstanding Universal Value’ of a World Heritage site.²³⁴ These missions are usually funded by the requesting State Party,²³⁵ and can be carried out by the advisory bodies, such as ICOMOS or IUCN.²³⁶ Numerous advisory missions have been carried out since 2008.²³⁷ Proposals are also currently underway to allow States Parties to the 1999 Second Protocol to request an advisory mission in order to receive advice with respect to their compliance with the Protocol’s obligations with respect to the adoption of preparatory peacetime measures for the safeguarding of cultural property or concerning (the imminent threat of) damage to or destruction of cultural property during an armed conflict.²³⁸ The costs of these advisory missions would also in principle be borne by the State Party requesting them.²³⁹

4.2.4.2 *Non-voluntary monitoring procedures*

However, alongside the potential of such voluntary procedures, a number of the cultural heritage conventions have non-voluntary monitoring procedures which can be initiated if there are concerns with regard to the implementation of the convention in question.

– *1972 World Heritage Convention*

As already noted above, the World Heritage Convention has a number of monitoring mechanisms which have been developed over the course of the years in the Convention’s operational guidelines.²⁴⁰ Alongside the regional periodic reporting cycle, the World Heritage Convention also has a reporting procedure which focuses on individual sites when there are reasons to believe that the outstanding universal value of the site is (possibly) under threat. This process is known as reactive monitoring, and is defined as ‘the reporting by the Secretariat, other sectors of UNESCO and the Advisory Bodies to the Com-

234 World Heritage Convention Operational Guidelines, para 28(f), fn 2. See also paras 176(b), 184 (in relation to Reactive Monitoring).

235 Ibid para 28(f), fn 2.

236 Ibid para 31(d).

237 For an overview, see https://whc.unesco.org/en/documents/?action=list&mode=&id_keywords=462&maxrows=75.

238 Committee for the Protection of Cultural Property in the Event of Armed Conflict, Decisions adopted during the 17th meeting of the Committee for the Protection of Cultural Property in the Event of Armed Conflict (16 December 2022) C54/22/17.COM/Decisions, Decision 17.COM 9A, Annex, para 134(b).

239 Ibid para 136.

240 See e.g. Cameron and Rössler (n 208); Evan Hamman and Herdis Hølleland (eds), *Implementing the World Heritage Convention: Dimensions of Compliance* (Elgar 2023) 119-3.

mittee on the state of conservation of specific World Heritage properties that are under threat'.²⁴¹ Sites on the In Danger List or which will potentially be deleted from the World Heritage List are in practice always subject to the reactive monitoring procedure; however, other sites can also be subjected to reactive monitoring if there is information that the site is under threat. Such information can be submitted by the State Party itself,²⁴² but can also be the result of information submitted by other stakeholders to the World Heritage Centre such as NGOs.²⁴³

The World Heritage Committee can subsequently request the preparation of a State of Conservation (SOC) report by the World Heritage Centre and the Advisory Bodies, to be examined by the Committee.²⁴⁴ This SOC report can be based on information submitted by the State Party, usually upon request by the Committee,²⁴⁵ or information received from other stakeholders.²⁴⁶ If the Secretariat receives such information from an actor other than the State Party, 'it will, as far as possible, verify the source and the contents of the

241 World Heritage Convention Operational Guidelines, para 169. Reactive Monitoring is to be distinguished from the Reinforced Monitoring Mechanism, which is reserved for a small number of sites where the Committee fears an impending loss of OUV at the site and which therefore '[require] a more effective monitoring and reporting activity beyond the standard state of conservation report asked for by the Committee' which can indicate the urgency of the need for the State Party to take action: World Heritage Committee, Mechanism proposed by the Director-General to Ensure the Proper Implementation of the World Heritage Committee Decisions (15 June 2007) WHC-07/31.COM/5.2. This Reinforced Monitoring Mechanism is an ad hoc procedure which has developed on the basis of the practice of the World Heritage Committee and the Director-General of UNESCO, and is intended to be a flexible procedure which can also take place outside the scope of regular Committee meetings. It has been selectively applied thus far to eleven World Heritage sites: the Old City of Jerusalem and its Walls; Virunga National Park; Kahuzi-Biega National Park, Garamba National Park; Salonga National Park; Okapi Wildlife Reserve; the Temple of Preah Vihear; the Medieval Monuments in Kosovo site; Manovo-Gounda Saint-Floris; Timbuktu; and the Tomb of Askia.

242 World Heritage Convention Operational Guidelines, paras 169, 172. Paragraph 169 thus states that 'States Parties shall submit specific reports and impact studies each time exceptional circumstances occur or work is undertaken which may have an impact on the Outstanding Universal Value of the property or its state of conservation'. In addition, in accordance with paragraph 172, States Parties are invited 'to inform the Committee, through the Secretariat, of their intention to undertake or to authorize in an area protected under the Convention major restorations or new constructions which may affect the Outstanding Universal Value of the property'.

243 Ibid para 174: '[w]hen the Secretariat receives information that a property inscribed has seriously deteriorated, or that the necessary corrective measures have not been taken within the time proposed, from a source other than the State Party concerned, it will, as far as possible, verify the source and the contents of the information in consultation with the State Party concerned and request its comments.'

244 Ibid paras 175-6.

245 Somewhat confusingly, these reports are *also* known as State of Conservation reports; the standard reporting procedure for such reports can be found in Annex 13 of the Operational Guidelines.

246 World Heritage Convention Operational Guidelines, para 174.

information in consultation with the State Party concerned and request it comments',²⁴⁷ the State Party thus retains a modicum of control over what information is used to assess its implementation of the Convention. However, the SOC report can also be based on the results of reactive monitoring missions which have been requested by the Committee.²⁴⁸

These reactive monitoring missions can be carried out by members of the advisory bodies or other international or non-governmental organisations invited by the World Heritage Committee,²⁴⁹ what distinguishes them from advisory missions is that they are coordinated and conducted by the World Heritage Centre,²⁵⁰ and are paid for by the World Heritage Fund of the Convention. In addition, the decision to undertake a reactive monitoring mission is made by the World Heritage Committee and not the State Party; although this decision happens 'in consultation with the State Party concerned', the process is not voluntary.²⁵¹ The trigger for the creation of such reactive monitoring missions is if a previous SOC report does not provide sufficient information for the Committee to make a decision on the next steps to be taken,²⁵² or if the Committee is considering to inscribe a site on the List of World Heritage in Danger in order to 'evaluate the nature and extent of the threats [to the site] and propose the measures to be taken'.²⁵³

After receiving information as necessary – whether through a reactive monitoring mission report or one of the other information sources outlined above – the World Heritage Centre and the advisory bodies draw up a SOC report, which identifies any threats which are likely to affect or are affecting the outstanding universal value (OUV) of the site.²⁵⁴ Upon examination of

247 Ibid para 174.

248 Ibid para 176(e); see also para 184. Such reactive monitoring missions are carried out by the World Heritage Centre and the Advisory Bodies. They are to be distinguished from advisory missions, which are 'carried out at the request of the States Parties and are usually funded by the inviting States Parties themselves. Such mission reports are not addressed at the Committee but are considered by the State Party itself': David Sheppard and Gamini Wijesuriya, 'Strengthening the Effectiveness of the World Heritage Reactive Monitoring Process' (UNESCO 2019) 55; see also World Heritage Convention Operational Guidelines, paras 160, 176(b) and (e), 184. Other international organisations and NGOs may also assist in reactive monitoring missions: para 38.

249 World Heritage Convention Operational Guidelines, paras 31(d), 38.

250 Ibid para 28(f).

251 Ibid fn 1; see also para 176(e).

252 Ibid para 176(e).

253 Ibid para 184.

254 Since 2008, the Committee has used a standardized list of threats which can potentially affect OUV at World Heritage sites in the context of periodic reporting and the reactive monitoring procedure: buildings and development; transportation infrastructure; services infrastructure; pollution; biological resource use/modification; physical resource extraction; local conditions affecting physical fabric; social/cultural uses of heritage; other human activities; climate change and severe events; sudden ecological or geological events; invasive/alien species or hyper-abundant species; and management and institutional factors.

the SOC report, the Committee can recommend measures which the State Party can take to mitigate the threat; it can also subsequently repeat its request for the preparation of such SOC reports or reactive monitoring missions until the threat is resolved to its satisfaction.²⁵⁵ The Committee can also decide to inscribe the site on the In Danger List or to delete it from the List, in line with the appropriate procedures in the Operational Guidelines;²⁵⁶ the following section will elaborate upon the latter two procedures.

– 1999 Second Protocol

In recent years a similar procedure has been developed with respect to the 1999 Second Protocol, as the Second Protocol Committee noted in 2020 that both the Second Protocol and its Implementation Guidelines were focused around the submission of periodic reports by States Parties, and '[did] not provide any proactive role for the Committee to request [information and advice from stakeholders] or take any other measure to monitor the effective protection of cultural property';²⁵⁷ in addition, 'the Guidelines do not clarify the supervision function of the Committee, which may entail different measures than of the monitoring'.²⁵⁸ An intergovernmental sub-committee was subsequently tasked with defining the scope of the tasks of the 1999 Protocol Committee related to the monitoring and supervision of the 1999 Second Protocol.²⁵⁹

The need to balance state consent with the development of potential monitoring mechanisms was a recurrent element in the discussions of the sub-committee,²⁶⁰ linked to the issue of which information can be received; a number of states were reticent to broadly define the powers of the Secretariat

See World Heritage Committee, Decision 32 COM 11E, and <https://whc.unesco.org/en/factors/>.

255 There is, however, no provision in the Operational Guidelines on when a site will no longer be subject to Reactive Monitoring.

256 World Heritage Convention Operational Guidelines, paras 176(c)-(d).

257 Committee for the Protection of Cultural Property in the Event of Armed Conflict, Monitoring and Supervision Mechanism for the Implementation of the 1999 Second Protocol (30 November 2020) C54/20/15.COM/14, para 3.

258 Ibid para 4.

259 Committee for the Protection of Cultural Property in the Event of Armed Conflict, Decisions Adopted During the 15th Meeting of the Committee for the Protection of Cultural Property in the Event of Armed Conflict (10-11 December 2020) C54/20/15.COM/Decisions, Decision 15.COM 14.

260 Committee for the Protection of Cultural Property in the Event of Armed Conflict, Reflection Document on the Application of Article 27(1)(c) of the 1999 Second Protocol, Including the Establishment of Monitoring and Supervision Mechanisms Aiming to Improve the Protection of Cultural Property in the Event of Armed Conflict, Notably in Extreme Emergency Situations (15 June 2021) C54/21/AHS/REF/V2.REV, paras 64, 80; Committee for the Protection of Cultural Property in the Event of Armed Conflict, Report of the *Ad Hoc* Subcommittee (18 November 2021) C54/21/16.COM/INF.12.II, paras 22-25.

to receive information from non-state actors.²⁶¹ The 1999 Protocol Committee eventually adopted a number of significant amendments to the Implementation Guidelines in December 2022, which will be examined and potentially adopted by the Meeting of the Parties to the 1999 Second Protocol in December 2023. These amendments establish an additional monitoring and supervision mechanism alongside the already existing system of periodic reporting, namely ad hoc monitoring.²⁶² One of the guiding principles underlying the monitoring and supervision mechanism remains the principle of consent, particularly in relation to the deployment of monitoring missions.²⁶³

The amendments to the Implementation Guidelines define ad hoc monitoring as ‘the reporting by the Secretariat on the state of protection of cultural property inscribed on the International List of Cultural Property under Enhanced Protection or other cultural property’.²⁶⁴ The ad hoc monitoring process is initiated by the Committee if it has received information concerning a state’s lack of preparatory peacetime measures (in line with article 5 of the Second Protocol); the damage or destruction, or imminent threat thereof, to cultural property in the course of an armed conflict; if it has reason to believe that there are grounds for the loss of enhanced protection status; or if there is a contravention of the treatment accorded cultural property in occupied territory outlined in articles 9(1) and 21(b) of the Second Protocol.²⁶⁵

Such information can either be submitted by one of the High Contracting Parties, which are encouraged to submit information to the Secretariat if there is a potential contravention of the obligations set out in the Second Protocol;²⁶⁶ however, the Committee can also act if it receives information from ‘relevant eminent international and national governmental and non-governmental organizations, having objectives similar to those of the Convention and its Protocols such as those mentioned in article 27(3) of the Second Protocol’.²⁶⁷ During the drafting of the amendments to the Guidelines, this group

261 Committee for the Protection of Cultural Property in the Event of Armed Conflict, Report of the Ad Hoc Subcommittee (23 June 2022) C54/22/17.COM/INF.9.1, paras 43–54, 77; see also C54/21/16.COM/INF.12.II (n 260) para 13: ‘The Chairperson surmised that the 1954 Secretariat could also potentially receive a lot of third-party information, which will require a mechanism in place. In this situation, the Secretariat could bring the matter to the attention of the Committee, or the Committee could itself be the beneficiary of the information. The Committee will then decide on the best means to verify the information and launch the activity that would allow it to discharge its function on monitoring and supervision.’

262 Decision 17.COM 9A (n 238) Annex, para 120.

263 Ibid para 121.

264 Ibid para 127.

265 Ibid para 128.

266 Ibid para 127–8.

267 Ibid para 128. The comments to this amendment noted that ‘[a]lthough there is no exhaustive list of such organizations, it is important that they have objectives similar to those of the Convention, i.e. operate in the field of the protection of cultural property’: Committee for the Protection of Cultural Property in the Event of Armed Conflict, Amendments to the Guidelines for the Implementation of the 1999 Second Protocol: Monitoring and super-

was defined more broadly as simply being 'other parties' than the High Contracting Parties; the language was revised in order to respond to critiques from states that this would lead to an opening of the floodgates in terms of unverifiable information about sensitive issues,²⁶⁸ and to underline that 'the primary responsibility to inform the Committee' lies with the High Contracting Party or Parties concerned.²⁶⁹ Subsequently, if the Secretariat to the Convention receives such information, 'it will, as far as possible, verify the contents of the information in consultation with the Party concerned and request its comments. During armed conflict, within its mandate and subject to the availability of funds, the Secretariat conducts independent assessment of the information'; this procedure is modelled on the procedure adopted for the receipt of information for actors other than States Parties in the Reactive Monitoring procedure of the World Heritage Convention.²⁷⁰

Subsequently, the Committee can take a number of steps – once again closely modelled on the Reactive Monitoring procedure of the World Heritage Convention.²⁷¹ The Committee can thus provide assistance to prevent or mitigate a threat to cultural property; if the state has not adopted preparatory peacetime measures, it can invite the state in question to take such measures, or grant international assistance to help it to implement these measures; in cases of cultural property granted enhanced protection, it can remove the property in question from the Enhanced Protection List. In addition, during an armed conflict, if the Committee 'considers that a cultural property is damaged or destroyed, or it has been subject to theft, pillage, or misappropriation, or acts of vandalism directed against it or that there is an imminent threat to a cultural property',²⁷² then it can invite the High Contracting Party to enforce its obligations relating to criminal jurisdiction as contained in the Second Protocol. Similarly, if in the case of occupied territories, the Committee considers that the Occupying Power has failed to meet its obligations under the Second Protocol, 'it may invite the Party in control of the cultural property to take the necessary corrective actions or, if applicable, invite the concerned Parties to settle their matters through an appropriate dispute resolution mechanism based on relevant international law'.²⁷³

Finally, the most far-reaching step the Committee can take is that, if it considers that it does not have sufficient information to decide on the next step to be taken, it 'may invite the Party concerned to submit a State of Pro-

vision of the implementation of the 1999 Second Protocol (19 October 2022) C54/22/17.COM/9A, 9.

268 C54/21/16.COM/INF.12.II (n 260) para 13; C54/22/17.COM/INF.9.1 (n 261) paras 43-54, 77.

269 C54/22/17.COM/9A (n 267) 9.

270 Decision 17.COM 9A (n 238) Annex, para 133.

271 Ibid para 134.

272 Ibid para 134(c).

273 Ibid para 134(e).

tection report', modelled on the State of Conservation reports submitted by states to the World Heritage Centre pursuant to the reactive monitoring procedure. The Second Protocol Committee can moreover request the Secretariat 'to provide complementary information through the use of data acquired from remote sensing technologies ... in consultation with the Party concerned',²⁷⁴ and it may decide to establish a state of protection mission. These state of protection missions are comparable to the World Heritage Convention's reactive monitoring missions; they are established by the Secretariat, albeit in consultation with the States Parties concerned, and composed of representatives of the Secretariat or international and national intergovernmental and non-governmental organisations, as well as experts; '[t]he overall mandate of such missions will be limited to conducting a technical assessment of the state of the cultural property or measures to be taken in a non-investigative manner'.²⁷⁵ While such procedures certainly hold potential, it remains difficult to assess their effectiveness at present given that the relevant amendments to the Implementation Guidelines have yet to be adopted by the Meeting of the Parties to the 1999 Second Protocol, as noted above.

– *2003 Intangible Cultural Heritage Convention*

While the Intangible Cultural Heritage Convention does not provide for the creation of information-gathering missions such as reactive monitoring missions or state of protection missions, recent practice of the Convention has also highlighted the need for the Secretariat of the Convention and the Intergovernmental Committee to be able to receive and consider information relating to the implementation of the Convention other than that submitted by States Parties in their periodic reports.

This issue first surfaced with respect to the evaluation of nomination files for elements to be inscribed on one of the Convention's two Lists, to which end the Intergovernmental Committee adopted a procedure in 2012 for the treatment of correspondence received from the public or other concerned parties with regard to nominations.²⁷⁶ According to these guidelines, any correspondence which is received by the Secretariat is submitted to the 'Permanent Delegation, National Commission for UNESCO, duly designated authorities and contact person responsible for the nomination of the concerned

²⁷⁴ Ibid para 134(f). The explanatory notes to this amendment note that 'the principle of consent applies only to the mechanism for aerial remote sensing monitoring of the state of protection of cultural property, in accordance with international air law. It does not apply in the case of satellite monitoring, as per the Principles Relating to Remote Sensing of the Earth from Outer Space adopted by the United Nations General Assembly': C54/22/17.COM/9A (n 267) 14.

²⁷⁵ Decision 17.COM 9A (n 238) Annex, para 135.

²⁷⁶ Intergovernmental Committee, Decision 7.COM 15 (2012) Annex.

submitting State';²⁷⁷ the submitting State subsequently provides comments to the Secretariat. Both the initial correspondence and response are made available on the website of the Convention prior to the examination of the nomination, and are subsequently removed after the end of the session.²⁷⁸ Bortolotto *et al.* note at least one example where such correspondence has led to the non-inscription of an element proposed for inscription on the Urgent Safeguarding List, namely the *Pilgrimage to Wirikuta*: a letter submitted by a Mexico NGO was taken as evidence that the relevant community did not agree with the inscription.²⁷⁹

In 2015, the Committee adopted similar guidelines on the treatment of correspondence with respect to the consideration of periodic reports: here, once again, any correspondence which is received by the Secretariat is submitted 'to the Permanent Delegation concerned as well as to the contact person indicated in the periodic report of the submitting State Party concerned';²⁸⁰ the submitting state subsequently provides comments to the Secretariat. Both the initial correspondence and response are made available on the website of the Convention prior to the examination of the periodic report, and are subsequently removed upon the conclusion of the meeting discussing the report.

However, the need for a procedure to consider information from third parties with respect to elements already inscribed on the Lists outside the context of the periodic reporting procedure was not officially signposted by

²⁷⁷ Ibid para 3.

²⁷⁸ However, these rules only apply with respect to the decision of the Intergovernmental Committee to inscribe an element on one of the Lists; in making its recommendation to the Intergovernmental Committee as to whether or not to inscribe the element, the Evaluation Body is limited to basing its decision on the information presented in the nomination file. The Evaluation Body thus cannot obtain additional information on the compliance of the nomination with the requirements of the Convention from third parties, such as NGOs or communities, groups and individuals. See further Intergovernmental Committee, Reflection on the Listing Mechanisms of the Convention (8 November 2019) LHE/19/14.COM/14, para 25; Intergovernmental Committee, Reflection on the Listing Mechanisms of the Convention and Proposal for Related Revisions to the Operational Directives (15 November 2021) LHE/21/16.COM/14, 13. Work is currently underway on the question of 'the possibility of obtaining additional information regarding nominations by using a dialogue process with accredited NGOs and communities, groups and, where appropriate, individuals concerned': Intergovernmental Committee, Decision 5.EXT.COM 4 (2022) Annex I, para 10.

²⁷⁹ Chiara Bortolotto and others, 'Proving participation: vocational bureaucrats and bureaucratic creativity in the implementation of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage' (2020) 28 Social Anthropology 66, 75. See Intergovernmental Committee, Decision 8.COM 7.A.8 (2013).

²⁸⁰ Intergovernmental Committee, Decision 10.COM 15.B (2015) para 3.

the Committee until 2018.²⁸¹ Since 2018, once again partly inspired by the reactive monitoring procedure of the World Heritage Convention,²⁸² the Secretariat has actively transmitted correspondence which it has received with respect to elements inscribed on the Lists to the Committee, summarising the correspondence which it has received.²⁸³ In accordance with the procedure currently followed by the Secretariat, the correspondence is transmitted to the State Party, who in turn can submit a response to the Secretariat. Neither the correspondence received or the responses by States Parties are made public, but are summarised in the report of the Secretariat to the Intergovernmental Committee. As will be seen in the following section, the consideration of third-party information with regard to inscribed elements has already led to the (partial) removal of two elements from the Lists of the Convention since 2018: *Aalst Carnaval* and the *Ducasse of Ath*, part of the *Processional giants and dragons in Belgium and France* inscription.

In addition to the procedures concerning the consideration of information from third parties in relation to nominations, the examination of periodic reports, and in general the implementation of the Convention with respect to elements inscribed on the lists – none of which are reflected in the Operational Directives of the Convention and have thus been developed on the basis of the practice of the Intergovernmental Committee – an additional monitoring procedure was added to the 2022 Operational Directives: the ‘enhanced follow-up’ procedure. This procedure was introduced pursuant to the process of the global reflection on the listing mechanisms of the 2003 Convention which took place from 2017 to 2022.²⁸⁴

The enhanced follow-up procedure is closely linked to the procedures for the removal of elements from either of the Lists established by the Convention. In this newly established procedure, the Intergovernmental Committee can decide to place an element under the enhanced follow-up procedure if it has received a request for the removal of an element from one of the Lists; the

281 In response to an increasing amount of correspondence received by the Secretariat from 2017 onwards: Intergovernmental Committee, Issues Concerning the Follow-up of Inscribed Elements on the Lists of the Convention (29 October 2018) ITH/18/13.COM/9, para 9. Of particular interest for the present inquiry is the fact that the correspondence received by the Secretariat up until 2018 included issues linked to the ‘[r]estriction on the practice of an element through legislative and regulatory measures’; ‘[l]ack of community involvement in the safeguarding of an element’; ‘[l]and use affecting spaces associated with an element’; ‘[e]xploitation of natural resources affecting spaces associated with an element’; and ‘[i]nfrastructure construction’ (para 10). See also Intergovernmental Committee, Decision 14.COM 14 (2019) para 15.

282 ITH/18/13.COM/9 (n 281) para 14-15.

283 Intergovernmental Committee, Follow-up on Elements Inscribed on the Lists of the Convention (14 December 2021) LHE/21/16.COM/11 Rev.; Intergovernmental Committee, Follow-up on Elements Inscribed on the Lists of the Convention (31 October 2022) LHE/22/17.COM/8.

284 LHE/21/16.COM/14 (n 278) 10.

procedure is intended to allow the Intergovernmental Committee to obtain more information in order to make an informed decision on the removal request.²⁸⁵ The Evaluation Body is in turn responsible for carrying out the procedure, which can take the form of 'written correspondence and/or online consultation with the State Party, communities, groups and, where appropriate, individuals concerned, and the ICH NGO Forum and/or a consultative mission'.²⁸⁶ The Evaluation Body subsequently submits a recommendation to the Committee whether to remove an element from the List in question,²⁸⁷ drawing up a report based on 'additional information gathered through exchange and dialogue, as appropriate'.²⁸⁸

Depending on the information gathered by the Evaluation Body and the recommendation which it provides, the Committee can decide to retain the element on the follow-up procedure, '[recommending] the implementation of reconciliatory/mediatory measures and [specifying] a session of the Committee in which the issue will be reported back by the State Party for a final decision by the Committee',²⁸⁹ alternatively to remove the element from the List (potentially including it in an Intangible Cultural Heritage Repository), or to maintain the element on the List. These procedures will be elaborated upon in the following section.

4.2.5 Responding to non-compliance

As noted in the previous sections, information on the potential non-compliance of a state with the obligations established by a cultural heritage convention is made 'visible' in international heritage governance through two routes: either by the state providing such information of its own accord through the submission of its periodic reports on the implementation of the convention; or by a body of the convention engaging in independent monitoring by verifying and gathering information on its own accord (although usually 'in consultation' with the state concerned), for example by collating information submitted by third parties, such as civil society organisations, or by sending expert missions to the state concerned.

As cultural heritage law is generally aimed at assisting states to overcome barriers which might stand in the way of compliance – such as a lack of technical knowledge or financial means to implement the convention – states are usually not 'punished' for non-compliance as such. Indeed, arguably many states frequently fail to meet the obligations established by cultural heritage

285 Intangible Cultural Heritage Convention Operational Directives, para 40.2.d.ii.2, 40.2.e.ii.

286 LHE/21/16.COM/14 (n 278) Annex I.

287 Intangible Cultural Heritage Convention Operational Directives, para 30.

288 Ibid para 40.3(a).

289 Ibid para 40.3(b)(i).

conventions, as is evident, for example, from the historic low response rate to periodic reporting exercises. In the majority of these situations, the monitoring body will simply respond by expressing concern about the situation of non-compliance, and seek to provide ways of providing the state in question with the necessary assistance. In this sense, cultural heritage law shows strong affinities with the monitoring and implementation mechanisms established within international environmental law.

However – similarly, once again to the situation described above with regards to periodic reporting and monitoring – since the 2000s several cultural heritage conventions have established procedures which seek to respond more strongly to situations of non-compliance, usually as the final step of the convention's monitoring procedure. As many of the cultural conventions do not outline any 'legal penalty, sanction or remedy' in response to non-compliance, these procedures have in many cases been developed through subsequent state practice rather than being (extensively) outlined in the conventions themselves.²⁹⁰ In this regard the World Heritage Convention has often been taken as an example: the Convention's reactive monitoring system, which can result in the inscription of a site on the List of World Heritage in Danger and the deletion of a site from the World Heritage List, has thus influenced the development of the Intangible Cultural Heritage Convention's enhanced follow-up procedure, which allows for the possibility of the removal of an element from the Lists of the Convention, as well as the ad hoc monitoring procedure of the 1999 Second Protocol, which similarly proposes the possibility of the cancellation of a cultural property's enhanced protection status.

4.2.5.1 1972 World Heritage Convention

The World Heritage Convention explicitly provides for the creation of the List of World Heritage in Danger, intended to be a 'list of the property appearing in the World Heritage List for the conservation of which major operations are necessary and for which assistance has been requested under [the] Convention'.²⁹¹ A site can be inscribed on the Danger List in situations of ascertained or potential danger,²⁹² although the threat in question must be 'amenable

290 Diana Zacharias, 'The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010) 327.

291 World Heritage Convention, art 11(4).

292 World Heritage Convention Operational Guidelines, para 179-80; in the case of cultural sites, this can include the 'serious deterioration' of materials, structure, or architectural coherence, the 'significant loss of historical authenticity' or the 'important loss of cultural significance', the lack of a conservation policy for the property, the threatening effects of regional planning projects or town planning, or threats posed by armed conflict. On the development of the criteria surrounding the Danger List in the Operational Guidelines, see Hamman and Hølleland (n 240) 163-4.

to correction by human action'.²⁹³ The practice of the World Heritage Committee has established that placement on the Danger List does not require the consent of the territorial state.²⁹⁴

As noted by Hølleland, Hamman and Phelps, the Danger List was initially intended to serve as a 'fire alarm', in order to '[draw] attention to threats at World Heritage sites, and serve to elicit financial and practical help from the international community', and as such carried positive connotations.²⁹⁵ However, over time the Danger List has also become a form of non-compliance procedure used to 'name and shame' states that have failed to meet their obligations under the Convention, '[serving] as a disciplinary instrument or reputational sanction aimed at recalcitrant states'.²⁹⁶ The Danger List has thus been used in response to States Parties which have not notified the World Heritage Committee of the undertaking of 'major restorations or new constructions' within the boundaries of World Heritage sites;²⁹⁷ in some cases, even the threat of including a site on the Danger List has been used to force states to comply with (repeated) requests from the World Heritage Committee concerning the desired management and protection of the site, as was evident in the case of the *Great Barrier Reef* site in Australia.²⁹⁸

In addition to the Danger List, the Committee has on three occasions decided to delete sites from the World Heritage List entirely, a step not initially envisaged in the text of the Convention itself. The Committee thus delisted the *Arabian Oryx Sanctuary* in Oman in 2007; *Dresden Elbe Valley* in 2009; and *Liverpool Maritime Mercantile City* in 2021.²⁹⁹ In addition, the Committee has on occasion used the threat of deletion from the List in order to ensure state

293 World Heritage Convention Operational Guidelines, para 181.

294 Herdis Hølleland, Evan Hamman and Jessica Phelps, 'Naming, Shaming and Fire Alarms: The Compilation, Development and Use of the List of World Heritage in Danger' (2018) 8 Transnational Environmental Law 35-39; this question was at the heart of discussions surrounding the potential inclusion of *Kakadu National Park* in Australia on the Danger List. On the debates surrounding Kakadu, see Graeme Aplin, 'Kakadu National Park World Heritage Site: Deconstructing the Debate, 1997-2003' (2004) 42 Australian Geographical Studies 152.

295 Hølleland, Hamman and Phelps (n 294) 38.

296 Ibid 38.

297 Hølleland, Hamman and Phelps provide a number of examples of this trend, including 'the Ancient city of Thebes and its Necropolis (Egypt); the Old Town of Regensburg with Stadthof (Germany); Kaziranga National Park (India); Ibiza (Spain); the Ancient City of Nessebar (Bulgaria); and the Great Barrier Reef (Australia)': ibid 49-50.

298 Ibid 52.

299 See Diana Zacharias, 'Cologne Cathedral versus Skyscrapers - World Cultural Heritage Protection as Archetype of a Multilevel System' (2006) 10 Max Planck Yearbook of United Nations Law 273; Sabine von Schorlemer, 'Compliance with the UNESCO World Heritage Convention: Reflections on the Elbe Valley and the Dresden Waldschlösschen Bridge' (2008) 51 German Yearbook of International Law 321; Bénédicte Gaillard and Dennis Rodwell, 'A Failure of Process? Comprehending the Issues Fostering Heritage Conflict in Dresden Elbe Valley and Liverpool - Maritime Mercantile City World Heritage Sites' (2015) 6 The Historic Environment: Policy & Practice 16.

compliance with the Committee's decisions, as in the case of *Cologne Cathedral*.³⁰⁰ Accordingly, deletion from the List can also be seen as a type of non-compliance mechanism which has been developed on the basis of the practice of the World Heritage Committee.³⁰¹

4.2.5.2 1999 Second Protocol

As noted in previous sections, neither the 1954 Hague Convention or the 1999 Second Protocol contain provisions which are explicitly aimed at responding to situations of non-compliance. Nonetheless, both the Convention and the Second Protocol do establish individual criminal responsibility for violations of the Convention.³⁰² The Hague Convention thus sets out that '[t]he High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, 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'.³⁰³ The 1999 Protocol establishes extended rules in relation to establishing criminality responsibility and jurisdiction; States Parties must establish a set list of offences set out within the Protocol within their domestic law and make these offences punishable;³⁰⁴ and 'each Party shall take the necessary legislative measures to establish its jurisdiction' over these offences,³⁰⁵ as well as an *aut dedere aut judicare* obligation.³⁰⁶

In addition, the 1999 Second Protocol can be seen as containing a mechanism which can be construed as a method of responding to non-compliance by states, similarly to the development over time of the World Heritage Convention's Danger List into a non-compliance mechanism: the suspension from or removal of cultural property from the Enhanced Protection List. As already noted above, both the 1954 Hague Convention and the 1999 Second Protocol establish lists of cultural property which enjoy a higher standard of protection: the International Register of Cultural Property under Special Protection established by the Hague Convention; and the International List of Cultural Property under Enhanced Protection established by the Second Protocol.

Whereas the Hague Convention only establishes procedures for the withdrawal of inscriptions from the International Register in situations where the

300 Zacharias, 'The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution' (n 290) 327.

301 Hamman and Hølleland (n 240) 216.

302 Somewhat comparably, the 1970 Convention requires States parties to 'undertake to impose penalties of administrative sanctions' on any person responsible for the infringement of the prohibitions on the illicit import or export of cultural property: art 8.

303 1954 Hague Convention, art 28.

304 1999 Second Protocol, art 15.

305 Ibid art 16.

306 Ibid arts 17-18.

High Contracting Party concerned requests such a withdrawal or denounces the Convention,³⁰⁷ the 1999 Second Protocol provides both for situations of the temporary loss of enhanced protection,³⁰⁸ as well as the suspension and cancellation of inscriptions on the Enhanced Protection List by the Second Protocol Committee rather than the State Party.³⁰⁹ While the Implementation Guidelines establish the procedure for suspension and cancellation³¹⁰ – namely if the cultural property concerned no longer meets the criteria for inscription, or if there is either a 'serious violation' or 'continuous and serious violation' of the prohibition of the use of such cultural property in support of military action – the Guidelines provide little to no assistance on *how* the Second Protocol Committee can gather information on potential situations of non-compliance beyond its ability to consult with 'eminent professional organisations'.³¹¹ As such, these cancellation and suspension procedures have yet to be used.

The 1999 Protocol Committee has sought to further develop these procedures through a recent amendment of the Implementation Guidelines of the 1999 Second Protocol in December 2022. While the amendments have yet to be officially adopted by the Meeting of the Parties, they would establish an ad hoc monitoring procedure which is closely modelled on the reactive monitoring procedure of the World Heritage Convention.³¹² As noted above, this ad hoc monitoring procedure can be triggered if the 1999 Protocol Committee has reason to believe that there are grounds for the loss of enhanced protection status,³¹³ either on the basis of information submitted by one of the High Contracting Parties or 'relevant eminent international and national governmental and non-governmental organizations'.³¹⁴ On the basis of the information provided, the Committee can subsequently decide to remove a cultural property from the Enhanced Protection List.³¹⁵

The ad hoc monitoring procedure can also be used to respond to other potential situations of non-compliance, such as a state failing to take sufficient preparatory measures for the protection of cultural property during peacetime, if there is a threat of damage or destruction of cultural property in the course

307 Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, art 16. See International Register of Cultural Property under Special Protection (23 July 2015) CLT/HER/CHP: a number of High Contracting Parties have indeed cancelled the inclusion of a range of refugees which had been granted special protection, namely Austria and the Netherlands.

308 'if, and for as long as, the property has, by its use, become a military objective': 1999 Second Protocol, art 13(b).

309 Ibid art 14.

310 Second Protocol Guidelines, paras 82-96.

311 Ibid para 91.

312 C54/21/AHS/REF/V2.REV (n 260) para 32 onwards.

313 Decision 17.COM 9A (n 238) Annex, para 128.

314 Ibid.

315 Ibid para 134.

of an armed conflict, or if cultural property in occupied territory is not granted protection in line with the provisions of the Second Protocol. On the basis of the information gathered, the Committee can subsequently decide to grant international assistance, invite the state concerned to enforce its obligations related to criminal jurisdiction, or invite it to take the 'necessary corrective actions' with respect to the treatment of cultural property in occupied territory.³¹⁶

4.2.5.3 2003 Intangible Cultural Heritage Convention

The Intangible Cultural Heritage Convention mirrors the set-up of the World Heritage Convention, also providing for the possibility of inscribing intangible cultural heritage on the List of Intangible Cultural Heritage in Need of Urgent Safeguarding. However, unlike the World Heritage Convention, intangible cultural heritage can only be inscribed either on the Representative List or the Urgent Safeguarding List; in addition, the practice of States Parties to the Convention thus far would seem to indicate that they do not necessarily perceive inscription on the Urgent Safeguarding List as a form of punishment, but rather as a way to draw attention to intangible cultural heritage requiring additional resources from the international community in order to ensure its safeguarding.³¹⁷

Inclusion of an element on the Urgent Safeguarding List thus occurs 'at the request of the State Party concerned',³¹⁸ unless there are 'cases of extreme urgency' which would require inscription (albeit still 'in consultation with the State Party concerned').³¹⁹ Elements can thus in principle only be inscribed on the Urgent Safeguarding List or transferred from the Representative List to the Urgent Safeguarding List pursuant to a request from the State Party or in any event a strong presumption of its consent.³²⁰ By comparison, many of the sites currently inscribed on the Danger List of the World Heritage Convention have been placed on the Danger List pursuant to a request of the governing bodies of the World Heritage Convention, rather than that of the territorial state concerned.³²¹ Moreover, no procedure was even envisaged for the transfer of elements from the Urgent Safeguarding List to the Represent-

316 Ibid para 134(e).

317 By comparison with the World Heritage Convention, a larger proportion of ICH is also inscribed on the Urgent Safeguarding List: 76 elements compared to the 599 elements on the Representative List; the World Heritage List counts a total of 1157 properties, of which only 55 are simultaneously inscribed on the Danger List.

318 Intangible Cultural Heritage Convention, art 17(1).

319 Ibid art 17(3).

320 Intangible Cultural Heritage Convention Operational Directives, paras 1, 38.1, 39.1. See also Federico Lenzerini, 'Art.16–17: Listing Intangible Cultural Heritage' in Janet Blake and Lucas Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (Oxford University Press 2020) 321.

321 Hølleland, Hamman and Phelps (n 294) 49-50.

ative List until 2017.³²² As such, it is arguably inappropriate to view the Urgent Safeguarding List as a non-compliance mechanism.

However, as noted in the previous section, the Convention has nonetheless been faced with increasing tensions surrounding elements already inscribed on the Lists, and how to manage situations where such elements potentially no longer meet the criteria for inscription. Indeed, the Secretariat noted in 2019 that it was 'evident that a list which does not set limits on the duration of inscriptions also requires an enhanced and robust monitoring mechanism.'³²³ This has led to the first removals of elements from the Lists: the 2019 removal of *Aalst Carnaval*, and the 2022 removal of a specific practice which formed part of the broader inscription of *Processional giants and dragons in Belgium and France*, namely the Ducasse of Ath procession in Belgium. The Convention did not initially provide a procedure for the removal of elements from either of the Lists; the need for such a procedure was precipitated by the controversy surrounding Aalst Carnaval and the Ducasse of Ath in Belgium, both of which were ultimately removed pursuant to a request from the territorial state in consultation with the communities involved with the practices.

In the case of *Aalst Carnaval*, carnival participants were widely criticised for displaying racist and antisemitic caricatures of Jews during the 2019 edition of the carnival. This led to an official press release from UNESCO critiquing the carnival, calling upon the Belgian authorities to respond to the events.³²⁴ Fairly swiftly, the Bureau of the Intergovernmental Committee requested the Secretariat to inscribe item on the agenda for the subsequent meeting of the Committee for a potential removal of the element from the List.³²⁵ The Secretariat had received 'more than twenty letters and emails, as well as an online petition gathering over 19,000 signatures' in relation to incidents in 2013, 2018 and 2019, with the majority of complaints addressing the 2019 edition. The Secretariat further considered that the situation surrounding Aalst Carnaval was distinguished from other communications it received, based on the severity and repetition of the issue, the number and diversity of the correspondence it had received, and the problematic reaction from the community surrounding

322 The first time such a transfer was required in the case of the element *Xoan singing of Phu Tho Province, Vietnam*, the Evaluation Body concurrently examined the report of the element with a new nomination of the element for the Representative List: Intergovernmental Committee, Decision 12.COM 14 (2017) para 5. In order to avoid having to repeat this cumbersome process, a procedure was subsequently elaborated: see Intangible Cultural Heritage Convention Operational Directives, para 39.2.

323 LHE/19/14.COM/14 (n 278) para 12.

324 'UNESCO condemns the racist and anti-Semitic representations at the Carnival in Aalst, Belgium, on 3 March' (UNESCO, 6 March 2019) <<https://www.unesco.org/en/articles/unesco-condemns-racist-and-anti-semitic-representations-carnival-aalst-belgium-3-march>>.

325 Intergovernmental Committee, Decision 14.COM 1.BUR 4 (2019).

Aalst carnaval.³²⁶ It considered that the element contradicted the 2003 Convention, in particular the requirement that any given element must be compatible with human rights and mutual respect amongst communities, in addition to the founding principles of UNESCO.³²⁷ In light of the controversy brought about by numerous editions of the Carnival, it added that it was not compatible with the purpose of the Representative List, which was to raise (positive) awareness of the significance of intangible heritage. As such, it no longer met the requisite criteria for inclusion on the Representative List. The Secretariat therefore recommended that the Committee should remove the element from the Representative List. However, before the matter could be discussed at the Committee meeting, Belgium submitted a note verbale to the Secretariat requesting the removal of the element from the Representative List 'at the request of the city of Aalst [and] on behalf of community of the [Aalst] carnival'.³²⁸ In light of this, as well as the consideration by the Committee that the element no longer met two of the criteria for inscription, the Committee removed Aalst carnaval from the Representative List.³²⁹

The removal of Aalst Carnaval was followed by the removal of a specific manifestation recognised in the element 'Processional giants and dragons in Belgium and France' in 2022, specifically the 'Ducasse of Ath', a yearly procession in the town of Ath (Belgium) which included a figure entitled 'Le Sauvage', who was painted black and wore a hat made of feathers (and, until 2021, also wore a nose ring and chains arounds his wrists and was therefore meant to be strongly suggestive of an enslaved individual).³³⁰ Here, once again, following discussions on the figure within the Intergovernmental Committee (with the Secretariat proposing that the Committee could decide, for

326 Intergovernmental Committee, Follow-up on Elements Inscribed on the Lists of the Convention (7 December 2019) LHE/19/14.COM/12 Add, 7-8. The letter submitted by the City of Aalst noted that the city 'formally [distanced] itself from the UNESCO recognition ... Not only because it threatens to damage the intangible heritage itself, but also because of UNESCO's approach to the whole process over the past months ... The parties involved never signed up for this'. The letter furthermore emphasized that '[n]o laws were broken by the carnivalists involved', pointing to the assessment by Unia which considered that Aalst Carnaval did not violate anti-discrimination laws and the outcome of a community gathering in September 2019 in which 58% of the attendees voted against continued inclusion on the Representative List: https://immaterieelerfgoed.be/nl/attachments/view/brief%20stad%20aalst_terugtrekking%20unesco%20conventie%202003_engels.

327 On the compatibility of the caricatures employed within Aalst carnaval with human rights, see e.g. Marike Lefevre and Marthe Van Damme, 'De perikelen van UNESCO en Aalst carnaval: Tussen lachen en spel zegt de zot zijn mening wel' (2020) 13 *Faro* 116; Marthe Van Damme and Dirk Jacobs, 'UNESCO's intangible cultural heritage and its polarising nature: A case study on Aalst Carnaval' (2022) 17 *International Journal of Intangible Heritage* 116.

328 LHE/19/14.COM/12 Add (n 326) 2.

329 Intergovernmental Committee, Decision 14.COM 12 (2019).

330 Elien Doesselaere, 'Ducasse van Ath geschrapt van Unesco-lijst' (*Faro*, 12 December 2022) <<https://faro.be/blogs/elien-doesselaere/ducasse-van-ath-geschrapt-van-unesco-lijst>>.

the first time, to initiate an 'enhanced follow-up procedure', which would see members of the Evaluation Body undertaking a mission to Ath to engage in dialogue with the authorities and communities concerned),³³¹ Belgium decided to withdraw the 'Ducasse of Ath' from inclusion within the 'Processional giants' element on the Representative List. The Intergovernmental Committee subsequently took note of Belgium's request to have the Ducasse removed from the element, and indeed decided to remove it, simultaneously '[expressing] the strong wish that the character of the "Sauvage" be removed from the "Ducasse of Ath"'.³³²

The controversies surrounding the removal of these two elements from the Representative List precipitated not only the development of a procedure in the Operational Directives on the removal of elements from the Lists, but also an additional monitoring procedure in the Operational Directives, namely the enhanced follow-up procedure which was outlined in the previous section. The enhanced follow-up procedure is triggered when the Intergovernmental Committee receives a request for the removal of an element from one of the Lists, and allows the Intergovernmental Committee to obtain additional information in order to inform its decision whether to maintain the element on the List or remove it.

The procedure for the removal of an element from one of the Lists differs according to whether the removal request originates from the territorial State Party or from a third party.³³³ If the request is submitted by the State Party concerned, it is automatically transmitted to the Committee;³³⁴ if it is submitted by another actor, such as communities, groups or individuals, then the request is transmitted to the Bureau of the Intergovernmental Committee, which decides whether to in turn transmit the request to the Committee.³³⁵ Subsequently, two options are possible: if the removal request was submitted by the State Party itself, the Committee can choose to place the element under 'follow-up' status, if additional information is needed; it can maintain the element on the List (potentially against the wishes of the state which initially inscribed the element);³³⁶ or it can remove the element from the List 'with

331 Intergovernmental Committee, Follow-up on Elements Inscribed on the Lists of the Convention (28 September 2022) LHE/22/17.COM 5.BUR/5; Intergovernmental Committee, Decision 17.COM 8.A (2022). On the proposed 'enhanced follow-up', see LHE/22/17.COM/8 (n 283) para 17.

332 Intergovernmental Committee, Decision 17.COM 8.A (2022) para 12.

333 On the development of the removal procedure, see LHE/21/16.COM/14 (n 278)

334 Intangible Cultural Heritage Convention Operational Directives, para 40.2(d)(i).

335 Ibid para 40.2(e)(i)

336 While the Operational Directives do not explicitly provide for the possibility of maintaining and element on the List if the removal request is submitted by the State Party concerned and the Committee decides not to place the element under the enhanced follow-up procedure, this possibility was explicitly discussed during the drafting of the amendments to the Operational Directives. When discussing whether an element could be maintained on the lists even after a State Party had requested its removal, the open-ended intergovernmental

the possibility of placing it in an Intangible Cultural Heritage Repository'.³³⁷ If the information was submitted by a party other than the territorial State Party, the Committee can either maintain the element on the List, or place the element under 'follow-up' status in order to gather additional information; after further information has been obtained, the Committee can subsequently decide to either maintain the element or remove it, once again potentially placing it in the Intangible Cultural Heritage Repository.³³⁸

While the precise modalities for the Intangible Cultural Heritage Repository have yet to be elaborated upon, the concept finds its origins in the idea of a 'Hall of Fame' for elements retired from the List after a set number of years and broader discussions on the evolving nature of the Lists established by the Convention.³³⁹ Initial proposals included the possibility of a 'sunset clause', after which an element would be removed from the List after a number of years and they could be moved to a 'hall of fame' which would not include reporting obligations for the States Parties, but this idea ultimately did not attract enough support.³⁴⁰ Instead, this proposal was incorporated into the outcome of the follow-up procedure, with the possibility of inscribing an element after removal on a 'memory bank', 'memory register', or 'archive' in order to 'preserve a record of elements that no longer existed',³⁴¹ or simply a record of those elements which were no longer inscribed on the Lists.³⁴² Somewhat curiously, during these discussions the chairperson of the open-ended intergovernmental working group noted that such a 'register might be useful if, for instance, there was a regime change in a particular state and the new government no longer wished to inscribe its intangible cultural heritage'.³⁴³

working group consulted Legal Affairs, which responded by pointing 'to paragraph 1 of Article 16 of the Convention ... A similar reference was made to Article 17.1 on the Urgent Safeguarding List. As a result, in line with the spirit of the Convention, it followed that the Committee held the authority to establish such Lists and also keep them up to date in the interest of humanity as a whole. Legal Affairs therefore had no legal object to amending the Operational Directives to reflect the decision that the Committee could maintain an element on a list when the state concerned had requested its removal': Intergovernmental Committee, Summary Records of the Open-ended Intergovernmental Working Group Meeting in the Framework of the Global Reflection on the Listing Mechanisms of the 2003 Convention (15 November 2021) LHE/21/16.COM/INF.14, para 666, see responses by States at para 687-736.

337 LHE/21/16.COM/14 (n 278) Annex I. See Intangible Cultural Heritage Convention Operational Directives, para 40.2(d)(ii)2.

338 Intangible Cultural Heritage Convention Operational Directives, para 40.3(b).

339 LHE/19/14.COM/14 (n 278) para 12.

340 LHE/21/16.COM/INF.14 (n 336) paras 83, 115, 251.

341 Ibid paras 501-25, 564-74.

342 Ibid para 568. A proposal which was notably made by the Belgian delegate, who noted that such a repository 'created an elegant possibility for removing elements that stakeholders might wish to delist for other reasons while maintaining a record of their inscription'.

343 Ibid para 507.

4.2.6 Dispute settlement

Many of UNESCO's cultural heritage conventions do not contain provisions on dispute settlement.³⁴⁴ Both the 1954 Hague Convention and the 1999 Second Protocol establish limited provisions on dispute settlement in the form of conciliation and mediation procedures, as well as the ability of the Director-General of UNESCO to lend their good offices in order to resolve a dispute between the contracting parties.³⁴⁵ Similarly, the 1970 Convention only provides for the extension of UNESCO's good offices over potential disputes,³⁴⁶ the World Heritage Convention and Intangible Cultural Heritage Convention both contain no dispute settlement clauses at all. A notable exception is the Underwater Cultural Heritage Convention, which follows the dispute settlement procedure established by Part XV of UNCLOS;³⁴⁷ however, this procedure is limited to inter-state claims, although most disputes under the Underwater Cultural Heritage Convention are likely to be between states and non-state actors.³⁴⁸

As such, most judicial discussion of issues relating to the UNESCO cultural conventions is limited to discussions in 'borrowed fora', such as human rights courts, international criminal courts and tribunals, investment arbitration, and – albeit very scarcely – the International Court of Justice,³⁴⁹ resulting in diverging approaches to the interpretation of cultural heritage law depending on the forum employed. Furthermore, unlike other international conventions which safeguard common interests, cultural heritage conventions also do not provide international standing to non-state actors such as individuals or communities.³⁵⁰ Similarly, due to the generally non-self-executing character of the majority of the obligations in cultural heritage treaties, domestic enforcement of the conventions is also often difficult to achieve in practice and often remains ad hoc.³⁵¹

344 Sabine von Schorlemer, 'UNESCO Dispute Settlement' in Abdulqawi A Yusuf (ed), *Standard-setting at UNESCO: Essays in Commemoration of the Sixtieth Anniversary of UNESCO* (Martinus Nijhoff 2007) 78; Chechi (n 160) 98 onwards.

345 1954 Hague Convention, art 22; 1999 Second Protocol, arts 35-6.

346 1970 Convention, art 17(5).

347 2001 Convention, art 25. Part XV of UNCLOS allows for the submission of disputes concerning the interpretation or application of the convention to ITLOS, the ICJ, or an arbitral tribunal.

348 Chechi (n 160) 113.

349 Francesco Francioni, 'Plurality and Interaction of Legal Orders in the Enforcement of Cultural Heritage Law' in Francesco Francioni and James Gordley (eds), *Enforcing International Cultural Heritage Law* (Oxford University Press 2013) 18-19.

350 Andreas Paulus, 'Reciprocity Revisited' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011) 125-6.

351 Chechi (n 160) 118; Novic (n 144) 643-4.

Perhaps the sole exception to the general absence of dispute settlement mechanisms in cultural heritage law is the Committee on Conventions and Recommendations (CCR). The CCR is a subsidiary body of UNESCO's Executive Committee and is tasked with monitoring the implementation of the conventions and recommendations adopted under the aegis of UNESCO (similarly to the tasks ascribed to bodies such as the World Heritage Committee),³⁵² and additionally examines individual communications 'concerning cases and questions of violations of human rights within UNESCO's fields of competence'.³⁵³ In this sense, it is comparable to the individual complaint mechanisms established by many human rights treaties. However, one important distinction with these bodies is that CCR procedures must remain confidential for twenty years; practice thus far does not seem to indicate that the procedure has been used for the types of disputes considered in the present work.³⁵⁴

4.2.7 Conclusion

A first glance at many of the cultural heritage conventions of UNESCO gives the impression that they establish little in the way of monitoring mechanisms; this has indeed been the critique of many heritage law scholars, who lament the toothless nature of cultural heritage law and argue that the current state of affairs results in uneven and inconsistent implementation and the continued dominance of states in decision-making processes.³⁵⁵ While cultural heritage law certainly continues to be characterised by a paucity of dispute settlement mechanisms, since the early 2000s the field has undergone an important shift, characterised by the regularisation of international heritage governance drawing upon synergies between the various cultural heritage conventions, and the extensive proceduralisation of the monitoring of the implementation of these conventions.

As seen above, the 2000s saw the establishment of regular meetings of the conventions' plenary bodies (in the case of the 1954 Hague Convention and the 1970 Convention) or the adoption of new conventions which have had regular meetings of their plenary bodies since their inception (in the case of

352 This task is specifically reserved for those conventions without their own monitoring procedures and a limited subset of recommendations decided upon by the General Conference of UNESCO: see UNESCO, *Committee on Conventions and Recommendations* (UNESCO 2022) 214 EX/BROCHURE CR/2, 14-15.

353 Executive Board of UNESCO, 104 EX/Decision 3.3 (2023) para 14.

354 For an overview of the practice of the CCR, see inter alia Leif Hölmstrom (ed) *Cases of the UNESCO Committee on Conventions and Recommendations: Communications examined under the 104 EX/Decision 3.3 Procedure of the Executive Board (1978-1988)* (Brill Nijhoff 2019); 214 EX/BROCHURE CR/2 (n 352) 30. See also Francesco Seatzu and Andrea Lai, 'Mission Impossible: Revitalizing the Role of UNESCO as a Human Rights Organization' (2017) 11 *Human Rights & International Legal Discourse* 222.

355 Chechi (n 160) 1-2; Vigni (n 140) 641; Novic (n 144) 643-4.

the 2001 and 2003 Conventions). In this sense, the conventions have increasingly mirrored each other with respect to practices relating to implementation and monitoring. Such meetings can ensure general awareness amongst states of their obligations and demonstrate a baseline commitment to the importance of not leaving implementation to the purview of individual States Parties. To a certain extent, this development can also be construed as evidence of the acceptance by states of the status of cultural heritage protection as a common interest, by potentially subjecting decision-making concerning the cultural heritage located within their territory to decisions which are adopted by a group of peers. That same group of peers can simultaneously exert a great deal of influence on the potential interpretation of the convention – and subsequently the scope of a state's obligations pursuant to that convention – by developing it through subsequent practice.

In addition, each of the conventions (with the exception of the Underwater Cultural Heritage Convention) has a subsidiary intergovernmental body which meets on a more frequent basis than the plenary body and is thereby better placed to respond to issues relating to the implementation of the conventions, if need be on an urgent basis. Moreover, the implementation of each of these conventions (with the exception of the 1954 Hague Convention) is guided by the adoption of operational guidelines which can be amended in order to take into account new developments as necessary; many of these operational guidelines have established extensive procedures which were not initially foreseen by their founding treaties.

This is particularly the case when it comes to the conventions' monitoring mechanisms. Whereas all conventions but the Underwater Cultural Heritage Conventions establish state-led periodic reporting mechanisms, these procedures have generally been deemed insufficient to ensure effective monitoring of the respective conventions. Thus the World Heritage Convention, the 1999 Second Protocol, and the 2003 Intangible Cultural Heritage Convention all provide for potentially far-reaching monitoring mechanisms which are not subject to state consent and are initiated by their subsidiary bodies. These procedures have been explicitly modelled on the reactive monitoring procedure established by the World Heritage Convention, and are relatively recent additions to the practice of these conventions (2022 in the case of the Intangible Cultural Heritage Convention's enhanced follow-up procedure, and 2023 in the case of the 1999 Second Protocol's ad hoc monitoring procedure). Perhaps most importantly, none of these procedures are provided for in the text of the respective conventions, having been developed through the revision of the conventions' operational guidelines.

These monitoring mechanisms also have greater possibilities of gathering information concerning the implementation of the conventions without having to solely rely upon states' periodic reports, as in the case of the World Heritage Convention's reactive monitoring missions, the 1999 Second Protocol's state of protection missions, and the Intangible Cultural Heritage Convention's

consultative missions. These monitoring mechanisms can moreover be triggered pursuant to information submitted by third parties, such as NGOs, and potentially even local communities and individuals. These procedures usually lead to the drawing up of a report on the implementation of the convention based on information gathered by the convention's secretariat, through monitoring missions, or as a result of information submitted by third parties.

Finally, as many authors point out, the efficacy of international heritage law should not only be measured by the strength of the regime at the international level, for example by looking at the presence of compulsory dispute settlement mechanisms. The impact of cultural heritage law thus can also be measured by examining policy changes adopted by states at the domestic level, as well as the role these regimes increasingly play in domestic decision-making procedures, including in national administrative law procedures.³⁵⁶ In addition, UNESCO's cultural conventions have gained increasing prominence in other parts of the UN. An example in point is provided by the work of the UN Security Council in response to cultural heritage destruction in Mali, Syria and Ukraine and the case-law of the ICC on cultural heritage, both of which have drawn upon developments initially spurred on by cultural heritage law.³⁵⁷ These actions are a way of enforcing the underlying goals of the cultural heritage conventions, even if not necessarily a way of directly enforcing these obligations themselves.³⁵⁸

However, the 2000s simultaneously also saw cultural heritage law take a number of important steps back with respect to monitoring and implementation. Thus whereas the practice of creating subsidiary bodies and adopting operational guidelines is now well-established within cultural heritage law, the precise modalities of these procedures have been curtailed over time. A tension has arisen in this respect with regards to the appropriate division of power between a convention's plenary and subsidiary bodies, with contemporary conventions more clearly delineating the responsibilities of advisory, subsidiary and plenary bodies. They often establish plenary bodies as the

356 Zacharias, 'The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution' (n 290) 3. On this point, see also e.g. Toshiyuki Kono and Stefan Wrška, 'General Report' in Toshiyuki Kono (ed), *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21st Century* (Martinus Nijhoff Publishers 2010) 223-30, drawing attention not only to the impact of cultural heritage law on domestic law, but also on broader prominence of cultural issues in social life.

357 In relation to the UN Security Council, see: UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483; UNSC Res 2199 (12 February 2015) UN Doc S/RES/2199; UNSC Res 2295 (29 June 2016) UN Doc S/RES/2295; UNSC Res 2347 (24 March 2017) UN Doc S/RES/2347. In relation to the ICC, see *Prosecutor v. Ahmad Al Faqi Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15 (27 September 2016).

358 On this see e.g. Tullio Scovazzi, 'International Cultural Heritage Law: The Institutional Aspects' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020) 740-4.

'sovereign' bodies of the convention to which other bodies must answer and which are ultimately responsible for the adoption of certain decisions which will shape the future of the convention, such as the adoption of operational guidelines. These developments indicate that while states are content to establish more regular monitoring of the implementation of the conventions, they are loath to wholly relinquish their sovereignty to consensus-based decision-making by their fellow states – let alone an independent expert body. As the reach of international heritage governance has expanded, the freedom of subsidiary bodies has accordingly decreased.

Having been adopted in the 1970s, the World Heritage Convention is thus the only cultural heritage convention which allows its subsidiary body to directly adopt revisions to its operational guidelines and take important decisions relating to implementation and monitoring; all conventions and procedures adopted or developed since then only allow the subsidiary body to propose amendments to operational guidelines, in order for them to ultimately be adopted by the plenary body (although the plenary body will, in practice, usually accept these amendments as is). The Intangible Cultural Heritage Convention strictly curtails the ability of its subsidiary body to adopt decisions which could surpass its plenary body: whereas removal from the World Heritage List can be done *proprio motu* by the convention's subsidiary body, such removal from the Lists established by the Intangible Cultural Heritage Convention can only follow from a request from the State Party concerned or from third actors. More critically, the Underwater Cultural Heritage Convention does not even establish such a subsidiary body. Similarly, the World Heritage Convention is the only convention which grants a significant role to independent expert bodies. By comparison, while both post-2000 cultural heritage conventions provide for the establishment of expert bodies in the form of the STAB and the Evaluation Body, both also require the members of these expert bodies to be nominated by states and elected by an inter-governmental body of the convention.

Yet the practice of the World Heritage Committee simultaneously shows that the establishment of subsidiary intergovernmental bodies is far from a panacea when it comes to resolving tensions surrounding the implementation of international heritage conventions. The General Assembly has thus adopted a number of progressive policies aimed at increasing the influence of individuals and local communities in World Heritage governance, as will be seen in the following section; yet due to its relative autonomy, these policies have by and large failed to influence the actual practice of the World Heritage Committee. More broadly speaking, the politicisation of the World Heritage Committee has significantly impacted its legitimacy, with the Committee increasingly ignoring the recommendations of the World Heritage Centre and the advisory bodies in the course of inscription and reactive monitoring procedures, adopting decisions which do not fully give force to the provisions

of the Operational Guidelines.³⁵⁹ In 2021, the General Assembly of the Convention even went so far as to adopt a Declaration of Principles which effectively sought to call the members of the World Heritage Committee into line, noting that their actions should be ‘guided by the core principles of integrity, objectivity, impartiality and respect for cultural diversity’.³⁶⁰ The adoption of these principles is generally perceived to be in response to the repeated ignoring by the World Heritage Committee of the advice of the advisory bodies in relation to nominations. These developments raise important questions with regards to the legitimacy of international heritage governance, particularly when viewed from the perspective of domestic decision-makers and of the local communities affected by the decisions adopted by intergovernmental bodies.³⁶¹

It also draws into question the wisdom of the 1999 Second Protocol and the Intangible Cultural Heritage Convention’s reliance on the World Heritage Convention’s reactive monitoring procedure as a model monitoring mechanism. While the reactive monitoring procedure has indeed produced some success stories,³⁶² it is effectively useless if the World Heritage Committee disregards the outcome of reactive monitoring on a regular basis.³⁶³ Hølleland and Hamman thus critique ‘the unaccountability of the Committee to its own rules’, which ‘enables an atmosphere of decision-making where the outcomes of compliance are neither comparable nor consistent across States Parties or their properties’.³⁶⁴ The end result is that States Parties frequently fail to comply with decisions adopted by the World Heritage Committee in the course of reactive monitoring; this non-compliance is ‘rarely reprimanded in any meaningful sense’³⁶⁵ by the Committee.

359 Sheppard and Wijesuriya (n 248) 19. See also World Heritage Committee, Decision 42 COM 12A (2018). See also the following principles suggested by the expert meeting tasked with reflection on the possible reform of the World Heritage nomination process, including that that there is a need to ‘[m]aintain high standards and a scientific-based approach throughout the overall evaluation process, bearing in mind that an evaluation is not a negotiated outcome, rather a rationale [sic] independent and evidence-based assessment’ and to ‘[e]nsure that practices are rule-based’: World Heritage Committee, Outcomes of the Reflection Meeting on Reforming the World Heritage Nomination Process (20 May 2019) WHC/19/43.COM/INF.8, 5–6.

360 General Assembly, Declaration of Principles to Promote International Solidarity and Cooperation to Preserve World Heritage (2021) Resolution 23 GA 10.

361 Zacharias, ‘The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution’ (n 290) 303.

362 Hamman and Hølleland (n 240) mention the inscriptions of the Ruins of Kilwa Kisiwani and Ruins of Songo Mnara, the Old Town of Lijiang, and the Melaka and George Town, Historic Cities of the Straits of Malacca: 127; Sheppard and Wijesuriya (n 248) call attention to the prevention of infrastructure construction which would have a negative impact on the OUV of a range of sites, such as Cologne Cathedral, St Petersburg, Lake Baikal (at 16–17; see also Annex G).

363 Sheppard and Wijesuriya (n 248) 19.

364 Hamman and Hølleland (n 240) 235–6.

365 Ibid 152.

Moreover, the World Heritage Committee has had to examine an increasing number of State of Conservation reports over time due to increasing use of the In Danger List, rising numbers of sites on the World Heritage List, and generally greater information being communicated with respect to World Heritage sites.³⁶⁶ As a result, not all sites placed under reactive monitoring can be discussed each year by the World Heritage Committee;³⁶⁷ it is not always clear on what basis SOC reports are selected for discussion by the Committee as there are no clear criteria for this selection process.³⁶⁸ This shows that while cultural heritage conventions may be better placed to 'collect more and better information about the nature and frequency of threats'³⁶⁹ to cultural heritage, this information will be of little use if the decision-making procedures of the conventions with respect to monitoring and non-compliance are not consistent and predictable for the States Parties.

A further indication of the fact that the extension of monitoring and implementation mechanisms in cultural heritage law has not necessarily resulted in a limitation of state sovereignty is evident from the fact that while the 1972 and 2003 Conventions and the 1999 Second Protocol have indeed established monitoring mechanisms, the deployment of these monitoring mechanisms remains subject to consultation with the state concerned. It is thus relatively unlikely that these mechanisms will be deployed against a state's will. Likewise, while information from third parties such as NGOs can potentially influence decision-making processes within these monitoring mechanisms, their role remains specifically curtailed – with the assumption being that any information which does *not* fall within the scope of these procedures cannot be considered. The information submitted by third parties is also usually not made available to the public at large. Somewhat paradoxically, the adoption of rules concerning information from third parties is thus a way for states to curtail their influence.

In this regard it is important to remember that the establishment of subsidiary bodies does not signal a move away from a state-centric status quo: states remain the central actors in these developments. There is a slight devolution of power, but it is to *other states*. The same holds for the increasing utilisation of operational guidelines within the conventions: whereas the continuous revision of many of these operational guidelines at face value lends credence to the hypothesis that the community interests represented in the Convention are given shape through a minimising of the role of absolute state consent – as embodied, for example, in the possibility in the case of the World Heritage Convention to delist heritage without the consent of the territorial

366 Sheppard and Wijesuriya (n 248) 45-6.

367 World Heritage Committee, Decision 39 COM 15 (2015) para 22, which limited the number of SOC reports examined by the Committee to 150 per year.

368 Sheppard and Wijesuriya (n 248) 47.

369 Hamman and Hølleland (n 240) 30.

state, a possibility not provided for in the text of the Convention itself – these operational guidelines are still composed, debated upon, and adopted by states.

As such, while cultural heritage law is indeed comparable to other common interest regimes through its establishment of institutions in which states are expected to answer to the international community with respect to the management of the common interest under their protection, the regime's recognition of cultural heritage as a common interest continues to run up against the limits of a system of international law which is centred around states as central actors, and more broadly speaking the tensions between 'form and function' which plague many common interest regimes in international law as outlined in the previous chapters.

4.3 FOSTERING INDIVIDUAL AND COMMUNITY PARTICIPATION

As noted in the introduction to the dissertation, disciplines related to the protection and management of cultural heritage – such as archaeology, anthropology, and cultural heritage studies – have undergone a radical shift since the mid-twentieth century, whereby community participation has assumed an ever-greater role in the conceptualisation of heritage value and conceptions on the best ways to manage cultural heritage.³⁷⁰ This development has gradually also been reflected in cultural heritage treaties, and more broadly the approach of UNESCO as an organisation to the issue of cultural heritage protection. At the level of UNESCO's cultural heritage treaties, increasing emphasis is thus placed on the importance of living heritage value and its direct association with the individuals and communities which contribute to the construction of this heritage.³⁷¹

This development has also been particularly prominent at the regional level within the Council of Europe, with both the European Landscape Convention and the Faro Convention on the Value of Cultural Heritage for Society adopting a participatory approach.³⁷² The European Landscape Convention thus requires its States Parties to undertake to 'establish procedures for the participation of the general public ... and other parties with an interest in the

370 Gill Chitty, 'Introduction: Engaging Conservation - Practising Heritage Conservation in Communities' in Gill Chitty (ed), *Heritage, Conservation and Communities: Engagement, Participation and Capacity Building* (Routledge 2017) 1-2.

371 Yvonne Donders, 'Cultural Heritage and Human Rights' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020) 382.

372 European Landscape Convention (adopted 20 October 2000, entered into force 1 March 2004) ETS No. 176 (Landscape Convention); Council of Europe Framework Convention on the Value of Cultural Heritage for Society (adopted 27 October 2005, entered into force 1 June 2011) CETS No. 199 (Faro Convention).

definition and implementation of landscape policies',³⁷³ particularly in the context of the identification of landscapes situated within their territories which will be subjected to such policies.³⁷⁴ Along similar lines, the Faro Convention establishes that States parties must establish conditions allowing members of the public to participate in heritage governance; in particular, they must undertake to 'encourage everyone to participate in ... the process of identification, study, interpretation, protection, conservation and presentation of the cultural heritage'.³⁷⁵

That being said, many of the participatory objectives of the Faro and Landscape Conventions have been described as 'aspirational', and 'difficult to operationalize and implement in any conventional political or administrative sense'.³⁷⁶ As a result, their realisation by States Parties is often more top-down than the wording of the conventions would suggest, with the implementation of community participation standards remaining little more than a paper tiger.³⁷⁷ Moreover, the Faro Convention explicitly excludes the possibility

373 European Landscape Convention art 5(c).

374 Ibid art 6(c)(1).

375 Faro Convention art 12(a); see also art 1(a), 7(b) and 9(a).

376 Adrian Olivier, 'Communities of Interest: Challenging Approaches' (2017) 4 *Journal of Community Archaeology & Heritage* 7, 16; see further Gian Franco Cartei, 'The Implementation of the European Landscape Convention and Public Participation' (2012) 18 *European Public Law* 269, 272; Amy Strecker, *Landscape Protection in International Law* (Oxford University Press 2018) 106-7. However, with respect to the Landscape Convention, more recent policy documents have adopted more robust participation standards: see in particular Council of Europe, Recommendation of the Committee of Ministers to Member States with a View to the Implementation of the European Landscape Convention of the Council of Europe – Landscape and Democracy: Public Participation (16 October 2019) CM/Rec(2019)8. Compare also the Napflion Declaration adopted by the Council of Europe Conference of Ministers Responsible for Spatial/Regional Planning, which mirrors the approach adopted in the Aarhus and Escazú Conventions: Council of Europe, Napflion Declaration: Promoting Territorial Democracy in Spatial Planning (17 June 2014) 16CEMAT(2014)5Fin E.

377 In relation to the Landscape Convention, see e.g. Michael Jones, 'The European Landscape Convention and the Question of Public Participation' (2007) 32 *Landscape Research* 613; Elisabeth Conrad and others, 'Rhetoric and Reporting of Public Participation in Landscape Policy' (2011) 13 *Journal of Environmental Policy & Planning* 23; Olivier (n 376) 13; Andrew Butler and Ulla Berglund, 'Landscape Character Assessment as an Approach to Understanding Public Interests within the European Landscape Convention' (2014) 39 *Landscape Research* 219, 219. More broadly in relation to the challenges of fostering participation in landscape management, see e.g. Michael Jones and Marie Stenseke (eds), *The European Landscape Convention: Challenges of Participation* (Springer 2011); Karsten Jørgensen and others (eds), *Mainstreaming Landscape through the European Landscape Convention* (Routledge 2015); Shelley Egoz, Karsten Jørgensen and Deni Ruggeri (eds), *Defining Landscape Democracy: A Path to Spatial Justice* (Elgar 2018); Strecker (n 376) 95-112. In relation to the Faro Convention, see e.g. Chiara Rabbiosi, 'The Frictional Geography of Cultural Heritage: Grounding the Faro Convention into Urban Experience in Forlì, Italy' (2022) 23 *Social & Cultural Geography* 140; Laia Colomer, 'Participation and Cultural Heritage Management in Norway: Who, When and How People Participate' (forthcoming) *International Journal of Cultural Policy*, doi: 10.1080/10286632.2023.2265940.

that it creates enforceable rights for individuals and communities,³⁷⁸ with similar conclusions having been drawn with respect to the Landscape Convention.³⁷⁹ As will be seen in the remainder of this chapter and in the following chapter, UNESCO's heritage conventions are plagued by similar problems; it is for this reason that Chapter Six turns to the elaboration of participatory principles within international environmental law and human rights law.

At the international level, the increasing emphasis on living heritage value and the role of communities within cultural heritage law has in turn been associated with a human rights-based approach to cultural heritage governance and the emergence of more far-reaching forms of community participation in heritage governance.³⁸⁰ The Special Rapporteur in the Field of Cultural Rights thus already noted in 2011 the existence of a right of access to and enjoyment of cultural heritage, which included 'the right to participate in the identification, interpretation and development of cultural heritage, as well as to the design and implementation of preservation/safeguard policies and programmes'.³⁸¹ She thus recommended that '[c]oncerned communities and relevant individuals should be consulted and invited to actively participate in the whole process of identification, selection, classification, interpretation, preservation/safeguarding, stewardship and development of cultural heritage'.³⁸² This raises the question whether individuals and communities are indeed able to effectively participate in international heritage governance and thereby challenge the state-centric nature of cultural heritage law outlined in the previous sections of this chapter.

378 Faro Convention art 6(c).

379 Cartei (n 376) 273-4. However, see Michel Prieur, 'The Human Right to Landscape' in Michael Faure (ed), *Elgar Encyclopedia of Environmental Law* (Elgar 2023); Council of Europe, Recommendation of the Committee of Ministers to Member States on the Guidelines for the Implementation of the European Landscape Convention (6 February 2008) CM/Rec(2008)3, Appendix 2: Suggested Text for the Practical Implementation of the European Landscape Convention at National Level, para 3(2) (which notes that '[l]andscape protection, management and planning entail rights and responsibilities for everyone'); Council of Europe, Recommendation of the Committee of Ministers to Member States on the Contribution of the European Landscape Convention to the Exercise of Human Rights and Democracy with a View to Sustainable Development (27 September 2017) CM/Rec(2017)7, para (g) (which recommends that States Parties to the Landscape Convention 'guarantee the right to participation by the general public, local and regional authorities, and other relevant parties including non-governmental organisations, with an interest in the definition, implementation and monitoring of landscape policies').

380 Ibid 382. See e.g. Executive Board of UNESCO, UNESCO Policy on Engaging with Indigenous Peoples (9 August 2017) 202 EX/9, para 3; World Heritage Committee, World Heritage and Sustainable Development (15 May 2015) WHC-15/39.COM/5D, Annex, para 20; World Heritage Convention Operational Guidelines, paras 12, 14bis.

381 Human Rights Council, Report of the Independent Expert in the Field of Cultural Rights (21 March 2011) UN Doc A/HRC/17/38, para 79.

382 Ibid para 80(c).

For the purposes of the present discussion, the following section distinguishes between three potential forms of community and individual participation in cultural heritage law: (a) participation of communities and individuals in the drafting of cultural heritage treaties; (b) participation in the monitoring of the implementation of these treaties at the international level; and (c) participation of communities and individuals in the process of inscription of cultural heritage on international heritage lists and the subsequent domestic implementation of the treaties in relation to these inscriptions. As the focus of the present chapter is on the implementation of cultural heritage treaties, the following section will not discuss the contributions of communities and individuals to the drafting of these treaties, particularly as these contributions have been extremely limited in practice. The following section will thus first address the general capabilities of individuals and communities to participate in international meetings of the governing bodies of UNESCO's cultural heritage conventions, before addressing participation in monitoring procedures and inscription processes in turn.

4.3.1 International meetings

Many of the cultural heritage conventions provide for some form of participation for non-state actors within international decision-making bodies, such as plenary or subsidiary bodies. Thus in the case of the plenary body of each of the conventions, NGOs can participate as observers if they have been invited by the UNESCO Director-General; these observers can subsequently address the meeting with the consent of its chairperson.³⁸³ Slightly broader categories of observers are admitted to the meetings of the various subsidiary bodies: the 1999 Second Protocol thus allows for 'public or private organizations of qualified individuals' to attend meetings of the Second Protocol Committee upon invitation in order to consult upon particular problems,³⁸⁴ the 1970 Convention allows its Subsidiary Body to invite not only NGOs, but also 'public and private organizations as well as individuals' to participate as observers,³⁸⁵ the World Heritage Committee makes similar provisions for NGOs and 'non-profit making institutions having activities in the fields covered by the Conven-

383 Meeting of Parties to the Second Protocol to the Hague Convention, Rules of Procedure of the Meeting of Parties to the Second Protocol to the Hague Convention (April 2005) CLT-05/CONF/208/2, Rules 2.2, 7.3; C70/21/6.MSP/15.FINAL (n 157) Rules 3.2-3, 14.3; CLT/CEM/UCH/2019/1 (n 185) Rules 2.2, 11.3; General Assembly of States Parties to the World Heritage Convention, Rules of Procedure (14 November 2014) WHC-14/GA/1 Rev. 4, Rules 2.2, 7.3; General Assembly of States Parties to the Intangible Cultural Heritage Convention, Rules of Procedure, Decision 9.GA 12 (2022) Rules 3, 16.

384 Committee for the Protection of Cultural Property in the Event of Armed Conflict, Rules of Procedure (15 February 2012) CLT-11/CONF/211/5 Rev., Rule 7.

385 C70/21/9.SC/3b.bis (n 159) Rules 7.4, 20.3.

tion’;³⁸⁶ and the Intergovernmental Committee of the 2003 Convention can authorise ‘public or private bodies and private persons, with recognized competence in the various fields of intangible cultural heritage’ to participate in its meetings.³⁸⁷ In each case, these observers can once again address the meeting of the subsidiary body with the consent of the chairperson.

Over time, the number of non-state attendees at these meetings has indeed increased.³⁸⁸ This is particularly the case for the 2003 Convention, which provides for a specific procedure through which NGOs can be accredited and can subsequently provide advisory services to the Intergovernmental Committee, *inter alia* through being elected to the Convention’s Evaluation Body.³⁸⁹ However, the influence of observers on the decision-making processes undertaken within both the plenary and subsidiary bodies of the conventions remains limited, particularly as in many situations observers will only be invited to take the floor after the States Parties have made their interventions, and have thus usually already settled upon the agreed text to be adopted and in many cases will have decided whether to vote against or in favour of the resolution under discussion.³⁹⁰ Moreover, in certain cases non-state actors will only be granted a relatively short time to make their contributions – in the case of the World Heritage Convention, for example, two minutes – which pales in comparison to the time granted to States Parties.³⁹¹ Although these limitations are in many cases not laid down in the relevant rules of procedure (with the exception of the Second Protocol’s Subsidiary Body), these uncoded practices can critically influence the potential impact of non-state actors on international decision-making processes.

A further important limitation of many of the statutory bodies’ rules of procedure is that observer status, or the ability to be consulted by the body on issues relating to the decision to be made, is often limited on the basis of the expertise of the non-state actor. These rules thus reinforce the situation which has been observed as endemic within cultural heritage law: the privileging of expert knowledge.³⁹² In this respect it is notable that not even the

386 World Heritage Committee, Rules of Procedure (July 2015) WHC-2015/5, Rule 8.3, 22.4.

387 Intergovernmental Committee, Rules of Procedure, Decision 12.COM 3 (2017) Rules 8.3, 22.3.

388 Jihon Kon, *Non-State Actors in the Protection of Cultural Heritage: An Analysis on Their Rights, Obligations, and Roles* (Springer 2021) 103.

389 Chiara Bortolotto and Jorijn Neyrinck, ‘Art.9: Accreditation of Advisory Organizations’ in Janet Blake and Lucas Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (Oxford University Press 2020).

390 International World Group for Indigenous Affairs, International Indigenous Peoples’ Forum on World Heritage, Indigenous Peoples of Africa Co-ordinating Committee, Submission to the UN Special Rapporteur on the Rights of Indigenous Peoples for his Report to the 77th Session of the UN General Assembly (30 March 2022) 11.

391 Hamman (n 70) 438.

392 Also known as the ‘Authorised Heritage Discourse’: see Laurajane Smith, *The Uses of Heritage* (Routledge 2006).

Intangible Cultural Heritage Convention explicitly provides for participation by communities, groups and individuals in intergovernmental meetings, despite their privileged position elsewhere in the Convention. While it can arguably be inferred that communities, groups and individuals could possess the necessary 'competence' to participate in these meetings in light of their central role in identifying and safeguarding intangible cultural heritage, this will not always seem an obvious or easy step for these actors to take.

4.3.2 Periodic reporting and monitoring mechanisms

As already noted above, there are a number of routes through which individuals and communities can participate in the monitoring mechanisms of UNESCO's cultural conventions, albeit indirectly. In the case of the World Heritage Convention, the Intangible Cultural Heritage Convention, the 1999 Second Protocol, individuals and communities can thus submit information to the secretariats of the conventions concerning their implementation by the respective States Parties. While these groups can of course submit information to the convention secretariats outside the scope of these procedures, this information is likely to be treated on an ad hoc and informal basis, and is thus difficult to track through official documents.

Nonetheless, the World Heritage Convention's Operational Guidelines explicitly provide that individuals and communities can submit information to the Secretariat as part of the reactive monitoring procedure.³⁹³ This information can relate to the fact that a property on the World Heritage List which has been subjected to reactive monitoring has 'seriously deteriorated, or that the necessary corrective measures have not been taken within the time proposed'; the Secretariat will subsequently 'verify the source and the contents of the information in consultation with the State Party concerned and request its comments'.³⁹⁴

Such information, particularly in the case of NGO submissions, has in the past indeed influenced the World Heritage Committee's decision-making with respect to World Heritage sites; although, as Hamman notes, there is a need for a 'stronger and clearer' overall role of information submitted by non-state actors within World Heritage governance.³⁹⁵ A 2019 review of the reactive monitoring procedure thus pinpointed that the Advisory Bodies of the Convention and the World Heritage Centre are placed under increasing pressure due to their responsibility to examine information submitted pursuant to the reactive monitoring procedure; the communications which they receive increase

393 This paragraph was included for the first time in the 2005 version of the Operational Guidelines.

394 World Heritage Convention Operational Guidelines, para 174.

395 Hamman (n 70).

on a yearly basis, yet both the Advisory Bodies and the World Heritage Centre often do not have sufficient time or the necessary financial resources to examine all of the communications received.³⁹⁶

Being modelled on the reactive monitoring procedure, similar provisions can be found in the operational guidelines of the 1999 Second Protocol (pending their adoption by the General Assembly in December 2023) and the Intangible Cultural Heritage Convention. The Subsidiary Committee of the Second Protocol can thus trigger its ad hoc monitoring procedure if it receives information about situations of non-compliance; this information can be submitted by 'relevant eminent international and national governmental and non-governmental organizations, having objectives similar to those of the Convention and its Protocols such as those mentioned in article 27(3) of the Second Protocol'.³⁹⁷ As already noted above, this is a significant reduction of the types of non-state actors which are empowered to submit information, as states were keen to ensure that the primary responsibility for the submission of information on the compliance with the Second Protocol should remain with the state concerned.³⁹⁸ Nonetheless, a limited role remains for non-state actors to submit such information, which will subsequently be verified by the Secretariat with the State Party which the information concerns.³⁹⁹ However, it is ultimately questionable whether these 'eminent international and national governmental and non-governmental organizations' will necessarily include representatives of local communities, thereby frustrating the ability of individuals and local communities to directly influence the decision-making of the 1999 Second Protocol.

The 2003 Convention grants perhaps the most extensive role to communities and individuals in its monitoring procedures. Through its practice, the Intergovernmental Committee has thus adopted procedures for the treatment of communications received by non-state actors with respect to nominations, the examination of periodic reports, and on an ad hoc basis any other communications received with respect to intangible cultural heritage inscribed on one of the Convention's Lists.⁴⁰⁰ In all cases, correspondence received by the Secretariat is submitted to the State Party concerned, which subsequently provides comments to the Secretariat. In the case of correspondence relating

396 Sheppard and Wijesuriya (n 248) 25.

397 Decision 17.COM 9A (n 238) Annex, para 128. The comments to this amendment noted that '[a]lthough there is no exhaustive list of such organizations, it is important that they have objectives similar to those of the Convention, i.e. operate in the field of the protection of cultural property': C54/22/17.COM/9A (n 267) 9.

398 C54/21/16.COM/INF.12.II (n 260) para 13; C54/22/17.COM/INF.9.1 (n 261) paras 43-54, 77; C54/22/17.COM/9A (n 267) 9.

399 Decision 17.COM 9A (n 238) Annex, para 133.

400 Intergovernmental Committee, Decision 7.COM 15 (2012) Annex; Intergovernmental Committee, Decision 10.COM 15.B (2015) para 3; Intergovernmental Committee, Decision 14.COM 14 (2019) para 15.

to nominations or the examination of periodic reports, the correspondence remains available on the website of the Convention during the meeting at which the nomination or periodic report will be discussed, after which it is removed from the website. Correspondence received in other circumstances is simply summarised by the Secretariat in its report to the Intergovernmental Committee.⁴⁰¹

In addition, the Convention establishes a number of requirements for States Parties with regards to community participation. When preparing their periodic reports on elements inscribed on the Representative List, States Parties shall thus 'endeavour to ensure the widest possible participation' of CGIs concerned;⁴⁰² in relation to inscriptions on the Urgent Safeguarding List they are merely required to 'endeavour to involve' these actors 'as broadly as possible'.⁴⁰³ Although the Operational Directives thus do not set out an absolute obligation for states to ensure participation of CGIs, they are nonetheless required to address the participation of CGIs in safeguarding processes in their periodic reports.⁴⁰⁴ States are thus requested to address how the participation of CGIs is fostered in safeguarding and management processes, for example 'through consultative bodies', and whether '[t]he importance of customary rights of communities and groups to land, sea and forest ecosystems necessary for the practice and transmission of ICH is recognized in policies and/or legal and administrative measures'.⁴⁰⁵ Similar requirements can be found with respect to the periodic reporting form of the World Heritage Convention, which includes questions on the level of involvement of stakeholders, such as local communities, residents, and Indigenous peoples, in the preparation of tentative lists and nomination dossiers.

Finally, the most far-reaching form of community involvement in the monitoring procedures of the 2003 Convention – and in fact any of the cultural heritage conventions – is the fact that communities, groups and individuals can also submit a request to the Secretariat for the removal of an element from one of the Lists of the Convention. While such requests from the State Party concerned are directly submitted to the Intergovernmental Committee, requests from third parties will be transmitted to the Bureau of the Intergovernmental Committee, which decides whether to transmit the request to the Commit-

401 See LHE/21/16.COM/11 Rev. (n 283); LHE/22/17.COM/8 (n 283).

402 Intangible Cultural Convention Operational Directives, para 157.

403 Ibid para 160.

404 Ibid paras 157(e), 162(e).

405 As outlined in the recently adopted Overall Results Framework for the Convention: ITH/18/7.GA/9 (n 224) Annex, Assessment Factors 1.3, 14.2. See also Assessment Factors 8.1 and 8.2 (on community participation in the inventorying process), 16.1 (on the inclusivity of safeguarding plans and programmes), 17.2 (on FPIC relating to awareness-raising activities), and 21.1 (on general participation of CGIs in safeguarding). The Overall Results Framework was adopted by the General Assembly in 2018: see Resolution 7.GA 9.

tee.⁴⁰⁶ The Committee can in turn decide to place the element under the enhanced follow-up procedure, which can ultimately result in the delisting of the element.⁴⁰⁷

4.3.3 Listing processes and domestic treaty implementation

In comparison to the relative paucity of procedures for the involvement of communities and individuals in monitoring processes which chiefly take place at the international level, the conventions establish a range of obligations for states to ensure community participation in the implementation of the conventions at the national level and more broadly establish communities and individuals as stakeholders in the implementation of the respective conventions.

For most of the conventions, this is limited to a general acknowledgment of the role of non-state actors. Thus the Guidelines of the 1999 Second Protocol note that the key actors of the Protocol (namely the States Parties, the Meeting of the Parties, the Subsidiary Committee and UNESCO) are 'encouraged to ensure the participation of a wide variety of stakeholders, including international and national governmental and non-governmental organizations',⁴⁰⁸ and thus do not explicitly focus on individuals or communities. The operational guidelines of the 2001 Convention, by comparison, are more inclusive, encouraging States Parties 'to ensure the participation of a wide variety of professionals, site managers, local and regional governments, local communities, underwater archaeologists, conservation specialists, non-governmental organizations ('NGOs') and the public at large in the protection of the underwater cultural heritage and the implementation of the Convention'.⁴⁰⁹ In addition, the Operational Guidelines provide that '[w]here and when appropriate, local communities directly linked to the underwater cultural heritage sites should be engaged in any activity directed at this heritage'.⁴¹⁰ Finally, at the national level, 'States Parties are encouraged to establish cooperation with and among non-governmental organizations, communities, groups and individuals ... to enhance the protection of the underwater cultural heritage',⁴¹¹ for example in relation to the identification and protection of that heritage. However, these provisions on individual and community participation appear to remain largely

406 Intangible Cultural Heritage Convention Operational Directives, para 40.2(e)(i).

407 Ibid para 40.3(b).

408 Second Protocol Guidelines, para 13, although in providing examples of such participation the Guidelines only mention 'the national implementation, awareness-raising and dissemination of the Second Protocol both within target groups and the general public' and 'offering technical advice related to safeguarding of cultural property'. See also para 24.

409 Underwater Cultural Heritage Convention Operational Guidelines, para 11.

410 Ibid para 49; see also para 54 on the public enjoyment and awareness of underwater cultural heritage.

411 Ibid para 81.

hortatory, as they are not assessed elsewhere in the 2001 Convention's mechanisms.

By contrast, a far greater emphasis is placed on the importance of the participation of individuals and local communities with respect to the implementation of the World Heritage Convention and Intangible Cultural Heritage Convention; the following sections will discuss each convention in turn.

4.3.3.1 1972 World Heritage Convention

'Communities' have formed the fifth strategic objective of the World Heritage Convention since 2005, 'recognizing the critical importance of involving indigenous, traditional and local communities in the implementation of the Convention'.⁴¹² Individuals, local communities and Indigenous peoples are moreover explicitly identified in the Convention's Operational Guidelines as '[p]artners in the protection and conservation of World Heritage'.⁴¹³ In recent years, their participation has increasingly been framed as one element of a human rights-based approach to the Convention (HRBA).⁴¹⁴ The Operational Guidelines thus encourage States Parties 'to adopt a human-rights based approach',⁴¹⁵ and to mainstream international human rights standards when implementing the Convention.⁴¹⁶ Beyond underlining the importance of the human rights-based approach, the Sustainable Development Policy 'specifically encourages the effective and equitable involvement and participation of indigenous peoples and local communities in decision-making, monitoring and evaluation of World Heritage properties and the respect of indigenous peoples' rights in nominating, managing and reporting on World Heritage properties in their own territories', noting that States Parties should '[e]nsure adequate consultations, the free, prior and informed consent and equitable and effective participation of indigenous peoples where World Heritage nomination, management and policy measures affect their territories, lands, resources and ways of life'.⁴¹⁷

At the UNESCO-wide level, the Executive Committee has moreover adopted the UNESCO Policy on Engaging with Indigenous Peoples, which is intended

412 World Heritage Committee, Decision 31 COM 13A (2007) para 5. See also World Heritage Convention Operational Guidelines, para 26. These strategic objectives had first been formulated in the Budapest Declaration, adopted by the Committee in 2002: World Heritage Committee, Decision 26 COM 9 (2002).

413 World Heritage Convention Operational Guidelines, para 40.

414 The HRBA was first concretely outlined in the context of the UNDP Guidelines on the Human Rights Based Approach to Development Cooperation.

415 World Heritage Convention Operational Guidelines, para 12. See also Sustainable Development Policy (n 164) paras 20, 7(j).

416 World Heritage Convention Operational Guidelines, para 14bis. See also Sustainable Development Policy (n 164).

417 Sustainable Development Policy (n 164) para 21-2.

to shape the action of all UNESCO organs.⁴¹⁸ The policy similarly commits to the adoption of a human rights-based approach in UNESCO programming relating to Indigenous peoples.⁴¹⁹ As a guiding principle, the policy establishes that Indigenous peoples have the right to full and effective participation in matters affecting their culture. As a result, they should be able to participate in the development of policies concerning their cultural heritage, 'including through effective participation in relevant consultative bodies and coordination mechanisms', and they have a right to be consulted with regard to activities concerning their heritage.⁴²⁰ In addition, Indigenous peoples have a right of access to the 'instruments, objects, artefacts, cultural and natural spaces and places of memory' necessary for the expression of their intangible cultural heritage, and more broadly a right to their traditional lands, territories and resources.⁴²¹ Consequently, Indigenous peoples should not be subject to forced relocation from their heritage sites, and when 'nomination, management and policy measures of international designations affect their territories, lands, resources and ways of life', then such interventions should ensure adequate consultation, free, prior and informed consent and the equitable and effective participation of Indigenous peoples.⁴²²

A number of significant amendments to the Convention's Operational Guidelines were moreover adopted in 2019, which provide several important guarantees relating to community participation and partially implement the standards established in the Sustainable Development Policy and the Policy on Engaging with Indigenous Peoples.⁴²³ States Parties are thus encouraged to 'ensure gender-balanced participation of a wide variety of stakeholders and rights-holders, including site managers, local and regional governments, local communities, indigenous peoples, non-governmental organizations (NGOs) and other interested parties and partners in the identification, nomination, management and protection processes of World Heritage properties'.⁴²⁴ In

418 202 EX/9 (n 380).

419 Ibid para 3. In relation to the World Heritage Convention, see also World Heritage Committee, Decision 35 COM 12E (2011) paras 15(e)-(f), where the Committee encouraged States parties to 'respect the rights of indigenous peoples when nominating, managing and reporting on World Heritage sites in indigenous peoples' territories'.

420 202 EX/9 (n 380) para 77.

421 Ibid.

422 Ibid.

423 World Heritage Committee, Decision 43 COM 11A (2020).

424 World Heritage Convention Operational Guidelines, para 12. See also para 111(b), which notes that one of the elements of an effective management system for a World Heritage site could be 'a respect for diversity, equity, gender equality and human rights and the use of inclusive and participatory planning and stakeholder consultation processes'. In addition, para 117 notes 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

addition, '[l]egislation, policies and strategies affecting World Heritage properties should ...promote and encourage the effective, inclusive and equitable participation of the communities, indigenous peoples and other stakeholders concerned with the property'.⁴²⁵

Specific guidelines are also provided with respect to participation in the preparation of Tentative Lists and the nomination process. States Parties are encouraged to prepare their Tentative Lists with the 'full' and 'effective' participation of a 'variety of stakeholders and rights-holders', including local communities.⁴²⁶ More broadly, in the preparation of nominations to the World Heritage List, states are 'encouraged to prepare nominations with the widest possible participation of stakeholders'.⁴²⁷ The nomination form which states submit to the World Heritage Centre requires states to indicate relevant stakeholders, as well as to '[d]emonstrate the extent of participation in the nomination process of stakeholders and rights-holders through, inter alia, making the nomination publicly available in appropriate languages and through public consultations and hearings', and to 'demonstrate the extent of consultation and collaboration with stakeholders and rights-holders in the management of the nominated property'.⁴²⁸

The World Heritage Committee has also increasingly incorporated notions of community participations in its decision-making in relation to World Heritage sites. The Committee has thus adopted a string of decisions on the involvement of local communities in the promotion of sustainable resource practices at sites.⁴²⁹ Particularly in cases where the site has traditionally been used by Indigenous communities (for example as grazing and hunting lands), the Committee requests states to develop policies on sustainable use 'in close cooperation with the indigenous communities using these areas',⁴³⁰ at times even requesting consultation with Indigenous peoples which are dependent on the use of the site, 'to find mutually acceptable ways to resolve any ongoing resource use conflicts, while respect any rights of use'.⁴³¹ At a broader level, it has also requested states 'to strengthen the cooperation with local communities, civil society and in particular the indigenous communities',⁴³² and to engage 'customary owners in ... decision-making processes'.⁴³³

property management, by developing, when appropriate, equitable governance arrangements, collaborative management systems and redress mechanisms'.

425 Ibid para 119.

426 Ibid para 64.

427 Ibid para 123.

428 Ibid Annex 5, section 5.a.

429 See e.g. World Heritage Committee, Decision 38 COM 7B.62 (2014); Decision 38 COM 7B.84 (2014); Decision 40 COM 7B.85 (2016); Decision 41 COM 7B.15 (2017); Decision 41 COM 7B.17 (2017); Decision 43 COM 7B.8 (2019).

430 See e.g. World Heritage Committee, Decision 36 COM 7B.25 (2012).

431 See e.g. World Heritage Committee, Decision 40 COM 7B.88 (2016).

432 See e.g. World Heritage Committee, Decision 43 COM 7A.2 (2019).

433 See e.g. World Heritage Committee, Decision 35 COM 7B.15 (2011).

However, despite this practice of the World Heritage Committee, ultimately many of the standards established by the Operational Guidelines with respect to community participation remain hortatory. By contrast, requirements relating to respect for the free, prior and informed consent (FPIC) of Indigenous peoples in relation to the preparation of tentative lists and nominations to the World Heritage List form an exception to this trend, as the Operational Guidelines related to these processes are phrased in obligatory language.⁴³⁴ In the case of tentative lists, States Parties thus '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'⁴³⁵ if the site concerned would affect their lands, territories or resources. Similarly, with respect to the preparation of nomination requests, states are not merely encouraged but '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.'⁴³⁶

States are also required to demonstrate issues relating to the FPIC of Indigenous peoples in the preliminary assessment and nomination forms which they submit to the World Heritage Centre if the nomination in question 'might affect the lands, territories or resources of indigenous peoples and/or local communities'.⁴³⁷ Thus in relation to their preliminary assessment requests, states must 'explain how [indigenous peoples] are represented, and in how far they have participated in the preparation of the Tentative List and the Preliminary Assessment request ... [and] [d]emonstrate, as appropriate, that the free, prior and informed consent of indigenous peoples has been obtained',⁴³⁸ for example by 'making the planned nomination publicly available in appropriate languages and public consultations and hearings.'⁴³⁹ For nomination requests, States Parties must similarly 'demonstrate whether their free, prior and informed consent to the nomination has been obtained';⁴⁴⁰ in addition to this, the State Party must '[d]emonstrate the extent of consultation and collaboration with indigenous peoples, as applicable, in the management of the nominated property'.⁴⁴¹

In recent years, the World Heritage Committee has referred to the importance of free, prior and informed consent in relation to four natural sites: *Talamanca Range – La Amistad Reserves/La Amistad National Park*, a transbound-

434 See also World Heritage Committee, Decision 35 COM 12E (2011) paras 15(e)-(f).

435 World Heritage Convention Operational Guidelines, para 64.

436 Ibid para 123.

437 Ibid, Annex 3 (95) Annex 5 (111).

438 Ibid, Annex 3 (95).

439 Ibid.

440 With, once again, the example being provided of 'making the planned nomination publicly available in appropriate languages and public consultations and hearings.'

441 Ibid, Annex 5 (111).

ary site of Costa Rica and Panama which was inscribed in 1983; *Salonga National Park* in the Democratic Republic of the Congo, which was inscribed on the World Heritage List in Danger in 1999; and during the inscription processes of *Kaeng Krachan Forest Complex* in Thailand and *Fanjingshan* in China. In the case of Talamanca Range, the Committee thus urged the State Party to halt a hydropower project until the FPIC of Indigenous communities with territorial rights in the areas concerned had been achieved.⁴⁴² Similarly, in relation to Salonga National Park the Committee requested the State Party to ensure that the resettlement of an Indigenous community in the national park was voluntary and in accordance with the principle of FPIC.⁴⁴³

The role of FPIC in nomination processes is somewhat spottier. Issues surrounding FPIC were thus raised during the nomination process of Kaeng Krachan, with the Committee referring the nomination back to Thailand in order to allow it to address concerns raised with respect to respect for the human rights of Indigenous peoples within the site, 'including the implementation of a participatory process to resolve rights and livelihood concerns and to achieve a consensus of support for the nomination of the property that is fully consistent with the principle of free, prior and informed consent'.⁴⁴⁴ However, the matter of FPIC did not feature in the other decisions of the Committee concerning the nomination, and Kaeng Krachan was inscribed (in the face of overwhelming criticism from the human rights community) in 2021.⁴⁴⁵ The Committee similarly inscribed Fanjingshan in 2018 despite a

442 World Heritage Committee, Decision 39 COM 7B.28 (2015) para 7(c). This was a reiteration of a previous request to Panama in response to the construction of two dams which had caused significant tensions with local Indigenous populations: Decision 37 COM 7B.30 (2013) para 8(a). Of interest, however, is the fact that the WHC also requested the States Parties to '[c]ompile and monitor field data on the present state of human activities, including intensity of cattle grazing and impact on OUV, extent of illicit crop cultivation within and directly adjacent to the park, including number of hectares affected, number of families making use of resources within the property, and nature and extent of overland pathways/trails present' (para 8(e)).

443 World Heritage Committee, Decision 43 COM 7A.10 (2019) para 6.

444 World Heritage Committee, Decision 40 COM 8B.11 (2016) para 4.

445 The nomination was once again referred in 2019, with the Committee asking Thailand to 'demonstrate that all concerns have been resolved, in full consultation with the local communities, in accordance with paragraph 123 of the Operational Guidelines': World Heritage Committee, Decision 43 COM 8B.5 (2019) para 6. Upon the inscription of the site in 2021, the Committee merely noted that Thailand should 'continue the work in progress on the following issues ... [e]nsuring consultations with the local communities on their livelihoods and their active engagement in management of the property': World Heritage Committee, Decision 44 COM 8B.7 (2021) para 5(c). IUCN had in fact recommended that the Committee should defer the inscription so that Thailand could 'fully resolve concerns regarding rights, in light with paragraph 123 of the Operational Guidelines, and Decisions 39 COM 8B.5, 40 COM 8B.1 and 43 COM 8B.5, demonstrating that consensus of support for the nomination of the property has been obtained from all affected indigenous peoples and local communities, fully consistent with the principle of free, prior and informed

lack of information surrounding relocation of residents within the site, simply requesting the State Party 'to undertake and document significant further work', in order to ensure that these relocations were 'fully voluntary and in line with the policies of the Convention and relevant international norms, including principles related to free, prior and informed consent [and] effective consultation'.⁴⁴⁶ As of 2023, the Committee has not yet followed up on this recommendation. As such, in each of these situations the Committee has not followed up on its request to the respective States Parties to ensure FPIC, despite issues remaining in many of the sites concerned.⁴⁴⁷

In conclusion, while there have certainly been improvements in recent years with respect to the position of individuals and communities in World Heritage governance, such as the adoption of a range of significant amendments to the Operational Guidelines in 2019, these changes have yet to have a measurable impact in practice. One of the core issues in this respect is that individual and community participation is not construed of as being part of the outstanding universal value of a World Heritage site, whereas the monitoring mechanisms of the Convention focus on threats to OUV. Issues relating to a lack of community participation are thus obscured within monitoring processes. As such, a lack of community participation does not form sufficient grounds for inscription on the Convention's Danger List. Furthermore, whilst the majority of the references to community participation in the Operational Guidelines focus on such participation with respect to inscriptions, it nonetheless seems likely that a nomination can nonetheless still be considered by the Committee even if the state does not provide sufficient information on community participation in its nomination documents,⁴⁴⁸ making these amendments largely a dead letter. Moreover, community participation is not only important in

consent': IUCN Evaluations of nominations of natural and mixed properties to the World Heritage List (2021) WHC/21/44.COM/INF.8B2.ADD, 40.

446 World Heritage Committee, Decision 42 COM 8B.6 (2018) para 4(a).

447 In the case of Talamanca Range, this was because the project which was subject to the Committee's request with respect to ensuring FPIC was ultimately cancelled by the State Party concerned. In the case of Salonga National Park, the site was removed from the Danger List in 2021, despite issues remaining with respect to human rights and FPIC; the DRC was simply requested to implement recommendations with respect to relocation and FPIC: World Heritage Committee, Decision 44 COM 7A.44 (2021).

448 In their recent submission to the Special Rapporteur on the Rights of Indigenous Peoples, IWGIA, IIPFWH and IPACC thus note that '[t]he evidence of Indigenous peoples' FPIC to World Heritage nominations affecting them is not mentioned in para 12 of the Operational Guidelines (on the necessary documentation for a nomination to be considered as "complete"); it is thus unclear whether the Secretariat can treat nominations lacking such evidence as "incomplete" and send them back to the submitting State Party(ies) upon receipt': International Work Group for Indigenous Affairs, Indigenous Peoples' Forum on World Heritage and Indigenous Peoples of Africa Co-ordinating Committee, Submission to the UN Special Rapporteur on the Rights of Indigenous Peoples for his report to the 77th Session of the UN General Assembly: Indigenous Peoples' Rights and UNESCO World Heritage Sites (30 March 2022) para 20.

relation to inscription processes but is critical throughout the life of a site on the World Heritage List, yet the Operational Guidelines do not set out any requirements with regards to post-inscription participation processes.

In any event, the politicisation of the World Heritage Committee has demonstrated the Committee's lack of consistency in ensuring respect for provisions relating to community participation. Consideration of issues relating to community participation appears to be highly dependent on the composition of the Committee and whether broader political interests are at stake with respect to the site; the treatment of the Karen residents of Kaeng Krachan is an example in point of this trend. Furthermore, issues relating to free, prior and informed consent only rarely surface in the decisions of the Committee, despite potentially being of import at many sites; when FPIC is raised as a point of discussion, it is often treated inconsistently and is not subject to the necessary follow-up by the Committee to ensure compliance with its previous decisions.

4.3.3.2 2003 Intangible Cultural Heritage Convention

Communities, groups and individuals (CGIs) form a core part of the Intangible Cultural Heritage Convention; by contrast to the World Heritage Convention, the former thus contains a specific provision on the importance of the participation of communities, groups and individuals.⁴⁴⁹ This article sets out that States Parties to the Convention 'shall endeavour to ensure the widest possible participation' of CGIs in the context of safeguarding activities, involving these groups actively in the management of intangible cultural heritage. However, this article is notably phrased in hortatory terms, as States Parties were reticent during drafting to adopt a stronger terminology which would establish absolute obligations with regards to participation. As such, 'the content and means of community participation were left to the different State Parties' discretion'.⁴⁵⁰ Nonetheless, the Convention does explicitly require the identification and definition of intangible cultural heritage at the national level to take place 'with the participation of communities, groups and relevant non-governmental organizations'.⁴⁵¹

In addition, the role of CGIs in the implementation of the Convention has been further reaffirmed through the progressive development of the Convention's Operational Directives, which effectively 'establish a higher standard of participation' than that set out in the text of the Convention.⁴⁵² As for

449 Intangible Cultural Heritage Convention, art 15.

450 Gabriele D'Amico Soggetti, 'Art.15: Participation of Communities, Groups, and Individuals. Participation and Democracy' in Janet Blake and Lucas Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (Oxford University Press 2020) 293.

451 Intangible Cultural Heritage Convention, art 11(b).

452 Lenzerini, 'Art.16–17: Listing Intangible Cultural Heritage' (n 320) 318.

inscription on the Lists of the Convention, the Operational Directives thus stipulate with regard to both Lists that nomination must be preceded by 'the widest possible participation of the community, group or, if applicable, individuals concerned and with their free, prior and informed consent'.⁴⁵³ Similarly, transfer of an element from one List to another must occur with the free, prior and informed consent of CGIs,⁴⁵⁴ as well as in cases of reduction of an element, where States Parties are required to provide evidence for the free, prior and informed consent of CGIs.⁴⁵⁵ A lower standard of FPIC is required for awareness-raising action undertaken at the national level, where states are merely 'encouraged to observe' that CGIs 'have given their free, prior and informed consent'.⁴⁵⁶

States are further 'encouraged to create a consultative body or a co-ordination mechanism' to facilitate community, group and individual participation in relation to identification, the creating of inventories, and nomination of manifestations of ICH to either List.⁴⁵⁷ The Directives furthermore prescribe that States Parties 'shall endeavour to ensure' that inscriptions on the Lists 'are not misused to the detriment of intangible cultural heritage and communities, groups or individuals concerned, in particular for short-term economic gain'.⁴⁵⁸ Finally, with respect to safeguarding at the national level, and in particular the development of plans, policies and programmes involving intangible cultural heritage, States Parties are expected to endeavour to 'ensure the widest possible participation of [CGIs] that create, maintain and transmit such heritage, and involve them actively in elaboration and implementation of such plans, policies and programmes',⁴⁵⁹ and to additionally ensure that these CGIs 'are the primary beneficiaries, both in moral and material terms' of these plans, policies and programmes.⁴⁶⁰ Such activities thus must not 'decontextualise or denaturalise' the intangible cultural heritage concerned.⁴⁶¹

The role of CGIs has also been reaffirmed through the development of policies by the Intergovernmental Committee, specifically in the form of the 2015 Ethical Principles for Safeguarding Intangible Cultural Heritage.⁴⁶² The Ethical Principles thus state that CGIs 'should have the primary role in safe-

453 Intangible Cultural Heritage Convention Operational Directives, paras 1.U.4, 2.R.4.

454 Ibid para 38.1.

455 Ibid para 17.2.

456 Ibid para 101. However, States Parties are nonetheless also encouraged to observe that CGIs 'widest possible participation in the awareness-raising actions is ensured', and that these actions 'fully respect customary practices governing access to specific aspects of such heritage, in particular secret and sacred aspects'.

457 Ibid para 80.

458 Ibid para 176.

459 Ibid para 171(a).

460 Ibid para 171(c).

461 Ibid para 171(c).

462 Intergovernmental Committee, Decision 10.COM 15.A (2015).

guarding their own intangible cultural heritage'.⁴⁶³ Moreover, '[a]ll interactions with the [CGIs] who create, safeguard, maintain and transmit intangible cultural heritage should be characterized by transparent collaboration, dialogue, negotiation and consultation, and contingent upon their free, prior, sustained and informed consent'.⁴⁶⁴ However, these principles were notably only endorsed by the Intergovernmental Committee, and not the Convention's General Assembly – despite the latter being the 'sovereign body' of the Convention,⁴⁶⁵ reducing their normative force.

At face value the Intangible Cultural Heritage Convention thus establishes far-reaching obligations upon States Parties to ensure individual and community participation in the implementation of the Convention. Unlike any of the other cultural conventions of UNESCO's, CGIs can directly influence the processes for the transfer of elements from one List to another and the removal of an element from a List, as already outlined in the previous section: CGIs can thus communicate their wishes to the Secretariat, which will accordingly inform both the State Party concerned and the Intergovernmental Committee.⁴⁶⁶

However, similarly to the World Heritage Convention, most of the requirements established by the Operational Guidelines are set out in relation to inscription of intangible heritage on one of the Convention's Lists. Even in relation to inscriptions, the Operational Directives ultimately do not clearly set out criteria with respect to the modalities of community participation: thus whereas some have interpreted the requirement that elements on the Lists must be nominated with the free, prior and informed consent of CGIs as establishing a 'veto' for CGIs of nominations, this seems unlikely.⁴⁶⁷ The Operational Directives do not provide a definition of FPIC; given that the issue of whether the principle of FPIC indeed provides a veto to the communities concerned remains controversial, it seems unlikely that this is indeed the intended interpretation of this provision.⁴⁶⁸ Quite to the contrary: the only party whose consent is explicitly required in the nomination process is that of states, as inscription can only occur with the consent and upon the action of the territorial state.⁴⁶⁹

Several commentators have moreover pointed out that the practice of the Convention thus far does not give a proper indication whether the obligation to secure the FPIC of communities, and more broadly the requirement of community participation, has indeed been respected in practice.⁴⁷⁰ Commun-

463 Intergovernmental Committee, Expert Meeting on a Model Code of Ethics (15 October 2015) ITH/15/10.COM/15.a, Annex, Principle 1.

464 Ibid Principle 4.

465 Intangible Cultural Heritage Convention, art 4(1).

466 Intangible Cultural Heritage Convention Operational Directives, para 38.2.

467 Lenzerini, 'Art.16–17: Listing Intangible Cultural Heritage' (n 320) 318.

468 On the definition of FPIC, see Chapter 6.

469 Nomination files can only be submitted by a State Party to the Convention.

470 Lenzerini, 'Art.16–17: Listing Intangible Cultural Heritage' (n 320) 318.

ity participation is primarily assessed through the submission by the state of signed consent forms (even amongst communities which are largely non-literate) and lists of participants at events concerning inscription; independent assessment of the veracity of these documents is politically sensitive and financially prohibitive for the governing bodies of the Convention.⁴⁷¹ As such, 'the degrees of actual participation [of CGIs] may differ widely' amongst States Parties.⁴⁷² In the past, members of the Evaluation Body have moreover indicated that the Convention's nomination forms 'do not provide adequate space to reflect the true nature of involvement of communities'.⁴⁷³ Even then, the Intergovernmental Committee often ignores the Evaluation Body's recommendations with regards to potential nominations, mirroring the trends described above with respect to the politicisation of the World Heritage Committee.⁴⁷⁴

Perhaps most surprisingly, the Intangible Cultural Heritage Convention is arguably less progressive with regards to the incorporation of human rights in comparison to the World Heritage Convention. Whereas in recent years the Operational Guidelines of the World Heritage Convention have incorporated numerous references to the importance of adopting a human rights-based approach in the implementation of the Convention, concrete references to human rights in the Intangible Cultural Heritage Convention and its Operational Directives are limited to the context of assessing which intangible heritage can be inscribed on the Lists.⁴⁷⁵ The main affirmation of human rights at the policy level can be found in the non-binding Ethical Principles adopted by the Intergovernmental Committee, which broadly reaffirm the right of CGIs to 'continue the practices, representations, expressions, knowledge and skills necessary to ensure the viability of the intangible cultural heritage'.⁴⁷⁶ However, even here the Committee chose to not refer to explicit human rights

471 Bortolotto and others (n 279) 72.

472 Janet Blake, 'Engaging "Communities, Groups and Individuals" in the International Mechanisms of the 2003 Intangible Heritage Convention' (2019) 26 *International Journal of Cultural Property* 113, 119. See also D'Amico Soggetti (n 450) 296.

473 Internal Oversight Service, *Evaluation of UNESCO's Action in the Framework of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage* (November 2021) IOS/EVS/PI/200, 7.

474 Blake, 'Engaging "Communities, Groups and Individuals" in the International Mechanisms of the 2003 Intangible Heritage Convention' (n 472) 120.

475 Intangible Cultural Heritage Convention, art 2(1): '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'. See also Intangible Cultural Heritage Convention Operational Directives, paras 73 (in relation to contributions to the Fund), 170 (in relation to national safeguarding activities).

476 ITH/15/10.COM/15.a (n 463) Annex, Principle 2.

standards, eschewing the use of the term 'human rights' as much as possible.⁴⁷⁷

4.3.4 Conclusion

As the foregoing demonstrates, while much of the current international political discourse surrounding cultural heritage protection emphasises the need to balance between the common interest in safeguarding cultural heritage and the particular interests of individuals and local communities,⁴⁷⁸ a closer analysis of UNESCO's cultural heritage conventions proves that there is still a long way to go. As recently as June 2022, the ILA Committee on Participation in Global Heritage Governance was thus able to note that while significant progress has been made in this respect in recent heritage conventions such as the Intangible Cultural Heritage Convention, the state-centrism of cultural heritage law 'is still a prevalent issue impairing participation'.⁴⁷⁹ States remain the 'driving force of organizational agendas', thereby complicating participation at a later stage by other actors such as communities.⁴⁸⁰

As noted above, the strongest guarantees in this respect relate to requirements imposed upon States Parties to the cultural heritage conventions, in

⁴⁷⁷ The preamble to the Ethical Principles simply notes that the Principles 'have been elaborated in the spirit of ... existing international normative instruments protecting human rights and the rights of indigenous peoples'. In addition to this, Principle 4 mentions the concept of 'free, prior, sustained and informed consent'. While it is not entirely clear why the Ethical Principles eschew any further explicit reference to human rights, an indication can be found in its preparatory works: a memorandum prepared for the expert meeting at which the Ethical Principles were drafted thus noted that 'the Convention incorporates (without enumerating them) all the fundamental principles of human rights that have been recognized by the international community. Ethical codes for intangible cultural heritage must therefore necessarily respect those human rights principles, but might also follow the Convention's example of referring to them in their totality rather than enumerating them in what will likely be an incomplete list': Intergovernmental Committee of the Intangible Cultural Heritage Convention, Towards Codes of Ethics for Intangible Cultural Heritage? (20 February 2015) ITH/15/EXP/2.

⁴⁷⁸ Of particular interest is the recognition in both the World Heritage Convention's Sustainable Development Policy and the Ethical Principles of the ICHC's Intergovernmental Committee that: (in the case of the WHC) States Parties should recognise 'both universal and local values within management systems for World Heritage properties' and that (in the case of the ICHC) '[t]he safeguarding of intangible cultural heritage is of general interest to humanity and should therefore be undertaken through cooperation among bilateral, sub regional, regional and international parties; nevertheless, communities, groups and, where applicable, individuals should never be alienated from their own intangible cultural heritage': see WHC-15/39.COM/5D (n 380) Annex, para 21-2; ITH/15/10.COM/15.a (n 463) Annex, Principle 12.

⁴⁷⁹ Committee on Participation in Global Cultural Heritage Governance, 'Final Report' in International Law Association Report of the Eightieth Conference (Lisbon 2022) (International Law Association, London 2023) para 77.

⁴⁸⁰ Ibid.

particular within the scope of the World Heritage Convention and the Intangible Cultural Heritage Convention, to ensure participation in the processes leading up to international inscription, as well as domestic safeguarding processes undertaken pursuant to the conventions. In the case of the World Heritage Convention, states are merely encouraged to ensure that nominations are prepared with the 'widest possible participation' of stakeholders;⁴⁸¹ if a site concerns the lands, territories or resources of Indigenous peoples, states 'shall demonstrate, as appropriate, that the free, prior and informed consent of [I]ndigenous peoples has been obtained'.⁴⁸² In the case of the Intangible Cultural Heritage Convention, nominations must be preceded by the 'widest possible participation'⁴⁸³ of communities and individuals and with their free, prior and informed consent; such free, prior and informed consent is similarly required with regards to the transfer of elements from one list to another and the reduction or removal of an element from one of the lists.

However, less guidelines have been formulated with respect to ensuring continued community participation throughout the life of cultural heritage on international lists. Moreover, the requirements currently established with respect to inscriptions and domestic safeguarding processes do not establish corresponding rights for individuals and communities through which they can seek to enforce that the State Party concerned does indeed meet its obligations, and it is unclear whether such provisions could form the subject of non-compliance procedures. Finally, these requirements also stand on shaky ground with respect to their obligatory force for States Parties, given that in almost all cases they find their origin not in the text of the conventions at stake but in the conventions' operational guidelines.⁴⁸⁴

By comparison to the baseline expectation of participation in domestic nomination processes, there are very limited possibilities for individuals and communities to participate in their own right in international decision-making processes, despite international fora constituting the venues where some of the most important aspects of international governance take place. This is due to the fact that provisions concerning participation by individuals and communities in the meetings of the governing bodies of the cultural heritage conventions are relatively limited.⁴⁸⁵

481 World Heritage Convention Operational Guidelines, para 123.

482 Ibid.

483 Intangible Cultural Heritage Convention Operational Directives, para 1.U.4, 2.R.4.

484 On whether the operational guidelines of the World Heritage Convention are binding, see von Schorlemer, 'Compliance with the UNESCO World Heritage Convention: Reflections on the Elbe Valley and the Dresden Waldschlössen Bridge' (n 299) 331-3; Zacharias, 'The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution' (n 290) 320-2.

485 See also the General Assembly of the World Heritage Convention's Declaration of Principles, which called upon the World Heritage Committee to commit to, '[i]n the interest of recognising global cultural diversity and equitable representation, encourage interventions from observers including local communities' and Indigenous peoples' representatives in items

As such, the main way for individuals and communities to participate in decision-making processes concerning their cultural heritage is by submitting information concerning that heritage to the secretariats of the conventions. This information will subsequently be considered at the intergovernmental level. In the case of the World Heritage Convention, the 1999 Second Protocol, and the Intangible Cultural Heritage Convention, there are thus specific procedures through which this information can be considered as part of monitoring or inscription procedures. However, here the territorial state nonetheless retains an important role, as this information is always first offered to the State Party concerned in order to verify it and is usually not made available to the general public.

At the practical level, where individual and community has been facilitated through the progressive development of cultural heritage treaties, it remains difficult for these groups to actually participate in decision-making processes due to the '[t]he increasing complexity of ... procedures in several UNESCO regimes, including periodic reporting and participating in developing nomination files'.⁴⁸⁶ It is also often difficult to assess whether standards with respect to individual and community participation have been met in practice, as there is a 'general deficit of methodologies for measuring participation'.⁴⁸⁷

While there have been some success stories of communities being able to shape, or sometimes even directly influence these decision-making procedures – such as in the case of the removal processes surrounding Dresden Elbe Valley from the World Heritage List and Aalst Carnaval from the Representative List, both of which were heavily driven by the wishes of local community – there have also been a number of recent occasions where communities have been side-lined in international decision-making procedures concerning their heritage. The inscription of Kaeng Krachan Forest Complex against the wishes of the Indigenous Karen community is a case in point, demonstrating that even where guarantees for individual and community participation exist, they are often flagrantly ignored by states.

More broadly, in 2022, the Special Rapporteur on the Rights of Indigenous Peoples considered that there were several examples of the exclusion of Indigenous peoples from the nomination and management of World Heritage sites located on their lands, concluding that boundaries remained towards the meaningful participation of Indigenous peoples and international and

concerning such groups with the prior consent of the Chairperson, and in full respect of Article 6 of the 1972 Convention before decisions are made by the Committee': General Assembly, Declaration of Principles to Promote International Solidarity and Cooperation to Preserve World Heritage (9 November 2021) WHC/21/23.GA/INF.10.

486 ILA Committee Final Report (n 479) para 82.

487 Ibid para 85.

national decision-making processes related to World Heritage.⁴⁸⁸ The Special Rapporteur did so in the context of his report on the obligations of states and international organisations with respect to the right of Indigenous peoples in protected areas; while his comments focus on natural or mixed World Heritage sites, his conclusions are equally valid with respect to cultural sites. The response of UNESCO to the call for submissions from the Special Rapporteur on the issue of protected areas is particularly telling in this regard:

It is the State Party's responsibility to manage the World Heritage sites and to ensure the application of the Operational Guidelines as well as other internationally recognized principles such as free, prior and informed consent. While it is possible for UNESCO, as the Secretariat of the World Heritage Convention, to bring conservation and management issues, including those related to indigenous peoples, to the attention of the World Heritage Committee, and while the World Heritage Committee, through its decision-making process, may make recommendations to States Parties, their implementation remains the responsibility of the State Party concerned.⁴⁸⁹

A similarly reticent attitude can be detected with regards to the status of human rights standards in international heritage governance. Thus while the governing bodies of the World Heritage Convention have on occasion advocated for the adoption of a human rights-based approach to World Heritage governance (an approach notably absent with respect to the Intangible Cultural Heritage Convention), and both the World Heritage Convention and the Intangible Cultural Heritage Convention set out standards in relation to the principle of free, prior and informed consent, it remains unclear what is explicitly expected of states in order to fulfil these standards. As will be seen in the following chapter, while the World Heritage Committee has made several requests to ensure that the displacement or relocation of individuals from World Heritage sites is 'in accordance with the policies of the Convention and relevant international standards', the Committee provides no clarification to States Parties on how they can harmonise their obligations under the Convention with human rights standards. In any event, the recalling of the need to implement the World Heritage Convention in line with human rights law happens inconsistently and is not independently assessed in the Convention's inscription or monitoring procedures, and thus seems to provide little support to affected individuals or communities.

488 Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples, Protected Areas and Indigenous Peoples' Rights: the Obligations of States and International Organizations (19 July 2022) UN Doc A/77/238, paras 43-4.

489 UNESCO Secretariat, *UNESCO submission to the UN Special Rapporteur on the Rights of Indigenous Peoples Regarding Protected Areas* (2022) 11, available at <https://www.ohchr.org/en/calls-for-input/2022/call-submissions-protected-areas-and-indigenous-peoples-rights-obligations..>

As such, the ILA Committee's conclusion with respect to international heritage governance that 'participation still appears to be primarily consultative only, and to take place early in the process of decision-making'⁴⁹⁰ appears to be largely correct; moreover, when individual and community participation takes place, this is often 'outside of international fora and restricted to other environments which may be less effective in bringing up issues that go against state priorities',⁴⁹¹ with the state remaining the key 'translator' of domestic issues to international fora. Ultimately, where non-state actors have made inroads into decision-making practices, this role often remains the prerogative of expert actors such as cultural heritage NGOs rather than individuals or communities directly.⁴⁹² A disparity thus remains between the state and individuals and local communities, not only in terms of who has a seat at the table in developing the norms of cultural heritage law, but also in their implementation. States are exceedingly reluctant to relinquish control of the means and modalities of the implementation of cultural heritage treaties, as well as their prerogative to assess whether such implementation is in line with international standards.⁴⁹³

4.4 CONCLUSION

This chapter set out to enquire whether it is possible to identify a common approach within international law with regards to the protection of cultural heritage, in terms of the types of obligations and the monitoring and implementation mechanisms employed. In doing so it sought to answer the overarching question whether, as a common interest regime, it is possible to identify the same tension within cultural heritage law between 'form and function' that can be identified with respect to other common interest regimes in public international law.⁴⁹⁴

Both questions can arguably be answered in the affirmative. The above overview of the five core conventions of international law heritage demonstrates that the field shows many affinities with other common interest regimes in public international law, both with respect to the methods of protection

490 ILA Committee Final Report (n 479) para 84.

491 Ibid para 85.

492 Kristin Hausler, 'The Participation of Non-State Actors in the Implementation of Cultural Heritage Law' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020) 763; Valentina Vadi, 'Exploring the Borderlands: The Role of Private Actors in International Cultural Law' in James Summers and Alex Gough (eds), *Non-State Actors and International Obligations: Creation, Evolution and Enforcement* (Brill Nijhoff 2018) 110, 118.

493 D'Amico Soggetti (n 450) 294.

494 Brölmann (n 38) 95; Catherine Brölmann, 'Law-Making Treaties: Form and Function in International Law' (2005) 74 *Nordic Journal of International Law* 383, 386.

employed and the tensions it faces with respect to ensuring effective implementation and compliance with the rules established by cultural heritage law.

The conventions examined above thus draw heavily upon the principle of international cooperation; their provisions have a largely inward-facing character, and frequently do not establish obligations of result but of conduct. The procedures established by the conventions, such as the creation of international heritage lists and the provision of technical and financial assistance, allow the international community to provide states with the necessary expertise and financial means to ensure the goals of the conventions: the protection of cultural heritage as a common interest. However, in doing so, these conventions explicitly do not set out to establish limitations on state sovereignty. Accordingly, they do not focus on punishing states for non-compliance with their international obligations, but set up a situation through which the international community can assist the state in safeguarding the common interest located within its borders.

In this sense, cultural heritage law shows similarities to other common interest regimes in light of its approach to issues of monitoring and implementation. Over time, states have become required to justify their protection of cultural heritage to assemblies of fellow states, and have delegated certain roles within the conventions to independent expert bodies. The development of the interpretation of the cultural heritage conventions has thus – at least in part – been decoupled from the actions of States Parties acting on an individual basis. The implementation of the conventions is shaped by successive meetings of the intergovernmental bodies established by the conventions, which have progressively developed these conventions through the adoption of operational guidelines.

In certain situations, the governing bodies of the conventions have established a range of monitoring mechanisms which go further than the periodic reporting procedures initially established by the conventions. The latter have been widely deemed to be insufficient to assess compliance due to their reliance upon self-reporting by states. While these new innovations – reactive monitoring, ad hoc monitoring and the enhanced follow-up procedure – have in part managed to circumvent the centrality of state consent in cultural heritage law, they still do not manage to overcome the inherent tension between state sovereignty and compliance which plagues many other common interest regimes.

This is because these monitoring mechanisms are still, by and large, state-led processes. As the practice of the World Heritage Committee's reactive monitoring procedure shows, objective and consistent monitoring of the World Heritage Convention remains difficult to achieve in practice. The outcomes of reactive monitoring are inconsistent, and States Parties frequently fail to follow up on the recommendations of the Committee yet often do not face subsequent sanctions. This contributes to an uncertain regulatory environment for States Parties to the Convention and lowers the incentive of complying

with the progressive requirements relating to community participation which have been established in the Operational Guidelines.

At a more fundamental level, it remains doubtful whether the governing bodies of the conventions are well-equipped to assess compliance with requirements related to community participation when this requires a legal (rather than a technical) assessment of standards such as the principle of free, prior and informed consent. Moreover, these monitoring mechanisms often remain subject to consultation with the State Party concerned and thus certainly shouldn't be seen as radical procedures seeking to upend state sovereignty.

This is also the case when one looks at broader developments within the conventions in recent years which seem to characterise states' wishes to limit the freedom of action, not only of independent expert bodies, but also that of subsidiary intergovernmental bodies. As such, both conventions which have been adopted since 2000 – the Underwater and Intangible Cultural Heritage Conventions – privilege the position of plenary intergovernmental bodies within their decision-making procedures.

Nor has the state-centric nature of cultural heritage law been remedied by the emergence in recent years of requirements with respect to individual and community participation in international heritage governance. The modalities of such participation remain strictly limited and do not provide for participation where it counts most, namely within the intergovernmental bodies where decisions are made with respect to inscriptions and monitoring. The requirements established within the conventions' operational guidelines moreover do not provide sufficient guidance in order to judge whether community participation has truly taken place. Nor do they establish clear guidelines which can shape state action, particularly in relation to issues which would inherently require a legal assessment by the State Party, as in the case of the principle of free, prior and informed consent.

As such these conventions, with their focus on states as the sole players able to implement and act upon them, demonstrate the limitations of international law in the protection of common interests. Indeed, as Blake notes, 'the challenge facing international law in this field is to try to satisfy as many of the legitimate interests in heritage as possible while, at the same time, operating within a system primarily established by and for sovereign and equal States'.⁴⁹⁵ When a state is less inclined to act selflessly on behalf of the international community – which, in many situations of cultural heritage protection, will be the case – then cultural heritage law is ultimately powerless to intervene. This is due to the nature of its legal norms, which largely do not prohibit certain forms of action but establish forms of international cooperation. As

495 Blake, *International Cultural Heritage Law* (n 1) 21-2.

such, the following chapter will discuss situations in which problems such as these arise, and the difficulties in responding to these problems within the current framework of cultural heritage law, demonstrating the necessity of a new approach.

This chapter examines the implementation of UNESCO's cultural heritage protection regimes from the perspective of two key stakeholders: individuals residing in a heritage site or participating in a heritage practice, and the local communities of which they form a part. It discusses how these cultural heritage conventions are implemented in relation to sites and practices subject to international heritage governance, asking which opportunities, but mainly shortcomings can be identified in practice with respect to the ability of individuals and local communities to shape decisions being made not only with regards to initial inscriptions of cultural heritage, but also ongoing protective measures of such cultural heritage which are triggered due to its subsequently 'internationalised' status.

This analysis ties in closely to the overarching research question of the dissertation, which focuses on how the interests of individuals and local communities should be safeguarded within the state-centric and universalist legal structures and norms of cultural heritage law. The previous chapters have charted how cultural heritage instruments fit into the broader emergence of common interest regimes within public international law, arguing that cultural heritage law remains largely state-centric despite its historically universalist inclinations and its increasing commitment to notions of living heritage value. As a result, the international legal framework for the protection of cultural heritage remains ill-suited to protect common interests. The result is that the field struggles to achieve its goal of securing the common interest of cultural heritage protection. The present chapter introduces individuals and local communities into this analysis, demonstrating how these stakeholders effectively fall into the cracks of contemporary cultural heritage law.

Its focus on the 'local' as an analytical lens in cultural heritage law also flows from the inherent blind spots of a state-centric system of international heritage governance described in previous chapters.¹ It has generally been accepted that individuals and local communities have difficulty in accessing international decision-making processes within UNESCO; doubly so in the case

1 In using the term 'local' in this context, the author does not seek to imply that the 'local' and the 'global' are strictly spatially limited spaces or that the 'local' is a space which is devoid of its own power politics.

of historically marginalised communities such as Indigenous peoples.² This exacerbates the problems within international heritage governance which are caused by a lack of effective oversight and reliance upon the good faith of States Parties. As will be seen below, this can lead to problems when states deploy international cultural heritage law in order to justify actions which run contrary to the law's object and purpose: the protection of the symbiotic relationship between tangible and intangible heritage, and the 'living heritage' which exists at this intersection.³

As will be seen in the sections below, there is a wealth of research from fields such as anthropology, archaeology, folklore studies, ethnography, and tourism studies documenting the impact of (international) listing on individual heritage sites and practices. Although there have been calls from various corners for an increased focus on the 'local impact' of international heritage law,⁴ relatively little work has been done thus far to bridge these disciplinary perspectives and to collate the results observed on the implementation of UNESCO's heritage conventions.⁵ Simultaneously, this wealth of research in other disciplines is mirrored by a relative paucity of sustained engagement by international legal scholars on the local implementation of international heritage law.⁶ This chapter thus builds upon the research which has been

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- 2 See e.g. Christoph Brumann, 'Imagining the Ground from Afar: Why the Sites Are so Remote in World Heritage Committee Sessions' in Christoph Brumann and David Berliner (eds), *World Heritage on the Ground: Ethnographic Perspectives* (Berghahn 2016).
 - 3 On the notion of 'living heritage', see e.g. Sarah Court and Gamini Wijesuriya, *People-Centred Approaches to the Conservation of Cultural Heritage: Living Heritage* (ICCROM 2015). See further Introduction, Section 1.3.3.
 - 4 Chiara De Cesari, 'Thinking Through Heritage Regimes' in Regina Bendix, Aditya Eggert and Arnika Peselmann (eds), *Heritage Regimes and the State* (Universitätsverlag Göttingen 2012) 402-3. Compare also the assertion by Hamman and Hølleland of the relative paucity of literature on compliance with the World Heritage Convention in Evan Hamman and Herdis Hølleland (eds), *Implementing the World Heritage Convention: Dimensions of Compliance* (Elgar 2023) 6-8.
 - 5 More broadly on the relationship between cultural heritage law and other disciplines, see Lucas Lixinski, 'Between Orthodoxy and Heterodoxy: the Troubled Relationships Between Heritage Studies and Heritage Law' (2015) 21 *International Journal of Heritage Studies* 203.
 - 6 Most discussions relating to the implementation of cultural heritage law by international lawyers focus on domestic legislative implementation rather than an analysis of specific case studies. Notable exceptions include Sabine von Schorlemer, 'Compliance with the UNESCO World Heritage Convention: Reflections on the Elbe Valley and the Dresden Waldschlösschen Bridge' (2008) 51 *German Yearbook of International Law* 321; Lucas Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination* (Oxford University Press 2019); Pier Luigi Petrillo (ed) *The Legal Protection of the Intangible Cultural Heritage: A Comparative Perspective* (Springer 2019); Marie Cornu and others (eds), *Intangible Cultural Heritage under National and International Law: Going Beyond the 2003 UNESCO Convention* (Elgar 2020); Josephine Gillespie, *Protected Areas: A Legal Geography Approach* (Palgrave Pivot 2020); Hamman and Hølleland (n 4). See also ILA Committee on Participation in Global Cultural Heritage Governance, 'Final Report' in *International Law Association Report of the Eightieth Conference* (Lisbon 2022) (International Law Association, London 2023).

carried out thus far into the local impact of international heritage conventions in order to indicate opportunities, but mainly obstacles and blind spots in the existing legal framework. It focuses in particular on measures and activities which have a critical impact on the living heritage value of a site or practice, such as the displacement or dispossession of residents. As noted in the introduction, these trends have been well documented with regards to natural heritage sites and international development projects (often referred to as 'development induced displacement'),⁷ yet have received comparatively less attention in relation to international cultural heritage management.

As such, the chapter chiefly focuses on those heritage regimes with the potential for the most far-reaching impact upon the daily lives of individuals and local communities: the 1972 World Heritage Convention and the 2003 Intangible Cultural Heritage Convention. Unlike most other cultural conventions, these treaties seek to establish a long-term heritage management regime under international supervision. In doing so, they underline the 'universal' or common interest implicated in the safeguarding of these forms of heritage, in light of the increased role played by the international community in its protection and management. While individuals and local communities are certainly implicated in the protection of cultural heritage pursuant to the other cultural conventions of UNESCO examined in the previous chapters, these conventions do not explicitly create heritage sites with management which is directly impacted by decision-making within intergovernmental fora. In addition to this, the World Heritage Convention and Intangible Cultural Heritage Convention far outstrip the other conventions in terms of the number of States Parties, with 195 and 181 States Parties, respectively, in comparison to 134 (1954 Convention), 143 (1970 Convention) and 72 (2001 Convention) States Parties.

Of course, this does not necessarily imply that UNESCO's other cultural conventions do not have potentially far-reaching impacts on individuals and

7 See e.g. Daniel Brockington and James Igoe, 'Eviction for Conservation: A Global Overview' (2006) 4 *Conservation and Society* 424; Paige West, James Igoe and Dan Brockington, 'Parks and Peoples: The Social Impact of Protected Areas' (2006) 35 *Annual Review of Anthropology* 251; Mark Dowie, *Conservation Refugees: The Hundred-Year Conflict between Global Conservation and Native Peoples* (MIT Press 2009); Kai Schmidt-Soltau, 'Is the Displacement of People from Parks only 'Purported', or is it Real?' (2009) 7 *Conservation and Society* 46; Tor A. Benjaminsen and Ian Bryceson, 'Conservation, Green/Blue Grabbing and Accumulation by Dispossession in Tanzania' (2012) 39 *The Journal of Peasant Studies* 335; James Fairhead, Melissa Leach and Ian Scoones, 'Green Grabbing: a new appropriation of nature?' (2012) 39 *The Journal of Peasant Studies* 237. For an example in relation to the implementation of international environmental law, see e.g. Nicola Perry and Josephine Gillespie, 'Restricting Spatial Lives? The Gendered Implications of Conservation in Cambodia's Protected Wetlands' (2019) 2 *Environment and Planning E: Nature and Space* 73 and Gillespie (n 6), who discuss the links between displacement and implementation of the Ramsar Convention. See also Marie-Catherine Petersmann, *When Environmental Protection and Human Rights Collide* (Cambridge University Press 2022).

local communities. So-called ‘source communities’ are for example frequently overlooked in the legal framework guaranteeing the restitution of illicitly transported cultural property, despite their close cultural ties to certain objects.⁸ Similarly, the impact of heritage destruction upon local communities in the course of armed conflict and concomitant issues related to transitional justice – such as reparations for cultural destruction or restitution of cultural property looted in the course of the conflict or the safeguarding of intangible cultural heritage during wartime – is underrepresented in the international legal literature.⁹ Whilst the 2001 Underwater Cultural Heritage Convention prioritises *in-situ* conservation, meaning that it is less likely that the measures taken pursuant to the Convention will directly impact the daily lives of individuals, there are similarly also exceptions to this trend.¹⁰ One can think, for example, of coastal communities closely involved with the use of the ocean or the seabed,¹¹ archaeological sites located close to the coastline or in inland waters which continue to have cultural significance to certain (coastal) com-

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- 8 See e.g. Erin Thompson, ‘Whose Public? Whose Interest? Rethinking Merryman’s “The Public Interest in Cultural Property”’ (2017) 22 *Art, Antiquity and Law* 305; Evelien Campfens, ‘Cross-border Title Claims to Cultural Objects: Property or Heritage?’ (PhD thesis, Leiden University 2021); Bénédicte Savoy, *Africa’s Struggle for Its Art: History of a Postcolonial Defeat* (Princeton University Press 2022).
 - 9 Kalliopi Chainoglou, ‘The Protection of Intangible Cultural Heritage in Armed Conflict: Dissolving the Boundaries Between the Existing Legal Regimes?’ (2017) 2 *Santander Art and Culture Law Review* 109; Luke Moffett, Dacia Viejo Rose and Robin Hickey, ‘Shifting the Paradigm on Cultural Property and Heritage in International Law and Armed Conflict: Time to Talk about Reparations?’ (2020) 26 *International Journal of Heritage Studies* 619.
 - 10 Thijs J Maarleveld, ‘Drama, Place and Verifiable Link: Underwater Cultural Heritage, Present Experience and Contention’ in Laurier Turgeon (ed), *Spirit of Place: Between Tangible and Intangible Heritage* (Presses de L’Université Laval 2009); Jesse Ransley, ‘Maritime Communities and Traditions’ in Ben Ford, Donny L. Hamilton and Alexis Catsambis (eds), *The Oxford Handbook of Maritime Archaeology* (Oxford University Press 2012). See also Lucas Lixinski, Jane McAdam and Patricia Tupou, ‘Ocean Cultures, the Anthropocene and International Law: Cultural Heritage and Mobility Law as Imaginative Gateways’ (2023) 23 *Melbourne Journal of International Law* 1, who argue in favour of a reconceptualization of the oceans as ‘living cultural spaces’.
 - 11 See once again Lixinski, McAdam and Tupou’s argument (n 10) in favour of a reconceptualization of the ocean as a ‘living cultural space’ for maritime cultures; see also in relation to the deep seabed Elisa Morgera and Hannah Lily, ‘Public Participation at the International Seabed Authority: An International Human Rights Law Analysis’ (2022) 31 *RECIEL* 374, 378 (specifically fn 68 and 69). Compare also to communities which are economically dependent on underwater treasuring hunting; Lydia Barbash-Riley, ‘Using a Community-Based Strategy to Address the Impacts of Globalization on Underwater Cultural Heritage Management in the Dominican Republic’ (2015) 22 *Indiana Journal of Global Legal Studies* 201; or coastal communities reliant upon fishing, which can similarly impact underwater cultural heritage: Amanda M. Evans, Antony Firth and Mark Staniforth, ‘Old and New Threats to Submerged Cultural Landscapes: Fishing, Farming and Energy Development’ (2009) 11 *Conservation and Management of Archaeological Sites* 43.

munities,¹² or situations in which underwater cultural heritage has retained its importance across time to a particular community after having been lost at sea.¹³

Despite these connections, the chapter nonetheless limits itself to a discussion of the 1972 and 2003 Conventions for the reasons outlined above – while acknowledging that broader issues relating to the role of individuals and communities in international heritage governance represent a fruitful source of future enquiry for heritage scholars. The chapter begins by reflecting on the chosen methodological framework and its limitations. It subsequently provides an overview of existing literature on the impact of international heritage listing, before zooming in on the impact on specific sites or practices inscribed on the World Heritage List or the Representative List and Urgent Safeguarding List of the Intangible Cultural Heritage Convention. After a brief discussion of the (minimal) role of human rights considerations in the decisions of the World Heritage Committee and the Intergovernmental Committee, the chapter concludes.

5.1 METHODOLOGY

The following chapter adopts a multidisciplinary approach. The first limb of analysis consists of an examination of qualitative case studies on the impact of international heritage listing, with a particular focus on case studies of individual inscriptions on the World Heritage List and the Representative List and Urgent Safeguarding List of the Intangible Cultural Heritage Convention. These case studies predominantly stem from the work of anthropological and ethnographic scholars. Case studies were selected pursuant to a systematic literature review; relevant works which were identified in the course of the systematic literature review were subsequently supplemented by snowballing.¹⁴

12 While the scope of the Underwater Cultural Heritage Convention is limited to cultural heritage which has been under water 'for at least 100 years' (art 1(1)(a)), in future, this category will potentially also include cultural heritage located in inland waters which was submerged due to large-scale infrastructural projects, such as dams: see e.g. Paola Demattè, 'After the Flood: Cultural Heritage and Cultural Politics in Chongqing Municipality and the Three Gorges Areas, China' (2012) 9 *Future Anterior* 49; Pýnar Aykaç, 'Absent Presents: musealisation of the historic town of Hasankeyf as a manifestation of "Absent Heritage"' (2023) *Journal of Architectural Conservation* 1.

13 E.g. in the case of artefacts transported by colonial powers. See e.g. Amber Crossman Cheng, 'All in the Same Boat – Indigenous Property Rights in Underwater Cultural Heritage' (2010) 32 *Houston Journal of International Law* 695.

14 On the role of systematic literature reviews in legal research, see Marnix Snel and Janaina de Moraes, *Doing a Systematic Literature Review in Legal Scholarship* (Eleven Publishing 2018). For the systematic literature review, a search was carried out on the following databases: JSTOR, Project Muse, Web of Science, Cambridge Core, Oxford Scholarship, Taylor & Francis, Springer Online, and Sage Journals. Examples of search terms used included the phrases "case study", "case studies", "impact", "effect" or "implementation",

In order to retain the focus of the analysis, the case studies examined with respect to the World Heritage Convention were limited to 'cultural' or 'mixed' sites. This discussion is furthermore limited to those case studies which explicitly discuss the impact of listing on an individual element on the respective list, as opposed to general case studies documenting the implementation of the convention in domestic legal and political systems or articles reflecting broadly on the inscription rather than its effects 'on the ground'. The focus was thus on the impact of listing on individuals and local communities living in or around the heritage site or connected to a given manifestation of intangible cultural heritage, and how they were affected by the listing of the cultural heritage in question.¹⁵

The second limb of analysis consists of a complementary investigation into the decisions adopted by the World Heritage Committee and the Intergovernmental Committee with respect to the monitoring of specific international inscriptions, in order to confirm the findings of the collected case studies. It does so in order to isolate to what extent the negative effects of international heritage listing identified within fields such as archaeology, anthropology and more broadly critical heritage studies are indeed the result of 'demands' formulated at the international level, as well as to gauge how the conventions' intergovernmental bodies respond to negative developments at the local level with respect to the position of individuals and local communities. As such, this second element of the analysis departs from the perspective of traditional doctrinal legal methodology, and thereby seeks to enrich and provide new

paired with one of the following phrases using the AND connector: "intangible heritage", "Intangible Cultural Heritage Convention", "Convention for the Safeguarding of the Intangible Cultural Heritage", "World Heritage", "world cultural heritage", "World Heritage Convention" or "Convention Concerning the Protection of the World Cultural and Natural Heritage". As noted above, the articles found via these databases were subsequently supplemented by snowballing.

- 15 Several edited volumes have been published on this topic which collate experiences from across the globe, although the majority of the case studies examined below are individual journal articles. These edited volumes include Roger H. White and John Carman (eds), *World Heritage: Global Challenges, Local Solutions* (Archaeopress 2007); Laurajane Smith and Natsuko Akagawa (eds), *Intangible Heritage* (Routledge 2009); Regina F Bendix, Aditya Eggert and Arnika Peselmann (eds), *Heritage Regimes and the State* (Universitätsverlag Göttingen 2012); Amarewar Galla (ed) *World Heritage: Benefits Beyond Borders* (Cambridge University Press 2012); Michelle L. Stefano, Peter Davis and Gerard Corsane (eds), *Safeguarding Intangible Cultural Heritage*, vol 8 (Boydell and Brewer 2012); Nicolas Adell and others (eds), *Between Imagined Communities and Communities of Practice: Participation, Territory and the Making of Heritage* (Universitätsverlag Göttingen 2015); Christoph Brumann and David Berliner (eds), *World Heritage on the Ground: Ethnographic Perspectives* (Berghahn 2016); Helaine Silverman, Emma Waterton and Steve Watson (eds), *Heritage in Action: Making the Past in the Present* (Springer 2017); Michelle L Stefano and Peter Davis (eds), *The Routledge Companion to Intangible Cultural Heritage* (Routledge 2017); Natsuko Akagawa and Laurajane Smith (eds), *Safeguarding Intangible Heritage: Practices and Politics* (Routledge 2019); Petrillo (n 6). See also the following special issue: Michael Dylan Foster, 'UNESCO on the Ground' (2015) 52 *Journal of Folklore Research* 143.

perspectives to research carried out in other disciplines on the impact of international heritage listing.

A number of initial methodological qualifications must be made in this respect. The first limitation relates to the possibility of drawing conclusions for international heritage governance *as a whole* on the basis of a comparison of case studies drawn from a range of diverse local and national contexts, particularly given that these case studies are drawn from disciplines with different epistemological approaches. Numerous anthropologists have thus emphasised that while UNESCO's heritage regimes are global in reach as a result of their international legal status, their implementation differs from place to place and is dependent on already existing power dynamics and domestic heritage legislation. While the script of international heritage governance is the same everywhere, the ways in which this script is performed thus differ from place to place.¹⁶ As Bortolotto writes, 'global policies do not spread uniform structures ... rather, they are twisted by local ... structures.'¹⁷ As such, some authors explicitly argue that emphasis should not be placed on the commonalities of the implementation of international heritage treaties across internationally listed heritage, but rather on the need to '[call] attention to the ways in which the translation of UNESCO's policies into local contexts produces rather different effects'.¹⁸

This approach emphasises how international law is 'lost in translation',¹⁹ and how a seemingly universal rule is 'domesticated' and thereby changed by already existing domestic politics, bureaucratic institutions and cultures, and legislation.²⁰ In this view, the implementation of international law in domestic contexts is above all a contingent process.²¹ As Brumann notes, this perspective is derived in particular from the methodological viewpoints of anthropologists, who assume that 'localities ... retain their own social dynamics even in times of globalization, shot through with wider connections and force

16 Maria Gravari-Barbas, Mike Robinson and Laurent Bourdeau, 'Tourism at World Heritage Sites: Community Ambivalence' in Laurent Bourdeau, Maria Gravari-Barbas and Mike Robinson (eds), *World Heritage Sites and Tourism: Global and Local Relations* (Routledge 2017) 1.

17 Chiara Bortolotto, 'The French Inventory of Intangible Cultural Heritage: Domesticating a Global Paradigm into French Heritage Regime' in Regina Bendix, Aditya Eggert and Arnika Peselmann (eds), *Heritage Regimes and the State* (Universitätsverlag Göttingen 2012) 277.

18 De Cesari (n 4) 402-3. See e.g. Adam M. Trau, Chris Ballard and Meredith Wilson, 'Bafa Zon: Localising World Heritage at Chief Roi Mata's Domain, Vanuatu' (2012) 20 *International Journal of Heritage Studies* 86, in relation to the localisation of the concept of the 'buffer zone' in Vanuatu.

19 De Cesari (n 4) 404-5.

20 Regina Bendix, Aditya Eggert and Arnika Peselmann, 'Introduction: Heritage Regimes and the State' in Regina Bendix, Aditya Eggert and Arnika Peselmann (eds), *Heritage Regimes and the State* (Universitätsverlag Göttingen 2012) 12.

21 De Cesari (n 4) 404-5, referring to the work of Bortolotto, Graezer Bideau and Tauschek.

fields but not entirely reducible to these.²² Some anthropologists thus call for recognition of the particularity of each situation under study.²³

However, this is not to say that international listing has no effect at all on heritage practices ‘on the ground’: as Hafstein argues, the successful adoption across the globe of ‘intangible cultural heritage’ as a phrase – effectively unknown prior to the 1990s – illustrates that there is some utility in comparison. In this sense, international legal regimes act as ‘catalysts’, based on which people around the world now ‘make claims that are recognizable with reference to an international regime and validated by a proliferating production of expert knowledge.’²⁴ As will be seen from the case studies below, it is precisely when international heritage status is used as a ‘trump card’ to justify overruling the legal status quo where the potential for problems arises, demonstrating the necessity of the present analysis.

Moreover, insights from scholars working in empirical legal studies on concepts such as norm diffusion and norm localisation drive home the argument that it is useful to examine international law as a cohesive object of study, despite the manifold ways in which it is implemented domestically.²⁵ This is arguably particularly the case where there is a constant interplay between the domestic and international spheres, as is the case for treaties such as the World Heritage Convention and the Intangible Cultural Heritage Convention which are characterised by active intergovernmental oversight. In situations such as these, local, regional, national and international actors each draw upon the power of an international heritage inscription in their own way, but are guided in their actions by standards set out at the international level within the text of the respective convention and its operational guidelines.

As such, ultimately the goal of the chapter is to identify situations in which the international governance of cultural heritage has negatively impacted individuals and local communities, either due to action taken by domestic

22 Christoph Brumann and David Berliner, ‘Introduction: UNESCO World Heritage – Grounded?’ in Christoph Brumann and David Berliner (eds), *World Heritage on the Ground: Ethnographic Perspectives* (Berghahn 2016) 2.

23 Kristin Kuutma, ‘Between Arbitration and Engineering: Concepts and Contingencies in the Shaping of Heritage Regimes’ in Regina Bendix, Aditya Eggert and Arnika Peselmann (eds), *Heritage Regimes and the State* (Universitätsverlag Göttingen 2012) 33. For a similar emphasis on the particularity of each case study, see Foster (n 15) 145.

24 Valdimar Tr Hafstein, *Making Intangible Heritage: El Condor Pasa and Other Stories from UNESCO* (Indiana University Press 2018) 12.

25 See e.g. Andrew P. Cortell and James W. Jr. Davis, ‘How Do International Institutions Matter? The Domestic Impact of International Rules and Norms’ (1996) 40 *International Studies Quarterly* 451; Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press 1999). More recently, see e.g. Koen de Feyter and others (eds), *The Local Relevance of Human Rights* (Cambridge University Press 2011); Gregory Shaffer and Tom Ginsburg, ‘The Empirical Turn in International Legal Scholarship’ (2012) 106 *AJIL* 1; Lisbeth Zimmermann, *Global Norms with a Local Face: Rule-of-Law Promotion and Norm-Translation* (Cambridge University Press 2017).

actors that was not subsequently corrected by the conventions' monitoring bodies, or directly due to requests for action from these monitoring bodies to domestic authorities. The methodological starting point is thus not that the findings summarised below are generalisable to international heritage governance as a whole, but rather that synthesising these results can provide insight into the nature and extent of the problem.²⁶ The chapter is thus chiefly interested in pinpointing how cultural heritage law is understood and acted upon by local actors. Doing so allows us to open up ways in which the sole common factor across these diverse locales (UNESCO's heritage conventions and their governing bodies) could adjust their behaviour accordingly.

A second limitation relates to the possibility of using case studies from disciplines such as anthropology to draw conclusions on the nature of international legal regimes. Given that these case studies have been carried out by scholars from outside the legal tradition, they generally pay relatively little attention to the impact of international listing over that of pre-existing domestic heritage protection laws.²⁷ Given that it is not possible to be inscribed on either the World Heritage List or the Representative List of the Intangible Cultural Heritage of Humanity without first being included on a tentative national list, it is thus important to emphasise that many of the consequences of international heritage listing described below could also potentially be ascribed to already existing domestic heritage laws.²⁸ Furthermore, as fieldwork that specifically focuses on the impact of international heritage listing can typically only commence after a site or practice has been included on the World Heritage or Representative List, it is difficult to isolate the impact of international listing.²⁹ Future research could potentially circumvent this by focussing on the legal landscape which existed prior to international listing.³⁰

For case studies which focus on eviction as a potential consequence of international heritage listing, this legal landscape should ideally also include

26 Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 934-5.

27 Although scholars have increasingly focused on this in recent years.

28 World Heritage Convention, art 11(1); World Heritage Convention Operational Guidelines, para 63; Intangible Heritage Convention, arts 11(b), 12; Intangible Cultural Heritage Convention, Operational Directives, para 2.

29 There are, however, some examples of case studies which commenced prior to the cultural heritage being inscribed at the international level or which explicitly follow the international listing process: see e.g. Anne-Laura Kraak, 'Heritage Destruction and Cultural Rights: Insights from Bagan in Myanmar' (2018) 24 *International Journal of Heritage Studies* 998.

30 Brumann and Berliner, 'Introduction: UNESCO World Heritage – Grounded?' (n 22) provocatively suggest that the changes wrought by World Heritage listing are the greatest outside of Europe, given that in Europe 'World Heritage often add only rather thin layers to long-established national conservation frameworks' (at 14).

a description of land tenure as it existed at the time of inscription.³¹ Almost all of the case studies examined below neglect to mention whether evicted residents were in fact the owners of the land or property which was expropriated, or whether their property had been constructed illegally.³² These issues are crucial in order to provide a holistic analysis of whether eviction or expropriation is in fact contrary to international human rights norms.³³ This demonstrates a clear gap in the literature in which legal research would provide added value over existing research. This issue also illustrates a broader blind spot within this particular body of literature: as has been pointed out previously by legal scholars, there is generally a lack of analysis within heritage studies and other related disciplines of the potential human rights implications of heritage management.³⁴

It is precisely for this reason that the case study analysis within the present chapter is supplemented by an analysis of the decisions adopted by the governing bodies of the World Heritage Convention and the Intangible Cultural Heritage Convention, both with respect to the inscriptions discussed in the case studies analysed, as well as with respect to other inscriptions with potential impact on individuals and local communities. In doing so, it becomes possible to tentatively isolate the impact of the conventions and the decision-making processes of their intergovernmental bodies from the already existing legal and political landscape.

31 For an exemplary analysis of changes over time in a World Heritage site, see Uditha Niroshini Jinadasa, 'Changes in the Cultural Landscape and their Impacts on Heritage Management: A Study of Dutch Fort at Galle, Sri Lanka' (DPhil thesis, Leiden University 2020).

32 This issue is further complicated by the fact that it is difficult to identify a holistic notion of 'legal' land tenure or property rights across all States Parties of the cultural conventions – further drawing into question the rather facile use in particular of the World Heritage Committee of identifying certain constructions as 'illegal'.

33 However, see Kirsty Gover, 'REDD+, Tenure and Indigenous Property: the Promise and Peril of a "Human Rights-based Approach"' in Christina Voigt (ed), *Research Handbook on REDD+ and International Law* (Elgar 2016), who points out that adopting a human rights-based approach to issues of land tenure can potentially disproportionately affect groups with historic claims to land who do not strictly speaking have 'legal' land tenure in contemporary domestic legal systems, such as Indigenous peoples; concepts such as ownership or property rights will thus not always form the appropriate starting point in these contexts in order to achieve just outcomes.

34 Lixinski, 'Between Orthodoxy and Heterodoxy: the Troubled Relationships Between Heritage Studies and Heritage Law' (n 5); Andrea Durbach and Lucas Lixinski, 'Introduction' in Andrea Durbach and Lucas Lixinski (eds), *Heritage, Culture and Rights: Challenging Legal Discourses* (Hart 2017).

5.2 THE IMPACT OF INTERNATIONAL HERITAGE LISTING

A key phrase used to describe the results of inscription is 'heritagisation', a catchword for the gentrification and ossification of cultural sites pursuant to their formal recognition as 'heritage'.³⁵ A wide range of phenomena are gathered under the heading of heritagisation, 'including alienation, fossilization, decontextualization, homogenization, commodification and standardization'.³⁶ While 'heritagisation' is not a negative process in and of itself, it is often connected to the privileging of expert opinion and the disconnection of local communities from the heritage with which they have had historic ties, as the management of the site or practice passes from the community to experts, the state, and the market.³⁷

While these trends can be observed in relation to domestic heritage listing, they are also closely tied to the invocation of universal heritage value, which is seen to erase the local heritage value of the site. Such erasures are intensified if the original values of the site relate to ritual or religious uses of the heritage, or if it supports the livelihood of the local population, whether in the form of subsistence or economic profit.³⁸ They become particularly problematic if the local community is a minority or Indigenous group.³⁹ At its most extreme, heritagisation culminates in the eviction of residents or other forms of 'displacement and dispossession'.⁴⁰ The result of such displacement can mean the erasure of the local – human – contexts that maintain heritage.

Beyond the identification of heritagisation as a dominant trend, countless authors emphasise that the international listing of a heritage site invariably 'empowers the state'.⁴¹ This empowerment is traced to several different

35 De Cesari (n 4) 410. Also known as 'patrimonialisation' in French. The phrase 'heritagisation' is usually applied in relation to tangible cultural heritage, whereas 'folklorisation' is applied to intangible cultural heritage.

36 Alexandra Denes, 'Folklorizing Northern Khmer Identity in Thailand: Intangible Cultural Heritage and the Production of "Good Culture"' (2015) 30 *Sojourn: Journal of Social Issues in Southeast Asia* 1, 2.

37 Oscar Salemink, 'Described, Inscribed, Written Off: Heritagisation as (Dis)connection' in Philip Taylor (ed), *Connected and Disconnected in Viet Nam: Remaking Social Relations in a Post-socialist Nation* (ANU Press 2016) 314. See also Laurajane Smith, *The Uses of Heritage* (Routledge 2006) on the privileging of expert perspectives through the 'Authorised Heritage Discourse'.

38 Jasper Chalcraft, 'Decolonizing the Site: The Problems and Pragmatic of World Heritage in Italy, Libya and Tanzania' in Christoph Brumann and David Berliner (eds), *World Heritage on the Ground: Ethnographic Perspectives* (Berghahn 2016) 240.

39 Bahar Aykan, 'How Participatory is Participatory Heritage Management? The Politics of Safeguarding the Alevi Semah Ritual as Intangible Heritage' (2014) 20 *International Journal of Cultural Property* 381, 382.

40 De Cesari (n 4) 410; Mary N. Taylor, 'Intangible Heritage Protection and the Cultivation of a Universal Chain of Equivalency' (2016) 22 *Nationalism and Ethnic Politics* 27, 44.

41 De Cesari (n 4) 400. See also Brumann and Berliner, 'Introduction: UNESCO World Heritage – Grounded?' (n 22) 27.

sources. At the level of domestic law, De Cesari writes, 'UNESCO's action often ends up reinforcing the power and reach of the nation-state and its bureaucracy, and its ability to shape people's lives through heritage',⁴² despite the organisation's attempts to emphasise the importance of community participation in heritage management. This is because these regimes are inherently structured around an 'expansion of the cultural domains under the management of the state'.⁴³ In other words, the transformation of a cultural practice or property into heritage 'implies that domains of people's lives previously unregimented now pass under the state's purview'.⁴⁴ This can entail that the ways in which individuals and local communities use their heritage are modified and monitored by the state.⁴⁵

At the political level, heritage regimes are faulted for their role in reinforcing 'stereotypical, hegemonic notions of national identity and national cultures'.⁴⁶ As numerous scholars argue, the process of heritage formation is selective; the path by which certain forms of culture are selected and transformed into heritage 'is shaped by the political demands of the present'.⁴⁷ Even though UNESCO's heritage regimes disavow nationalism, the majority of states have strategic goals which motivate their participation in these regimes.⁴⁸ These goals can range from the benign to the nefarious: in the case of the latter, heritage listing can be abused by nondemocratic states in order to exercise control over minority groups by symbolically claiming the group's heritage as belonging to the nation, and thereby shaping it in a way which is desirable to political elites.⁴⁹ This has important implications for the (lack of) potential of successful community participation. Simultaneously, critical heritage scholars are also quick to emphasise that the act of heritage listing cannot – by its very nature – be neutral or apolitical: it will always involve a process of selecting and promoting certain aspects of cultural life whilst excluding others.⁵⁰

A further fault which is often found with regards to contemporary heritage regimes is their perspective of communities as monolithic entities devoid of

42 De Cesari (n 4) 401-2.

43 Ibid 402.

44 Ibid 407.

45 Ibid 409.

46 Ibid 407; see also Walter Leimgruber, 'Switzerland and the UNESCO Convention on Intangible Cultural Heritage' (2010) 47 *Journal of Folklore Research* 161, 169; Aykan (n 39) 384; Denes (n 36) 1.

47 Bahar Aykan, "'Patenting" Karagöz: UNESCO, Nationalism and Multinational Intangible Heritage' (2015) 21 *International Journal of Heritage Studies* 949, 950-1.

48 Bendix, Eggert and Peselmann (n 20) 18-9.

49 Aykan, 'How Participatory is Participatory Heritage Management? The Politics of Safeguarding the Alevi Semah Ritual as Intangible Heritage' (n 39) 382; Hafstein (n 24) 48-9.

50 Barbara Kirshenblatt-Gimblett, 'Intangible Heritage as Metacultural Production' (2004) 56 *Museum International* 52; Hafstein (n 24) 2.

differences *within* the group.⁵¹ Like any group of individuals, 'communities are run through with divergent interests, anger, boredom, fear, happiness, loneliness, frustration, envy, wonder and a range of either motivating or disruptive energies.'⁵² Heritage regimes can reinforce the position of certain communities within the state, and the leaders within them; depending on the nature of existing structures for group recognition, this can have problematic results.⁵³ As Noyes argues, due to the immense global scale of international heritage regimes '[s]upervision from above ... will not be close, informed, or ongoing'.⁵⁴ As such, it is more likely than not that the individuals or groups who present themselves as representatives of the community will be accepted at face value.⁵⁵ These are likely to be individuals who already possess some form of prestige within their communities, thereby further concentrating power (and the resources that flow from it) in the hands of a select few.⁵⁶ It is for this reason that some authors argue that the increasing emphasis on community participation in heritage governance is antidemocratic: if the 'community' gains legally embedded privileges in the management of cultural heritage, this can run counter to already existing democratic procedures (and will arguably not be able to replace the absence of these procedures in non-democratic governments).⁵⁷

However, authors also highlight that the application of international heritage law in local contexts is not necessarily a hegemonic, one-way process.⁵⁸ After all, states are not the only actors that deploy heritage strategically: individuals and local communities also often consciously decide to employ the language of heritage protection in order to achieve their goals.⁵⁹ In a more positive sense, De Cesari emphasises, '[s]peaking the global language of heritage bestows on practitioners a sense of being part of a broader transnational community with which they interact as equals'.⁶⁰ This perspective can be particularly appealing to Indigenous peoples and other historically marginalised groups. In this understanding, heritage recognition offers these

51 Emma Waterton and Laurajane Smith, 'The Recognition and Misrecognition of Community Heritage' (2010) 16 *International Journal of Heritage Studies* 4, 10; Gravari-Barbas, Robinson and Bourdeau (n 16) 8.

52 Waterton and Smith (n 51) 8.

53 Bendix, Eggert and Peselmann (n 20) 18-19.

54 Dorothy Noyes, 'The Judgment of Solomon: Global Protections for Tradition and the Problem of Community Ownership' in *Humble Theory* (Indiana University Press 2016) 348.

55 Ibid.

56 Waterton and Smith (n 51) 10; Noyes (n 54) 348; Christina Maags, 'Struggles of Recognition: Adverse Effects of China's Living Human Treasures Program' (2018) 25 *International Journal of Heritage Studies* 780 2, 7.

57 Ellen Hertz, 'Bottoms, Genuine and Spurious' in Nicolas Adell and others (eds), *Between Imagined Communities and Communities of Practice* (Universitätsverlag Göttingen 2015) 52-3.

58 De Cesari (n 4) 405-6.

59 Ibid.

60 Ibid.

groups an 'opportunity for identity reconstruction and representation in a world that has consistently silenced them'.⁶¹

International heritage recognition can also help to revitalise practices which had previously been side-lined or economically unattractive, thereby strengthening the community's feeling of self-belief and sense of identity. In the case of tangible heritage, it will often invariably improve the physical fabric of the heritage, by freeing up resources, expertise and attention for its conservation.⁶² Both sets of changes – at the level of tangible and intangible heritage – in turn transform the relationship of local residents to 'their' heritage: the fact that it has been recognised internationally affects them at an emotional level, 'by appealing to their civic duty and moral responsibility' to ensure that their heritage is transmitted to future generations.⁶³ Listing brings with it a sense of pride, and '[elicits] the self-recognition of communities as the inheritors and custodians of their own heritage'.⁶⁴ As a result, heritagisation is far from a wholly negative process: local communities often appreciate the results of heritage listing, even if the trade-off might be changes in traditional practices and uses of that heritage.⁶⁵

5.3 IMPACT OF THE 1972 WORLD HERITAGE CONVENTION

The World Heritage Convention entered into force in 1975. As a result, the Convention has accumulated almost 50 years of state practice across 1157 World Heritage sites located in 167 states. Of these, 900 sites are cultural, 218 are natural and 39 sites are mixed. A significant body of literature has sought to empirically assess the impact of the inclusion of a site on the World Heritage List. Numerous quantitative empirical studies, in particular within tourism studies, thus seek to analyse whether inclusion on the List is beneficial for tourism,⁶⁶ or is likely to raise the level of development in the area or country

61 Rosabelle Boswell, 'Making the Past Pay? Intangible (Cultural) Heritage in South Africa and Mauritius' in Michelle L Stefano and Peter Davis (eds), *The Routledge Companion to Intangible Cultural Heritage* (Routledge 2017) 99.

62 Although what constitutes 'improvement' is of course culturally contingent.

63 Hafstein (n 24) 106.

64 Ibid 107.

65 Amy Cox Hall, 'Macchu Picchu: An Andean Utopia for the Twenty-First Century?' in Laurent Bourdeau, Maria Gravari-Barbas and Mike Robinson (eds), *World Heritage Sites and Tourism: Global and Local Relations* (Routledge 2017) 41.

66 See e.g. Roberto Cellini, 'Is UNESCO recognition effective in fostering tourism? A comment on Yang, Lin and Han' (2011) 32 *Tourism Management* 452; Chia-Hui Huang, Jen-Ruey Tsaur and Chih-Hai Yang, 'Does World Heritage List Really Induce More Tourists? Evidence from Macau' (2012) 33 *Tourism Management* 1450; Yu-Wen Su and Hui-Lin Lin, 'Analysis of international tourist arrivals worldwide: The role of world heritage sites' (2014) 40 *Tourism Management* 46; Yang Yang, Lan Xue and Thomas E. Jones, 'Tourism-enhancing Effect of World Heritage Sites: Panacea or Placebo? A Meta-analysis' (2019) 75 *Annals of Tourism Research* 29.

in which a site is located.⁶⁷ A further body of empirical research seeks to address the impact of World Heritage listing at the local level, in order to capture the intricacies of implementing the Convention. While this body of literature also includes quantitative empirical work,⁶⁸ the following section focuses on qualitative empirical studies carried out by archaeologists, anthropologists, ethnographers and (social) geographers.⁶⁹

5.3.1 Gentrification and resettlement

One factor that most, if not all, authors identify is an increase in the number of tourists at a site following inscription. Such an increase in tourism does not necessarily always have negative outcomes for local communities.⁷⁰ To the contrary: residents can often benefit financially from inscription, for

67 See e.g. Devi Roza Kausar and Yoshiaki Nishikawa, 'Heritage Tourism in Rural Areas: Challenges for Improving Socio-economic Impacts' (2010) 15 *Asia Pacific Journal of Tourism Research* 195; Brian Logan VanBlarcom and Cevat Kayahan, 'Assessing the Economic Impact of a UNESCO World Heritage Designation' (2011) 6 *Journal of Heritage Tourism* 143; Christian M Rogerson and Clinton D van der Merwe, 'Heritage Tourism in the Global South: Development Impacts of the Cradle of Humankind World Heritage Site, South Africa' (2016) 31 *Local Economy* 234; Josephine Caust and Marilena Vecco, 'Is UNESCO World Heritage Recognition a Blessing or Burden? Evidence from Developing Asian Countries' (2017) 27 *Journal of Cultural Heritage* 1.

68 See e.g. Lorraine Nadia Nicholas, Brijesh Thapa and Yong Jae Ko, 'Residents' Perspectives of a World Heritage Site: The Pitons Management Area, St. Lucia' (2009) 36 *Annals of Tourism Research* 390; Roselyne N. Okech, 'Socio-cultural Impacts of Tourism on World Heritage Sites: Communities' Perspective of Lamu (Kenya) and Zanzibar Islands' (2010) 15 *Asia Pacific Journal of Tourism Research* 339; Takamitsu Jimura, 'The Impact of World Heritage Site Designation on Local Communities – A Case Study of Ogimachi, Shirakawamura, Japan' (2011) 32 *Tourism Management* 288; Kyungmi Kim, Muzaffer Uysal and M. Joseph Sirgy, 'How Does Tourism in a Community Impact the Quality of Life of Community Residents?' (2013) 36 *Tourism Management* 527; Ming Ming Su and Geoffrey Wall, 'Global-local Relationships and Governance Issues at the Great Wall World Heritage Site, China' (2012) 20 *Journal of Sustainable Tourism* 1067; Ming Ming Su and Geoffrey Wall, 'Community Involvement at Great Wall World Heritage Sites, Beijing, China' (2015) 18 *Current Issues in Tourism* 137; Christina Geng-qing Chi, Ruiying Cai and Yongfen Li, 'Factors Influencing Residents' Subjective Well-being at World Heritage Sites' (2017) 63 *Tourism Management* 209; Ralf Buckley and others, 'World Heritage Tourism Triggers Urban-Rural Reverse Migration and Social Change' (2019) 59 *Journal of Travel Research* 559; Shuhaida Md Noor and others, 'Inscription of a Destination as a World Heritage Site and Residents' Perceptions' (2019) 24 *Asia Pacific Journal of Tourism Research* 14; Kokel Melubo and Brent Lovelock, 'Living Inside a UNESCO World Heritage Site: The Perspective of the Maasai Community in Tanzania' (2019) 16 *Tourism Planning & Development* 197.

69 See e.g. Bendix, Eggert and Peselmann; Laurent Bourdeau, Maria Gravari-Barbas and Mike Robinson (eds), *World Heritage, Tourism and Identity: Inscription and Co-production* (Routledge 2015); Brumann and Berliner, *World Heritage on the Ground: Ethnographic Perspectives* (n 15); Laurent Bourdeau, Maria Gravari-Barbas and Mike Robinson (eds), *World Heritage Sites and Tourism: Global and Local Relations* (Routledge 2017).

70 Gravari-Barbas, Robinson and Bourdeau (n 16) 2-3.

example by increased business and sales, by being able to command a higher selling price for their house due to the appreciation of the land it is situated on, or by gaining employment in the tourism sector.⁷¹ World Heritage protection can also lead to an improvement in local infrastructure and public areas, particularly in historic urban landscapes.⁷² At an emotional level, World Heritage status is often a source of pride for residents.⁷³

However, the economic benefits of inscription are not always spread equally across the population. In the case of urban World Heritage sites, rising house prices might simply mean that residents move to other low-income areas of the city, often further removed from the new amenities and services available to them in the historic city centre. Similarly, rising house prices might be beneficial to those residents who own property; for those renting, it will mean that rent will quickly become unaffordable to residents and small businesses.⁷⁴ As such, inscription is unlikely to deliver the financial benefits of tourism to all members of the local community.

Tourism can also lead to the replacement (or displacement) of original residents by new owners through the construction of hotels or other amenities catering to tourists, resulting in the 'disappearance of traditional functions in favour of new services for visitors ... [and] impact on traditional ways of life and local communities'.⁷⁵ At a metaphysical level, the environmental changes that result from tourism can thus lead to a loss of the values originally ascribed to the site and it becoming 'frozen' in an idyllic vision of the past, accompanied by the 'spatial cleansing' of elements deemed antithetical to its heritage status.⁷⁶ The heritage site is transformed from a place to live to a site of tourism, thereby excluding original residents from areas which had previously formed an integral part of their day-to-day lives and traditions.⁷⁷

71 Alfredo Conti, 'The Impact of Tourism on Latin American World Heritage Towns' in Laurent Bourdeau, Maria Gravari-Barbas and Mike Robinson (eds), *World Heritage Sites and Tourism: Global and Local Relations* (Routledge 2017) 182; Ruth Foo and Gengswari Krishnapillai, 'Preserving the Intangible Living Heritage in the George Town World Heritage Site, Malaysia' (2019) 14 *Journal of Heritage Tourism* 358, 360-1 mention a 200-400% increase in the case of George Town, part of the *Melaka and George Town World Heritage Site*.

72 Conti (n 71) 180.

73 Owe Ronström, 'Consequences of World Heritage Production: the Heritage Town' in Herdis Hølleland and Steinar Solheim (eds), *Between Dream and Reality: Debating the Impact of World Heritage Listing* (Primitive tider 2014) 16.

74 Foo and Krishnapillai (n 71) 363.

75 Conti (n 71) 175, 181; Foo and Krishnapillai (n 71) 358-362. See also, in the case of *Hoi An Ancient Town* (1999), Nir Avieli, 'The Rise and Fall (?) of Hoi An, a UNESCO World Heritage Site in Vietnam' (2015) 30 *Journal of Social Issues in Southeast Asia* 35.

76 A term borrowed from Michael Herzfeld, 'Spatial Cleansing: Monumental Vacuity and the Idea of the West' (2006) 11 *Journal of Material Culture* 127. See e.g. in relation to the *City of Quito* (1978): Diana Burgos-Vigna, 'Quito, a World Heritage City or a City to Live In?' (2017) 21 *City* 550, 553.

77 Gravari-Barbas, Robinson and Bourdeau (n 16) 6-7.

Somewhat surprisingly, while the issue of gentrification is generally widely acknowledged as a potential consequence of the heritagisation process, particularly in urban environments, the World Heritage Committee only rarely explicitly addresses gentrification.⁷⁸ In addition, for those sites where the Committee has discussed the issue of gentrification, it generally does not extensively address the consequences of such gentrification or return to it in subsequent discussions with the State Party during periodic reporting or reactive monitoring processes. While the Committee has often addressed issues related to tourism with respect to numerous sites on the List,⁷⁹ it usually focuses on the impact of tourism on the OUV of the site and not on local communities as such.⁸⁰ Both trends indicate a problematic lack of monitoring of the impacts of gentrification and tourism at World Heritage sites on individuals and local communities.

An example in point can be found by examining the changes over time at the World Heritage site of *Old Havana and its Fortification System* (1982), in particular at the Plaza Vieja (Old Square) at the heart of the site. The Plaza Vieja was historically a low-income residential area; upon the inclusion of Havana on the World Heritage List, local authorities decided that it was necessary to renovate the buildings surrounding the square in order to preserve their historical and architectural value. The imposition of new zoning laws

78 Firstly in relation to the *City of Cuzco* (Peru, 1983): the Committee requested Peru to update its management plan to include 'provisions to address urban degradation and gentrification': Decision 35 COM 7B.133 (2011) para 4(a). Secondly, in relation to the *Port, Fortresses and Group of Monuments, Cartagena* (Colombia, 1984): the Committee requested Colombia 'to address the concerns of gentrification and changing social dynamics, public access to the property, and social appropriation of heritage' in its management and protection plan: Decision 43 COM 7B.99 (2019) para 7. This request was reiterated in the following year: Decision 44 COM 7B.167 (2020) para 9. And finally, in relation to *As-Salt – The Place of Tolerance and Urban Hospitality* (Jordan, 2021): the Committee recommended after the inscription of the site that Jordan should 'give consideration to ... [w]orking with communities and local authorities to develop strategies, tools, and incentives to maintain the cultural practices of the city and avoid the possible gentrification of the historic urban core': Decision 44 COM 8B.34 (2021) para 4(m). The World Heritage Centre and Advisory Bodies have raised issues relating to gentrification on a number of other occasions, particularly in relation to the *Archaeological Site of Panamá Viejo and Historic District of Panamá*, see e.g.: World Heritage Committee, State of Conservation of World Heritage Properties Inscribed on the World Heritage List (1 June 2012) WHC-12/36.COM/7B.Add, 206.

79 See e.g. https://whc.unesco.org/en/soc/?action=list&id_threats=118 for an overview of SOC reports discussed by the Committee in relation to the impact of tourism as a potential threat on the OUV of World Heritage sites. See also the adoption of the World Heritage and Sustainable Tourism Programme in 2012: World Heritage Committee, World Heritage Tourism Programme (11 May 2012) WHC-12/36.COM/5E.

80 Of all 716 SOC reports discussed by the Committee relating to the threat posed by tourism as of 2023, only 147 explicitly mention (local) communities: https://whc.unesco.org/en/soc/?action=list&id_threats=118&fullsearch=communities+OR+community. However, see WHC-12/36.COM/5E (n 79) paras 7-12 acknowledging that tourism can 'have a devastating effect on fragile environments and local communities'.

resulted in the gentrification of the area through the promotion of (foreign) tourism and the resettlement of original residents.⁸¹ As is the case for many heritage sites, designation of the houses on the square as both national and universal heritage extended the control of the state over them, given that it paved the way for (the threat of) expropriation.⁸² These issues largely do not feature in the decisions of the World Heritage Committee concerning the site;⁸³ nor do the contributions of (earlier) residents to the living heritage value of the site feature in the retrospective Statement of OUV which was adopted in 2013.

Similar problems occurred after the inscription of the *Old Town of Lijiang* site in China (1997), as the once-remote city experienced a massive influx of tourism. This had a particular impact on members of the Naxi ethnic group, who constituted more than fifty percent of the original residents of the town. Living in Lijiang was no longer a desirable prospect for the Naxi, due to the increase in tourism following inscription and the measures taken by the local government to revise the city to make it look more 'authentically' historic and the rising cost of living.⁸⁴ Local businesses disappeared in favour of services catering towards the more lucrative tourist market, with 70% of shops in Lijiang solely catering towards the tourist market as of 2010.⁸⁵ The result was a steady process of gentrification, leading many Naxi to decide to resettle at the edge of the city. The local community was moreover barely represented in decision-making processes concerning the site, with the state's authority remaining predominant.⁸⁶

This process did not go without comment from the advisory bodies and the World Heritage Centre, which explicitly recommended that the management of the site should take into account the intangible heritage values of the Naxi which are associated with the site.⁸⁷ Despite these signals, the revised

81 Adelheid Pichler, 'Choice and Heritage Regimes in the "Making of Old Havana"' in Regina F. Bendix, Aditya Eggert and Arnika Peselmann (eds), *Heritage Regimes and the State* (Universitätsverlag Göttingen 2012) 40, 44.

82 Ibid 47.

83 With the exception of an emergency international assistance request which was granted in 1993 in order to provide funds for the reconstruction of residential buildings which had been damaged during a hurricane: World Heritage Committee, Decision 17 COM X (1993).

84 Xiaobo Su, "'It Is My Home. I Will Die Here': Tourism Development and the Politics of Place in Lijiang, China' (2012) 94 *Geografiska Annaler* 31; Yujie Zhu, 'Heritage Making in Linjiang: Governance, Reconstruction and Local Naxi Life' in Christoph Brumann and David Berliner (eds), *World Heritage on the Ground: Ethnographic Perspectives* (Berghahn 2016) 82-3.

85 Zhu (n 84) 86.

86 Xiaobo Su, 'Urban Conservation in Lijiang, China: Power Structure and Funding Systems' (2010) 27 *Cities* 164.

87 State of Conservation of World Heritage Properties Inscribed on the World Heritage List (31 May 2007) WHC-07/31.COM/7B.Add, at 42; JING Feng and Yukio Nishimura, Mission Report, UNESCO-WHC ICOMOS Reactive Monitoring Mission to the Old Town of Lijiang, China (January 2008) at 26; World Heritage Committee, Decision 32 COM 7B.67 (2009).

statement of OUV which was adopted by the World Heritage Committee in 2013 still largely emphasised the physical aspects of the site, thereby implicitly giving an imprimatur to the actions of local authorities which predominantly emphasised the physical fabric of the site. Moreover, despite receiving signals of the endangerment of the living heritage values of the site, the Committee has not adopted any decisions in relation to Lijiang since 2013. All in all, the listing of Lijiang thus largely benefited outside actors and elites within and around Lijiang, marginalising the role of the Naxi in the city and leading to the loss of the living cultural heritage of the site through the displacement of its residents, with little to no comment from the Committee.⁸⁸

5.3.2 Restrictions of property rights

Another near-universal result of World Heritage listing is the restriction of property rights within the site boundaries. A fitting example is the site of *Kalwaria Zebrzydowska* (1999) in Poland, a pilgrimage park housing not only a religious complex and monastery in use to this day, but also a small town within the park which continues to be inhabited. As a result, a significant part of the land within the park is privately owned.⁸⁹ Private owners have subsequently faced restrictions with regards to their ability to construct new buildings upon their land, leading to tensions between the management authorities and local residents.⁹⁰ Upon inscription, ICOMOS had in fact recommended that the State Party should restore 'full property rights' over the site to the local monastery in order to prevent inappropriate alterations to the physical fabric of the site.⁹¹ While the State Party did not implement this recommendation, it is nonetheless indicative of the potentially far-reaching impact that international listing can have upon pre-existing property relations at World Heritage sites. Perhaps more problematic is the fact that the site has only been the subject of one periodic report by the State Party since its inscription in 1999; this report indicated housing as a significant threat to the OUV of the site and noted the absence of local communities in the management

88 Zhu (n 84) 93-4.

89 Katarzyna Zalaszińska and Katarzyna Piotrowska, 'Kalwaria Zebrzydowska Cultural Landscape' (2012) 18 *International Journal of Heritage Studies* 307, 311.

90 Ibid 312-3.

91 ICOMOS moreover recommended to refer the nomination back to Poland due to the absence of a management plan: ICOMOS, *Evaluations of Cultural Properties* (1999) WHC-99/CONF.209/INF.7, 152. The Committee nonetheless went ahead with inscription: World Heritage Committee, Decision 23 COM VIII.C1 (1999).

of the site.⁹² In spite of these warning signals, the site has not been subject to any discussion by the Committee since its inscription.

While the Convention notes that the recognition of the duty of the international community to cooperate for the protection of World Heritage is 'without prejudice to property right provided by national legislation'⁹³ – and as such does not prescribe how and to what extent such property rights will be affected or what form the required legal measures adopted by the State Party for the protection of World Heritage should take⁹⁴ – it is unquestionable that decisions and recommendations made at the international level shape local property relations. The legislative measures adopted by States parties with respect to specific World Heritage sites are thus subject to monitoring by the Convention's governing bodies in the context of periodic reporting and reactive monitoring.⁹⁵ Over the years, the Committee has thus examined 512 State of Conservation reports by the World Heritage Centre and the Advisory Bodies in relation to 141 World Heritage sites in 91 States Parties with respect to issues concerning the legal framework established with respect to the site.⁹⁶

On most of these occasions the Committee merely examines whether such legislation exists and is appropriate for the protection of the site, and thus does not necessarily make proposals for the type of legislation to be adopted beyond the fact that such legislation is necessary. However, the Committee has on occasion sought to push States Parties in a certain direction with regards to the adoption or implementation of domestic heritage laws with potential impact on private property rights – for example by expressing concern in relation to the State Party's granting of permits which are in principle in line with the state's domestic laws but which negatively impact the OUV of the site in the eyes of the Committee.

Prominent examples of this practice include the *Historic Centre of Vienna* (2001) and *Liverpool – Maritime Mercantile City* (2001); in both cases, the Committee has been engaged in lengthy conflicts with Austria and the United Kingdom with respect to the granting of permits for large-scale development projects. Whilst the Committee has acknowledged statements by the States Parties that such permits have been granted in conformity with domestic

92 Periodic Report, Second Cycle, Section II, Kalwaria Zebrzydowska: the Mannerist Architectural and Park Landscape Complex and Pilgrimage Park (2014) <<https://whc.unesco.org/document/164312>>.

93 World Heritage Convention, art 6(1).

94 Ibid art 5(d); see also World Heritage Convention Operational Guidelines, paras 97-8. See also Guido Carducci, 'Articles 4-7, National and International Protection of the Cultural and Natural Heritage' in Francesco Francioni and Federico Lenzerini (eds), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press 2008) 120.

95 Periodic reporting and the reactive monitoring procedure both utilize a standard list of factors affecting the OUV of World Heritage properties, which includes the 'legal framework': UNESCO World Heritage Convention, 'List of factors affecting the properties' (UNESCO, n.d.) <<https://whc.unesco.org/en/factors/>>.

96 See https://whc.unesco.org/en/soc/?action=list&id_threats=144&.

legislation, it has nonetheless repeatedly sought to halt the progression of the projects – despite protests from Austria and the United Kingdom that they were not permitted any leeway in this respect under domestic law.⁹⁷ This ultimately resulted in the deletion of Liverpool from the List,⁹⁸ with Vienna currently under threat of a similar fate.

Another example is that of the *Mahabodhi Temple Complex at Bodh Gaya* (2002) in India, the site of the famous 'Bodhi Tree' under which the Buddha obtained enlightenment. The World Heritage Committee has repeatedly requested the Indian government to designate the temple complex at Bodh Gaya as a national monument in order to ensure its legal protection under national legislation – a step which would have potentially far-reaching impact upon individuals and local communities within the site due to restrictions of property rights. The Indian government resisted such a change, insisting that designation of Bodh Gaya as a national monument was inappropriate due to the status of the temple complex as living religious heritage. The World Heritage Centre and the advisory bodies ultimately accepted the position of India after intensive negotiations.⁹⁹ As such, the Committee arguably does on occasion adopt decisions which seek to steer States Parties in certain substantive directions with regards to their domestic legislation; in doing so, it often does not tend to consider the impact of such potentially restrictive legislation on individuals and local communities.¹⁰⁰

97 In relation to Vienna, see World Heritage Committee, State of Conservation of Properties Inscribed on the World Heritage List (2 June 2017) WHC/17/41.COM/7B.Add, 36; see also World Heritage Committee, Decision 41 COM 7B.42 (2017); Decision 44 COM 7A.32 (2021). In relation to Liverpool, see World Heritage Committee, Decision 37 COM 7A.35 (2013); Decision 41 COM 7A.22 (2017); Decision 42 COM 7A.7 (2018). Compare similar discussions in the case of the *Natural and Culturo-Historical Region of Kotor* (1979): World Heritage Committee, Decision 42 COM 7B.26 (2018) para 4. Similarly, in the case of *Saint-Sophia Cathedral and Related Monastic Buildings* in Kiev (1990), the Committee even went so far as to request Ukraine to '[i]mpose a legal ban on all previously delivered and planned permits for constructions in the buffer zone of the property and its vicinity until these HIAs have been reviewed by the World Heritage Centre and the Advisory Bodies': World Heritage Committee, Decision 41 COM 7B.53 (2017) para 5(d).

98 World Heritage Committee, Decision 44 COM 7A.34 (2021).

99 World Heritage Committee, Decision 28 COM 15B.57 (2004) para 4; Decision 29 COM 7B.52 (2005) para 6; Decision 30 COM 7B.64 (2006) para 7; Decision 31 COM 7B.82 (2007) para 6; Decision 34 COM 7B.70 (2010) para 5; Decision 36 COM 7B.61 (2012) para 3.

100 See also in relation to the *Historic Centre of Riga* (1997): World Heritage Committee, Decision 31 COM 7B.99 (2007) in which the Committee urged Latvia to 'further reinforce the current law on the preservation and protection of the Historic Centre of Riga by limiting the height of new constructions in the World Heritage core and buffer zones, and beyond, if necessary' (para 5) as an example of a substantive recommendation by the Committee with regards to domestic legislation. On further substantive recommendations, see e.g. World Heritage Committee, Decision 28 COM 15B.98 (2004).

5.3.3 Eviction and forced relocation

Changes such as those described above with respect to gentrification and restrictions of property rights are of course not by definition unacceptable or unavoidable. To the contrary, change is a natural part of heritage listing and to a certain extent also envisioned by the inscribing state as a desired end-result; similarly, restrictions of property rights as the result of cultural heritage legislation are often crucial to achieve the goals of the World Heritage regime, and such limitations will not necessarily constitute an *impermissible* limitation from the perspective of human rights law. By its very nature, World Heritage listing implies that other interests need to be accommodated than solely those of residents in order to recognise the universal interest in the protection of the heritage; a comparable logic can be found with respect to domestic cultural heritage legislation, which similarly requires a balancing of interests, albeit at the national rather than international level. However, problems begin to arise when universal interests receive absolute priority over local interests, or these universal interests are misrepresented and abused by those in power to the detriment of the interests of individuals and local communities. This is particularly the case when the lure of tourism can move beyond voluntary resettlement to the eviction and forced relocation of local residents.

An illustration of this trend is the inscription process of the cultural landscape of *Bagan* (2019) in Myanmar, home to more than 3000 Buddhist pagodas constructed between the 11th and 13th centuries. In the 1990s, pursuant to the wishes of the military junta, the municipal authorities resettled a local population of 5,000 from the village of Old Bagan to New Bagan. This was done despite the fact that experts from ICOMOS had not recommended the move as necessary to the site: many sites within the landscape had been in continuous religious use, indicating the symbiotic relationship between the residents of Bagan and its heritage values.¹⁰¹ Nonetheless, '[v]illagers were told their move was needed to protect the monuments and for Bagan to become a World Heritage site'.¹⁰² This process illustrates that the displacement or eviction of original residents is thus not necessarily tied to the possession of World Heritage status: original residents are often resettled in the process of the state preparing its World Heritage bid in order for it to increase its chances

101 Anne Laura Kraak, 'Impediments to a Human Rights-based Approach to Heritage Conservation: the Case of Bagan, Myanmar' (2017) 23 *International Journal of Cultural Policy* 433, 435-6; Anne Laura Kraak, 'Cultural and Participation Rights in Bagan, Myanmar' in Peter Bille Larsen (ed), *World Heritage and Human Rights: Lessons from the Asia-Pacific and Global Arena* (Routledge 2018) 123.

102 Kraak, 'Cultural and Participation Rights in Bagan, Myanmar' (n 101) 123.

at a successful nomination bid by enhancing the – perceived – authenticity and integrity of the site.¹⁰³

The actual inscription of Bagan was not to follow until two decades later, and in the meantime the homes of resettled residents in Old Bagan were replaced by hotels and a museum instead. In the lead-up to listing, proprietors of guesthouses located within the proposed boundaries of the World Heritage site worried that increased restrictions would endanger their livelihood; those who had illegally constructed homes within the site also feared relocation.¹⁰⁴ These fears are likely to come to fruition, as both ICOMOS and the World Heritage Committee noted upon inscription that action would need to be taken to remove illegally constructed dwellings,¹⁰⁵ although the Committee recommended that this should occur '[f]ollowing a process of consultation and careful consideration of the interests and welfare of residents'.¹⁰⁶ Myanmar has subsequently noted in its most recent State of Conservation report that while public consultation processes had been reduced or suspended as a result of the pandemic and political crisis within Myanmar, the removal of dwellings has nonetheless proceeded, and that 'daily field monitoring' was being carried out by a 'cultural security section from the Department of Archaeology and National Museum' in order to detect encroachments upon the site and to initiate the process for the removal of illegal structures.¹⁰⁷

The example of Bagan underlines the tensions between the conservation of the tangible heritage that constitutes the World Heritage site, and the intangible cultural and religious values associated with its use by human beings.¹⁰⁸ The approach of the World Heritage Committee indicates that the end result – the eviction of residents – is fixed, providing little to no room for residents to provide input into this process. It also leaves a wide margin of appreciation for the State Party to remove residents from Bagan while employing World Heritage status as a justification for its actions, without these actions subsequently being subject to international oversight. As such, even though the value of continuous use of the site and the associated religious

103 See also e.g. Shu-Li Wang, 'Civilization and the Transformation of Xiaotun Village at Yin Xu Archaeological Site, China' in Christoph Brumann and David Berliner (eds), *World Heritage on the Ground: Ethnographic Perspectives* (Berghahn 2016).

104 Kraak, 'Impediments to a Human Rights-based Approach to Heritage Conservation: the Case of Bagan, Myanmar' (n 101) 436.

105 ICOMOS, Evaluations of Nominations of Cultural and Mixed Properties, ICOMOS report for the 43rd session of the World Heritage Committee (2019) WHC-19/43.COM/INF.8B1, at 168; World Heritage Committee, Decision 43 COM 8B.20 (2019).

106 World Heritage Committee, Decision 43 COM 8B.20 (2019).

107 Republic of the Union of Myanmar, Ministry of Religious Affairs and Culture, State of Conservation Report for Bagan (1 December 2021), available at <<https://whc.unesco.org/document/191009>>, 92.

108 Kraak, 'Impediments to a Human Rights-based Approach to Heritage Conservation: the Case of Bagan, Myanmar' (n 101) 436.

practices of residents were explicitly recognised upon the inscription of Bagan,¹⁰⁹ the threat remains that the new World Heritage status will affect the religious and cultural rights of residents and disproportionately infringe upon their right to housing.¹¹⁰

Bagan is not the only World Heritage site where the state has explicitly grounded its authority to expropriate private property in the value of the site as World Heritage:¹¹¹ expropriation and evictions are frequent occurrences in World Heritage sites, and are at times paired with violence, as in the case of the *Historic Centre of Puebla* (1987) in Mexico. Upon inscription, the historic district of Puebla was seen as an opportunity for redevelopment: the sixteenth-century *barrios* had 'evolved into a high-density, low-rent zone housing workers, the poor, and rural-to-urban migrants.'¹¹² As the housing in the area had become neglected over time, the municipal government decided to evict the residents in order to revitalise the urban core and make way for commercial development.¹¹³ Residents protested against this plan, drawing upon the long history in which this area of the city had supported not only the poor but also Indigenous populations of Puebla, '[contending] that their rights to *their* heritage, both tangible and intangible, was no less important than the recovery and restoration of the buildings said to constitute the tangible heritage of *all* Pueblans.'¹¹⁴

Although the municipal government promised compensation to those whose property would be expropriated, many argued that the compensation was below market value.¹¹⁵ Tensions between the residents and the municipal government culminated on one evening in May 1997: the power was cut and a number of residents were removed from their homes in the middle of the night with 'considerable violence'; their homes were immediately bulldozed.¹¹⁶ The end result of the overall redevelopment project was the displacement of 4,590 people and the loss of the intangible heritage of historic

109 WHC-19/43.COM/INF.8B1 (104) 167. ICOMOS noted in its assessment of the nomination file, pursuant to criterion (vi), 'that while the evidence of practices of merit-making are common in many Buddhist sites and areas, the influences established in the Bagan period, and the scale and diversity of expressions, and continuing traditions make Bagan exceptional' (at 170).

110 Kraak, 'Impediments to a Human Rights-based Approach to Heritage Conservation: the Case of Bagan, Myanmar' (n 101) 436.

111 Michael Herzfeld, 'Heritage and the Right to the City: When Securing the Past Creates Insecurity in the Present' (2015) 8 *Heritage & Society* 3.

112 Nancy Churchill, 'Dignifying Carnival: The Politics of Heritage Recognition in Puebla, Mexico' (2006) 13 *International Journal of Cultural Property* 1, 2.

113 *Ibid* 2.

114 *Ibid* 3.

115 Nancy Churchill, 'El Paseo del Río San Francisco: Urban Development and Social Justice in Puebla, Mexico' (1999) 26 *Social Justice* 156, 168-9.

116 Gareth Jones, 'Gentrification, Neoliberalism and Loss in Puebla, Mexico' in Loretta Lees, Hyun Bang Shin and Ernesto López Morales (eds), *Global Gentrifications: Uneven Development and Displacement* (Policy Press 2015) 271-2.

Puebla.¹¹⁷ While these evictions were certainly not solely due to the World Heritage status of Puebla, the inscription was nonetheless employed by the authorities to serve as a justification for the removal of its inhabitants to make way for a more 'authentic' representation of historic Puebla, reinforcing the authority of the municipal government over the historic centre.¹¹⁸

The World Heritage Committee, for its part, took notice of the urban redevelopment project but mainly expressed concern about the physical integrity of the historic buildings rather than the interests of their residents.¹¹⁹ Whilst ICOMOS had received letters from a committee of concerned tenants who felt the looming threat of expropriation, it did not raise any concerns about these potential evictions in its 1994 report to the World Heritage Committee.¹²⁰ Similarly, after an expert mission in 1994, the ICOMOS expert concluded that the proposed policies were acceptable;¹²¹ this conclusion was subsequently adopted by the World Heritage Committee.¹²² The 1997 evictions did not even feature in the Committee's subsequent decisions.¹²³

Expropriation is not only an issue in historic urban landscapes, but also in rural settings.¹²⁴ The valley surrounding *Mount Wutai* (2009) in China was inscribed as a cultural landscape and is the setting of a number of temples; the area has historically been a destination for pilgrims and a centre of Buddhism in the region.¹²⁵ At the time of inscription the valley housed a number

117 Ibid 266-7.

118 Ibid; Maribel L. Alvarez, 'Stretching the Dough: Economic Resiliency and the Kinesthetics of Food Heritage across the US-Mexico Border' in Michelle L. Stefano and Peter Davis (eds), *The Routledge Companion to Intangible Cultural Heritage* (Routledge 2017) 273; Sandra C. Mendiola García, *Street Democracy: Vendors, Violence, and Public Space in Late Twentieth-Century Mexico* (University of Nebraska Press 2017) 27, 156; G.A. Jones and A. Varley, 'The Reconquest of the Historic Centre: Urban Conservation and Gentrification in Puebla, Mexico' (1999) 31 *Environment and Planning* 1547, 1553. Authors note that the prevailing neoliberal politics of the city in the 1990s was also one of the driving factors behind the evictions.

119 World Heritage Committee, Decision CONF 002 X (1994) 27.

120 Examination of the Reports on the States of Conservation of World Heritage Cultural Properties: Action by ICOMOS (2 June 1994) WHC-94/CONF.001/3b.Add2, at 2.

121 Monitoring of the State of Conservation of the World Heritage Cultural and Natural Properties (28 October 1994) WHC-94/CONF.003/6, at 50. The expert did also include some brief critical notes of the effect of expropriation on the local population: Giorgio Lombardi, 'Proyecto del Paseo del Río San Francisco, Puebla, Analisis Urbano y Criterios de Intervencion' (UNESCO 1996) at 21-2.

122 Monitoring of the State of Conservation of the World Heritage Cultural and Natural Properties (28 October 1994) WHC-94/CONF.003/6, Decision 18 COM IX.

123 A further three buildings were demolished in 2002, this time as the result of damage sustained during a fire; the Committee merely '[noted] with regret the demolition of three houses' and did not inquire as to whether appropriate measures had been taken to support the former residents of the demolished houses: World Heritage Committee, Decision 27 COM 7B.94 (2003) para 2.

124 Robert J. Shepherd, 'UNESCO's Tangled Web of Preservation: Community, Heritage and Development in China' (2017) 47 *Journal of Contemporary Asia* 557, 557.

125 Ibid 563.

of residents and a sizeable population of Buddhist monks and nuns. In its nomination file, China noted that the activities of secular residents were one of the main threats to the conservation of the site; accordingly, the management plan made provisions for their rehousing.¹²⁶ This drew some consternation from residents, who protested that they had in fact played an important role in the conservation of Mount Wutai: they had historically supported the pilgrims and monastic communities, and had protected the temples from destruction during the Cultural Revolution.¹²⁷ The authorities, in turn, asserted that they were merely carrying out the management plan which had been approved by UNESCO.¹²⁸

Despite these potential threats to the living heritage values of Mount Wutai, China has not yet submitted any State of Conservation reports to the Committee even though the site has been inscribed since 2009. Nor has the site been discussed by the Committee, notwithstanding the far-reaching changes which were indicated to be carried out between 2009 and 2025 in the site's management plans. Moreover, it is clear that ICOMOS was also aware upon inscription of the drastic changes planned at the site; yet they also did not indicate any issues with the approach being taken, despite the marginal involvement of the local community in the implementation of the management plan and the planned evictions of residents.¹²⁹

Finally, of particular interest is the effect of listing on archaeological sites. The discipline of archaeology has long wrestled with the balance between the preservation of an archaeological site and the uses of that site by the local population; preference was historically given to the presentation of archaeological sites as 'pristine', devoid of contemporary importance and therefore requiring the removal of contemporary populations.¹³⁰ These tensions are

126 Ibid 564.

127 Ibid 564-5.

128 Ibid 565.

129 These changes included the eviction of some 395 households or 583 residents: Evaluations of Cultural Properties prepared by ICOMOS for the 33rd Ordinary Session of the World Heritage Committee (2009) WHC-09/33.COM/INF.8B1, at 4, 6. By contrast, Shepherd (n 124) reaches a different number with regards to the number of evictions: he argues at the management plan will ultimately result in the removal of 7,000 residents (at 566).

130 Wendy M K Shaw, 'In Situ: The Contraindications of World Heritage' (2017) 6 International Journal of Islamic Architecture 339. See e.g. in the case *Ancient Thebes with its Necropolis* (1979): Lynn Meskell, 'Sites of Violence: Terrorism, Tourism, and Heritage in the Archaeological Present' in Lynn Meskell and Peter Pels (eds), *Embedding Ethics* (Bloomsbury 2005); Kees van der Spek, *The Modern Neighbors of Tutankhamun: History, Life, and Work in the Villages of the Theban West Bank* (The American University in Cairo Press 2011). In relation to the *Nubian Monuments from Abu Simbel to Philae* (1979), see e.g. William Carruthers, *Flooded Pasts: UNESCO, Nubia, and the Recolonization of Archaeology* (Cornell University Press 2022). In relation to *Angkor* (1992), see e.g. Michael Falser, *Angkor Wat – A Transcultural History of Heritage* (De Gruyter 2020). Finally, in the case of the *Site of Palmyra* (1980), see e.g. Michael Press, 'Excavating the Forgotten History of Palmyra' (*Hyperallergic*, 22 April, 2016) <<https://hyperallergic.com/292461/excavating-the-forgotten-history-of-palmyra/>>; Michael

brought to the fore in the management of archaeological World Heritage. Residents of archaeological sites will often find that their lived experiences do not form part of the heritage value of the site as it is perceived by the state and the international community; they become modern arrivals who need to be removed in order to allow the outstanding universal value of the site to come to full expression.¹³¹ Issues with archaeological World Heritage sites are particularly likely if there is a disconnect between the values ascribed to the site in the World Heritage List by heritage practitioners and contrary values and uses of the local population, such as uses of the site for subsistence purposes.¹³² In such situations, listing can aggravate already existing tensions between management authorities and local populations.¹³³

Yet in many cases there is not necessarily a clear conflict of interest between the protection of the heritage values of an archaeological site and the continued presence of 'original' residents of the site, particularly if residents contribute to the intangible heritage of the site – an issue overlooked until relatively recently in World Heritage management. Thus, in the case of *Petra* (1985) in Jordan, World Heritage listing meant the removal of the Bedouin tribes from the areas surrounding the caves which they had historically inhabited in the same year as the inscription; they were relocated to newly constructed villages on the edge of the archaeological park, in particular a settlement at nearby Umm Sayhoun.¹³⁴ On the one hand, the resettlement of the Bedu meant an

Press, 'The Getty Revisits Ancient Palmyra, but the Modern City Is Mostly Invisible' (*Hyperallergic*, 22 February, 2021) <<https://hyperallergic.com/623729/the-getty-return-to-palmyra/>>.

131 Wang (n 103) 178-9. See e.g. in relation to the *Archaeological Site of Carthage* (1979): Layli Foroudi, 'Battle of Carthage: Tunisia demolishes homes to protect ancient site' (*Thomson Reuters Foundation*, August 14, 2019) <<https://news.trust.org/item/20190813233753-0b555/>>; Michael Press, 'The Implicit Threat of Being Designated a World Heritage Site' (*Hyperallergic*, September 5, 2019) <<https://hyperallergic.com/515985/the-implicit-threat-of-being-designated-a-world-heritage-site/>>.

132 See e.g. Noel Biseko Lwoga, 'Dilemma of Local Socio-economic Perspectives in Management of Historic Ruins in Kilwa Kisiwani World Heritage Site, Tanzania' (2018) 24 *International Journal of Heritage Studies* 1019, who details in relation to the *Ruins of Kilwa Kisiwani and Ruins of Songo Mnara* (1981) how the inscription failed to bring socio-economic benefits to the local community, and how restrictions on the use of the site fail to take this into account. A lack of community consultation is thus partly the cause for residents' 'illegal' uses of the site, and 'the right of poor locals to access and benefit from their heritage is tampered with by [cultural heritage management] that fallaciously brands itself as protecting the heritage for the community' (1033). See also Shadreck Chirikure and others, 'Unfulfilled Promises? Heritage Management and Community Participation at Some of Africa's Cultural Heritage Sites' (2010) 16 *International Journal of Heritage Studies* 30.

133 Ioannis Poullos, *The Past in the Present: A Living Heritage Approach – Meteora Greece* (Ubiquity Press 2014) 126-7; Chalcraft (n 38) 221.

134 As noted by Meerpohl, the 'rediscovery' of Petra in the nineteenth century was only a rediscovery from the perspective of the West, as it already formed the homeland of the Bedu: Meike Meerpohl, 'Whose Heritage? Petra and the Politics in the Process of Heritagiza-

increased quality of life; on the other hand, it also led to the loss of the connection between the tangible and intangible heritages of Petra,¹³⁵ as well as increasing tensions with a neighbouring tribe who had in fact possessed the land to which the Bedu had been relocated and who had thus been similarly dispossessed without compensation.¹³⁶ Somewhat ironically, the intangible cultural heritage of the Bedu was inscribed on the Representative List of the Intangible Cultural Heritage Convention several decades later.¹³⁷

While the relocation was not directly the result of requests from the advisory bodies or the World Heritage Committee, it was nonetheless inextricably tied up with the process of requesting World Heritage status for the site,¹³⁸ also in the eyes of the Bedu.¹³⁹ To make matters worse, for many years the Bedu did not feature extensively in the Committee's decisions concerning Petra except with respect to limitations on their use of the site,¹⁴⁰ which has on occasion resulted in eruptions of violence between the Bedu and the authorities.¹⁴¹ It was not until 2015 that the Committee explicitly reflected on the living standards of the Bedu and their contribution to the intangible heritage value of the site.¹⁴² While the Committee's recent decisions commend Jordan's

tion' in Achim Lichtenberger, Dieter Haller and Meike Meerpohl (eds), *Essays on Heritage, Tourism and Society in the MENA Region* (Brill 2015) 173.

135 Mikkel Bille, 'Assembling Heritage: Investigating the UNESCO Proclamation of Bedouin Intangible Heritage in Jordan' (2012) 18 *International Journal of Heritage Studies* 107. See also Mikkel Bille, *Being Bedouin Around Petra: Life at a World Heritage Site in the Twenty-First Century* (Berghahn 2019) 27-52.

136 Meerpohl (n 134) 175.

137 As the 'Cultural space of the Bedu in Petra and Wadi Rum': Intergovernmental Committee, Decision 3.COM 1 (2008). See Bille, 'Assembling Heritage: Investigating the UNESCO Proclamation of Bedouin Intangible Heritage in Jordan' (n 135).

138 The Jordanian government had in fact already attempted to relocate the Bedu in the 1970s but met armed resistance; the settlement at Umm Sayhoun was similarly constructed prior to the granting of World Heritage status: John Shoup, 'The Impact of Tourism on the Bedouin of Petra' (1985) 39 *Middle East Journal* 277, 283. However, the government's plan to relocate the Bedu from Petra stemmed from the 1968 Master Plan for the creation of a 'Petra National Park' drawn up by the US National Park Service and was also recommended by UNESCO in the 1970s prior to the World Heritage inscription: Meerpohl (n 134) 174-5; Lynn Meskell and Christina Luke, 'Developing Petra: UNESCO, the World Bank, and America in the Desert' (2021) 6 *Contemporary Levant* 126, 130, 135.

139 Bille, *Being Bedouin Around Petra: Life at a World Heritage Site in the Twenty-First Century* (n 135) 42.

140 World Heritage Committee, Decision 18 COM IX (1994); World Heritage Committee, Decision 20 BUR IV.7 (1996).

141 Meerpohl (n 134) 175.

142 The World Heritage Centre and Advisory Bodies thus encouraged Yemen in their 2015 SOC report 'to urgently allocate appropriate resources to an equitable solution for the livelihood of the Um Sayhoun Community, which was evicted from the property': State of Conservation of Properties Inscribed on the World Heritage List (29 May 2015) WHC-15/39.COM/7B.Add. The Committee subsequently simply '[encouraged] the State Party to sustain its efforts in creating opportunities for sustainable local development around the property': Decision 39 COM 7B.52 (2015) para 6. See also World Heritage Committee,

efforts to carry out community engagement activities with respect to the site,¹⁴³ it seems unlikely that such projects will be able to resolve the continuing underlying tensions between the authorities and the Bedu with respect to their original relocation,¹⁴⁴ reflected by ongoing limitations on construction at Umm Sayhoun, the settlement to which the Bedu were relocated from Petra.¹⁴⁵

The *Group of Monuments at Hampi* site in India (1986) similarly reveals problematic evictions of original residents. The archaeological site of Hampi was resettled in the 1940s and 1950s after having been abandoned in the 16th century. Individuals took up residence in and around the monuments, building shops in the remains of the monumental bazaar leading up to the Virupaksha Temple at the heart of the site; in the 1970s, a number of families were granted plots in the areas behind the bazaar, although in some cases residents in the bazaar area 'had ownership papers predating independent India'.¹⁴⁶ Shop owners sold goods to pilgrims visiting the temple, and the residents generally coexisted with the monuments in which they lived and worked, although residents were occasionally relocated on a voluntary basis within the boundaries of the monument.¹⁴⁷

This situation changed in 1997, when the local government decided to construct two bridges within the site boundaries, leading to a reactive monitoring mission and inscription on the Danger List in 1999.¹⁴⁸ While the bridges were ultimately not constructed, Hampi remained on the Danger List as the Committee's attention had been drawn by what it deemed to be a rampant problem of illegal encroachment within the site. The inclusion of Hampi on the Danger List was effectively the catalyst of a vicious cycle of reporting and

Decision 42 COM 7B.54 (2018) and the attached report by Jordan on the state of conservation of the property.

143 The Committee commended Jordan in 2018 for carrying out the management of the site in line with the Sustainable Development Policy, as indicated by 'its active involvement of local communities and civil society organisations in decision-making and local development actions, in addressing their needs in terms of economic and social development': Decision 42 COM 7B.54 (2018) para 4(b); see also Decision 44 COM 7B.16 (2021) para 4(e).

144 See Report of the Joint World Heritage Centre/ICOMOS/IUCN Reactive Monitoring mission to Petra (Jordan), 21-26 November 2017, <<https://whc.unesco.org/en/documents/168269/>> 36.

145 Meerpohl (n 134) 175-6.

146 Krupa Rajangam, 'World Heritage Subjects or Citizens? Geographical Imaginations and Displacement of Local Communities' (2022) 11 *Change Over Time* 226, 235. See also Natalia Bloch, 'Evicting Heritage: Spatial Cleansing and Cultural Legacy at the Hampi UNESCO Site in India' (2016) 48 *Critical Asian Studies* 556, 559.

147 Rajangam (n 146) 235 provides an overview of relocations and displacement of residents from Hampi over time.

148 Bloch (n 146) 561. On the construction of the bridges and the Danger Listing of the site, see also Krupa Rajangam, 'Bridging Development and Heritage: Expert Gaze, Local Discourses, and Visual Aesthetic Crisis at Hampi World Heritage Site' (2021) 16 *Journal of South Asian Development* 75.

evictions of local residents from 2000 onwards,¹⁴⁹ with evictions in parts of the site continuing to this date, such as the evictions of 300 residents in 2001,¹⁵⁰ the overnight demolition of 326 houses and shops in 2011,¹⁵¹ and sporadic further demolitions between 2011 and 2020, leading to 'the gradual alienation of residents from their everyday life, including the Hampi landscape'.¹⁵² Each series of demolitions and evictions was preceded by the World Heritage Committee expressing its concern for the problems caused by illegal construction within the site – in 2010 even directly requesting India to stop illegal construction¹⁵³ – and subsequently congratulating the State Party for taking action to resolve the issue.¹⁵⁴

While the Committee occasionally requested India to take the interests of individuals and local communities into account in its decisions,¹⁵⁵ many of these issues were not followed up on in subsequent decisions. As such, its lukewarm response to the 2011 evictions was merely to encourage India 'to elaborate, in close cooperation with the local community, a strategy and action plan for the bazaar area ... to prevent any further encroachments'.¹⁵⁶ This stands in stark contrast to the Committee's treatment of the issue of illegal construction, which was repeatedly raised and thereby contributed to the view that Hampi needed to be established as a pristine archaeological site without human habitation.¹⁵⁷ In 2009 and 2010, the Committee even went so far as to express concern about the construction of social housing projects within the site.¹⁵⁸ As such, certainly in the eyes of residents, demolitions at Hampi

149 Bloch (n 146) 561.

150 Bureau of the World Heritage Committee, Reports on the State of Conservation of Properties Inscribed on the List of World Heritage in Danger (21 May 2001) WHC-2001/CONF.205/4, 14; World Heritage Committee, Reports on the State of Conservation of Properties Inscribed on the List of World Heritage in Danger (15 October 2001) WHC-01/CONF.208/9, 14.

151 World Heritage Committee, State of Conservation of World Heritage Properties Inscribed on the World Heritage List (3 May 2013) WHC-13/37.COM/7B, 115; Rajangam, 'World Heritage Subjects or Citizens? Geographical Imaginations and Displacement of Local Communities' (n 146) 235.

152 Rajangam, 'Bridging Development and Heritage: Expert Gaze, Local Discourses, and Visual Aesthetic Crisis at Hampi World Heritage Site' (n 148) 92. See also Rajangam, 'World Heritage Subjects or Citizens? Geographical Imaginations and Displacement of Local Communities' (n 146) 235 for an overview of relocations and evictions at the site.

153 World Heritage Committee, Decision 34 COM 7B.67 (2010) para 4(e).

154 World Heritage Committee, Decision 25 COM VIII.64-66 (2001).

155 World Heritage Committee, Decision 27 COM 7A.23 (2003) para 6; World Heritage Committee, Decision 28 COM 15A.24 (2004) para 2; World Heritage Committee, Decision 37 COM 7B.61 (2013) para 6(a).

156 World Heritage Committee, Decision 37 COM 7B.61 (2013) para 6(a).

157 World Heritage Committee, Decision 29 COM 7A.22 (2005); Decision 30 COM 7A.24 (2006); Decision 31 COM 7B.81 (2007); Decision 32 COM 7B.70 (2008); Decision 33 COM 7B.71 (2009); Decision 34 COM 7B.67 (2010).

158 World Heritage Committee, Decision 33 COM 7B.71 (2009) para 7; Decision 34 COM 7B.67 (2010) para 4(e).

are seen as being closely tied to its World Heritage status.¹⁵⁹ The starting point in the Committee's decisions thus appeared to be that the local community had to be evicted; concerns surrounding the treatment of the local community, whilst acknowledged by the Committee, did not form grounds for the taking of further measures under the Convention (unlike the bridge construction, which triggered several monitoring missions and the Danger Listing of the site).

In addition, while India has on occasion reported to the Committee on measures being taken to provide alternative housing or compensation to evicted residents,¹⁶⁰ the Committee has subsequently not followed up on these reports in order to enquire whether these measures had indeed been taken by the State Party.¹⁶¹ This is undeniably problematic, as evidence from researchers appears to indicate that evictions are still ongoing and that many residents have yet to receive (adequate) compensation.¹⁶² Furthermore, while some residents who were relocated are now located in so-called New Hampi, a village in the buffer zone, and received home construction loans (albeit only '[a]fter a long-drawn struggle'),¹⁶³ they are uncertain about their livelihoods, which were closely tied to their residences and shops located in the bazaar that were demolished.¹⁶⁴

As such, the internationalisation of heritage governance at Hampi has led to a situation in which residents are constantly subjected to the bureaucratisation of that which had before simply been part of their day-to-day lives, yet receive little to none of the benefits of international listing, let alone possess the ability to influence international decisions which elude most forms of accountability.¹⁶⁵ The result is a bitterness amongst residents about the impact

159 Rajangam, 'World Heritage Subjects or Citizens? Geographical Imaginations and Displacement of Local Communities' (n 146) 234.

160 World Heritage Committee, State of Conservation of Properties Inscribed on the List of World Heritage in Danger and on the World Heritage List (2 June 2003) WHC-03/27.COM/7A, 28; World Heritage Committee, State of Conservation of World Heritage Properties Inscribed on the World Heritage List (3 May 2013) WHC-13/37.COM/7B, 115.

161 World Heritage Committee, Decision 39 COM 7B.64 (2015); Decision 41 COM 7B.90 (2017); Decision 43 COM 7B.61 (2019). Extensive information on the resettlement and compensation scheme was provided in the State Party's 2015 SOC report.

162 Rajangam, 'Bridging Development and Heritage: Expert Gaze, Local Discourses, and Visual Aesthetic Crisis at Hampi World Heritage Site' (n 148) 92. See also Rajangam, 'World Heritage Subjects or Citizens? Geographical Imaginations and Displacement of Local Communities' (n 146) 235 for an overview of relocations and evictions at the site.

163 Rajangam, 'World Heritage Subjects or Citizens? Geographical Imaginations and Displacement of Local Communities' (n 146) 233.

164 Ibid 241.

165 Rajangam, 'Bridging Development and Heritage: Expert Gaze, Local Discourses, and Visual Aesthetic Crisis at Hampi World Heritage Site' (n 148) 95; Rajangam, 'World Heritage Subjects or Citizens? Geographical Imaginations and Displacement of Local Communities' (n 146) 225; Krupa Rajangam, 'A Bureaucracy of Care in Managing Hampi World Heritage Site' (2019) 20 *Journal of Social Archaeology* 144, 157.

of the far-reaching measures and their ability to practice their own form of caring for the heritage values of Hampi.¹⁶⁶ In taking these measures, local management authorities often turn to UNESCO as providing the reason for their actions, despite the World Heritage Committee's decisions not necessarily explicitly asking for them.¹⁶⁷ Driven by demands initially formulated at the national and international levels, particularly by the Indian government's desire to ensure the removal of Hampi from the Danger List as quickly as possible, these local heritage actors thus perceive themselves as required to apply a static interpretation of the heritage value of Hampi.¹⁶⁸ As a result, residents are transformed into squatters endangering the site, rather than being seen as contributing to its living heritage value by ensuring the continuation of the functions it originally embodied as a site of pilgrimage and active worship.¹⁶⁹

5.3.4 Exclusion of living heritage values in site management

Closely linked to the issue of resettlement and eviction is the exclusion of living heritage values associated with the local community from the management of the site. Thus in the case of the *Town of Luang Prabang* in the Lao People's Democratic Republic (1995), the management of the site has been dominated by foreign experts.¹⁷⁰ After its inscription, the World Heritage Committee and World Heritage Centre repeatedly expressed concerns with regards to violations of building regulations within the site and the need to maintain the authenticity of the site.¹⁷¹ The town was subjected to extensive international monitoring by the Committee from 1997 until 2014,¹⁷² with the Committee on one notable occasion even endorsing the recommendation of a reactive monitoring mission for the local authorities to 'execute as an example and with the necessary publicity, at least one or two demolitions of the illegal

166 Rajangam, 'A Bureaucracy of Care in Managing Hampi World Heritage Site' (n 165) 145, 149.

167 Ibid 147-8.

168 Bloch (n 146) 561; Rajangam, 'A Bureaucracy of Care in Managing Hampi World Heritage Site' (n 164) 153, 155, 157-9.

169 Bloch (n 146) 557-9, 564-5.

170 In the form of the 'Heritage House', a cooperation between the local authorities, the French government and the World Heritage Centre: World Heritage Committee, Decision 20 COM VII.D.51/52 (1996).

171 Ibid; World Heritage Committee, State of Conservation of Properties Inscribed on the World Heritage List (27 October 1999) WHC-99/CONF.209/14, 49; Bureau of the World Heritage Committee, Decision 24 BUR IV.B.69 (2000); World Heritage Committee, Decision 27 COM 7B.50 (2003); Decision 28 COM 15B.60 (2004); WHC-07/31.COM/7B.Add (n 87) 49.

172 World Heritage Committee, State of Conservation of World Heritage Properties Inscribed on the World Heritage List (16 May 2014) WHC-14/38.COM/7B.Add, 122. However, the Committee has continued to express concern with regards to the policies in place for the preservation of the physical fabric of the site, for example in 2021: World Heritage Committee, Decision 44 COM 7B.32 (2021) para 4.

constructions', in order to ensure compliance with building regulations;¹⁷³ Laos was subsequently commended for carrying out the demolitions.¹⁷⁴ Despite these rather far-reaching impositions on the lives of individuals and the local community as a result of the World Heritage listing of Luang Prabang, the community remains markedly absent in Committee decisions, even in recent years.¹⁷⁵

In the view of international heritage experts the local population of Luang Prabang did not necessarily need to be removed from the site; however, their presence needed to fit into a very particular image of 'traditional life', with modern construction being incompatible with this vision.¹⁷⁶ As a result, the residents of Luang Prabang 'are often denied any aesthetic and patrimonial competence', and their role in the preservation of their heritage is thus minimised.¹⁷⁷ While locals are proud of the World Heritage label and recognise the financial benefits that have flowed from inscription, they perceive the site's management body as a 'restrictive institution', whose planning regulations make life more difficult and limit property rights in favour of heritage protection.¹⁷⁸ In short, there is a clear disconnect between the heritage values of Luang Prabang as viewed by residents and those of the experts; the latter seek to preserve the historical integrity and authenticity of the site, whereas residents see the heritage value of Luang Prabang as constantly in development and able to accommodate changing uses regardless of the historicity of the physical fabric.¹⁷⁹

173 World Heritage Committee, State of Conservation of Properties Inscribed on the World Heritage List (5 December 2002) WHC-02/CONF.202/17, 32; World Heritage Committee, Decision 26 COM 21B.54 (2002).

174 World Heritage Committee, Decision 28 COM 15B.60 (2004) para 1.

175 See e.g. World Heritage Committee, Decision 36 COM 7B.63 (2012); Decision 38 COM 7B.98 (2014); Decision 44 COM 7B.32 (2021).

176 David Berliner, 'Multiple Nostalgias: The Fabric of Heritage in Luang Prabang (Lao PDR)' in Christoph Brumann and David Berliner (eds), *World Heritage on the Ground: Ethnographic Perspectives* (Berghahn 2016) 103.

177 Ibid 105.

178 Ibid 111. Compare the situation at the *Cultural Landscape of Bali Province* (2012), a cultural landscape comprised of irrigated rice fields. Listing entailed limitations on possible conversions of irrigated fields to housing for expanding families or the creation of businesses which are more lucrative than rice farming, and such land use changes have subsequently attracted critique from the advisory bodies: Graeme MacRae, 'Universal Heritage Meets Local Livelihoods: 'Awkward Engagements' at the World Cultural Heritage Listing in Bali' (2017) 23 *International Journal of Heritage Studies* 846, 854.

179 Berliner (n 176) 111-2. See also Lynne M. Dearborn and John C. Stallmeyer, *Inconvenient Heritage: Erasure and Global Tourism in Luang Prabang* (Routledge 2012); Russell Staiiff and Robyn Bushell, 'Mobility and Modernity in Luang Prabang, Laos: Re-thinking Heritage and Tourism' (2013) 19 *International Journal of Heritage Studies* 98; Lior Bear, Nir Avieli and Jackie Feldman, 'UNESCO World Heritage Sites: Shared Shrines or Contested Sanctuaries? The Case of the Buddhist Temples of Luang Prabang, Laos' (2021) 16 *Journal of Heritage Tourism* 1.

Other sites are similarly characterised by a circumscription of the site as 'heritage' by experts, whilst local communities may not agree with the heritage label and instead see the site as intrinsically tied to religious practices (and therefore a form of 'living heritage'),¹⁸⁰ leading to conflicts in the use of the site between those seeking to use it as a religious space and those visiting it as tourists.¹⁸¹ An example of these trends is the listing of *Angkor* (1992) in Cambodia,¹⁸² which illustrates how 'global ideals have come, intentionally or by misrepresentation, to freeze many traditional local practices on the ground'.¹⁸³ The numerous authorities – both national and international – involved in the management of the site have thus faced many conflicts with the local communities since the site's inscription.

From the 2000s onwards, residents were for example confronted with restrictions in their use of the areas in and around the archaeological site, enforced by the local Heritage Police.¹⁸⁴ These restrictions chiefly related to the ability of residents to use the heritage site and exercise customary rights, in particular by cultivating rice in pools within the site and tapping resin from trees similarly located within the protected area; both practices predated the World Heritage inscription.¹⁸⁵ These bans made it significantly more difficult for locals to support their livelihood while remaining in Angkor.¹⁸⁶ In addition, the inscription of Angkor caused broader restrictions of its use as a ritual site by locals. While these changes were not necessarily directly demanded

180 See e.g. in relation to the *Historic City of Ahmadabad* (2017): Aarthi Janakiraman, 'Constructing National Identity through World Heritage: the International and Intranational Politics of the Built Environment in Ahmadabad' (2022) 28 *International Journal of Heritage Studies* 235, 245.

181 See e.g. in relation to *Gusuku Sites and Relaties Properties of the Kingdom of Ryukyu* (2000): Aike P. Rots, "'This Is Not a Powerspot': Heritage Tourism, Sacred Space, and Conflicts of Authority at Sefa Utaki' (2019) 78 *Asian Ethnology* 155.

182 See e.g. the contributions in Brigitta Hauser-Schäublin (ed) *World Heritage, Angkor and Beyond: Circumstances and Implications of UNESCO Listings in Cambodia* (Universitätsverlag Göttingen 2011); Josephine Gillespie, 'Buffering for Conservation at Angkor: Questioning the Spatial Regulation of a World Heritage Property' (2012) 18 *International Journal of Heritage Studies* 194; Keiko Miura, 'Thinking Globally and Acting Locally in Angkor' in Christoph Brumann and David Berliner (eds), *World Heritage on the Ground: Ethnographic Perspectives* (Berghahn 2016); Adèle Esposito, *Urban Development in the Margins of a World Heritage Site: In the Shadows of Angkor* (Amsterdam University Press 2018); Falser.

183 Miura (n 182) 125.

184 Gillespie, *Protected Areas: A Legal Geography Approach* (n 6) 70.

185 Miura (n 182) 132-3; Keiko Miura, 'From Property to Heritage: Different Notions, Rules of Ownership and Practices of New and Old Actors in the Angkor World Heritage Site' in Brigitta Hauser-Schäublin (ed), *World Heritage, Angkor and Beyond: Circumstances and Implications of UNESCO Listings in Cambodia* (Universitätsverlag Göttingen 2012) 102-3, 106-7, 115.

186 Miura, 'From Property to Heritage: Different Notions, Rules of Ownership and Practices of New and Old Actors in the Angkor World Heritage Site' (n 185) 115.

by the World Heritage Committee,¹⁸⁷ the Heritage Police relied upon the World Heritage inscription as a basis for the restrictions of traditional practises; Miura describes how '[t]he understanding of the Heritage Police chief was that the global value of the World Heritage site superseded its local uses'.¹⁸⁸ Furthermore, in light of the close involvement of UNESCO in the management of the site, the limitations imposed upon local communities are inextricably linked to Angkor's World Heritage status.¹⁸⁹

From 2004 onwards, APSARA – the local management authority – sought to expand the conservation of Angkor Wat from the direct environs of the site to surrounding villages, in order to preserve the overall cultural landscape of Angkor. This entailed limitations on the types and numbers of houses which could be built within the site; construction which violated these guidelines was demolished.¹⁹⁰ New houses could no longer be constructed, running contrary to the housing practices of the residents of Angkor: 'married daughters often built their houses in and around the compounds of their parents' houses', but were no longer able to do so following the new restrictions.¹⁹¹ The transformation of Angkor Wat into heritage thus fundamentally transformed relationships in and around the site.

In the new relationships which emerged following listing, locals had little input in the management of the site and no bargaining power to resist decisions which fundamentally changed the way they lived, worshipped and worked in and around Angkor.¹⁹² As such, there is a tension between the management of the site and the ability of residents to express living heritage values.¹⁹³ Simultaneously, local communities are effectively absent in the

187 However, see World Heritage Committee, Decision 34 COM 7B.65 (2010) para 4, where the Committee expresses the need to control illegal occupation at the site.

188 Miura, 'Thinking Globally and Acting Locally in Angkor' (n 182) 132-3.

189 UNESCO is the secretariat to an intergovernmental body tasked with coordinating the management of the site in collaboration with the Cambodian government: The 'International Coordinating Committee', also known as ICC-Angkor, a joint initiative between the governments of France and Japan: <http://icc-angkor.org>.

190 Miura, 'Thinking Globally and Acting Locally in Angkor' (n 182) 135-6.

191 Ibid 135-6.

192 Brigitta Hauser-Schäublin, 'Foreword' in Brigitta Hauser-Schäublin (ed), *World Heritage, Angkor and Beyond: Circumstances and Implications of UNESCO Listings in Cambodia* (Universitätsverlag Göttingen 2011) 2. See also Josephine Gillespie, 'Protecting World Heritage: Regulating Ownership and Land Use at Angkor Archaeological Park, Cambodia' (2009) 15 *International Journal of Heritage Studies* 338; Josephine Gillespie, 'World Heritage Management: Boundary-making at Angkor Archaeological Park, Cambodia' (2013) 56 *Journal of Environmental Planning and Management* 286. See also World Heritage Committee, State of Conservation of World Heritage Properties Inscribed on the World Heritage List (22 May 2008) WHC-08/32.COM/7B, 118.

193 See e.g. Keiko Miura, 'Conservation of a "Living Heritage Site": A Contradiction in Terms? A Case Study of Angkor World Heritage Site' (2005) 7 *Conservation and Management of Archaeological Sites* 3; Britt Baillie, 'Conservation of the Sacred at Angkor Wat: Further Reflections on Living Heritage' (2006) 8 *Conservation and Management of Archaeological Sites* 123.

decisions of the World Heritage Committee, with Cambodia even characterising the management of illegal land occupation as a 'battle' to the Committee – phraseology which would certainly not suggest a community-centric approach to the management of the site.¹⁹⁴

All in all, the exercise by individuals or local communities of certain traditional practices with respect to World Heritage sites has thus often been seen as a form of encroachment by the World Heritage Committee – also beyond the examples of Luang Prabang and Angkor Wat described above. The Committee has thus raised the topic of encroachment with respect to both cultural and natural World Heritage sites, ranging from issues such as agricultural encroachment to (illegal) construction.¹⁹⁵ In doing so, the Committee has at times congratulated or commended states for resolving issues related to encroachment of a site, or has asked the State Party to halt such encroachment, often without any consideration of the position of local communities.¹⁹⁶

That being said, the position of local communities has assumed greater importance over time in the Committee's decisions on issues related to encroachment.¹⁹⁷ Whereas many of the Committee's earlier decisions on encroachment do not mention local communities at all, more recent decisions draw attention to the need to carry out consultations with local community members, the role of community participation, and the importance of ensuring the continuation of existing intangible heritage values at a given site.¹⁹⁸

194 World Heritage Committee, State of Conservation of World Heritage Properties Inscribed on the World Heritage List (30 April 2014) WHC-14/38.COM/7B, 14.

195 See e.g. World Heritage Committee, Decision 16 BUR V.21 (1992); Decision 17 BUR VIII.2 (1993); Decision 18 COM IX (1994); Decision 19 BUR VI.22 (1995); Decision 20 COM VII.C.27 (1996); Decision 24 BUR.IV.B.65 (2000); Decision 24 COM VIII.18 (2000); Decision 26 BUR XII.63-77 (2002); Decision 28 COM 14B.30 (2004); Decision 29 COM 8B.30 (2005); Decision 30 COM 7A.3 (2006); Decision 31 COM 7B.116 (2007); Decision 33 COM 7B.81 (2009); Decision 34 COM 7A.24 (2010); Decision 34 COM 7B.18 (2010); Decision 34 COM 7B.44 (2010); Decision 35 COM 7A.2 (2011); Decision 35 COM 7A.17 (2011); Decision 36 COM 7A.27 (2012); Decision 37 COM 8B.31 (2013); Decision 38 COM 7B.2 (2014); Decision 39 COM 7B.17 (2015); Decision 40 COM 7B.22 (2016); Decision 42 COM 7A.13 (2018); Decision 43 COM 7B.12 (2019); Decision 44 COM 7B.24 (2021); Decision 44 COM 7B.97 (2021).

196 See e.g. World Heritage Committee, Decision 25 COM VIII.64-66 (2001); Decision 26 COM 21B.14 (2002); Decision 27 COM 7A.24 (2003); Decision 28 COM 15A.26 (2004); Decision 35 COM 7B.19 (2011).

197 See e.g. the request of the Committee to Bangladesh with respect to the *Sundarbans* to 'engage with local communities to communicate the importance of the property to sustainable livelihoods and to determine alternatives to encroachment into the property': Decision 32 COM 7B.10 (2008) para 4(d).

198 See e.g. in relation to the *Fort and Shalamar Gardens in Lahore* site: Decision 34 COM 7A.25 (2010) paras 4-5. Here, once again, the approach of the Committee is not wholly consistent: thus in 2017 the Committee did not discuss the role of the local community in responding to encroachments: Decision 41 COM 7B.96 (2017). With respect to *Abu Mena*, see Decision 40 COM 7A.9 (2016) paras 3, 6(b). With respect to natural sites, see e.g. the decisions on *Tropical Rainforest Heritage of Sumatra*: Decision 34 COM 7B.14 (2010) para 5(b); Decision 36 COM 7A.13 (2012) para 9; Decision 41 COM 7A.18 (2017) para 4.

However, there are a number of important caveats to these developments: for one, even though the Committee has requested on a number of occasions that states should engage in consultations with local communities, the starting point of these discussions remains the identification of the community as being engaged in some form of encroachment which needs to be managed and ideally removed.¹⁹⁹ In addition, the Committee's approach is often inconsistent, both with respect to decisions taken in respect of different sites,²⁰⁰ but also decisions across time with respect to the same site.²⁰¹ Finally, decisions which explicitly refer to the position of individuals or local communities remain relatively rare in light of the total number of sites on the World Heritage List. States Parties thus seem to be placed in a somewhat uncertain regulatory environment, whereby they run the risk of being criticized for not taking action, as well as for taking action and not taking into account the interests of communities.

5.3.6 Positive effects

However, the above analysis does not imply that individuals and local communities are wholly powerless within World Heritage governance and that the effects of inscription are automatically negative for these stakeholders. World Heritage listing is thus frequently associated with pride for individuals and local communities of their heritage, and a feeling of connection to the international community and thereby an affirmation of their place within a broader whole.²⁰² Moreover, international inscription of a site can also lead

199 See once again World Heritage Committee, Decision 34 COM 7A.25 (2010) paras 4-5; Decision 40 COM 7A.9 (2016) paras 3, 6(b).

200 Compare e.g., in the same session, Decision 44 COM 7B.97 (2021) para 7 (suggesting the possible incompatibility of legislation on community participation with the management of the site) with Decision 44 COM 7B.185 (2021) para 5 (calling upon the State Party to 'respect the social, economic and cultural rights of indigenous peoples and local communities').

201 In the case of *Fort and Shalamar Gardens in Lahore*, compare World Heritage Committee, Decision 34 COM 7A.25 (2010) paras 4-5 (where the Committee considered that encroachment was 'a delicate issue that requires careful consultations with the local community') and Decision 41 COM 7B.96 (2017) (where the Committee did not discuss the role of the local community in responding to encroachments). In the case of the *Tropical Rainforest Heritage of Sumatra*, compare e.g. Decision 41 COM 7A.18 (2017) para 4 (where the Committee requested Indonesia 'to ensure that the process of clarifying land rights in forest areas is undertaken in a fully transparent manner and with full participation of the concerned local communities) with Decision 42 COM 7A.40 (2018); Decision 43 COM 7A.1 (2019); and Decision 44 COM 7A.52 (2021), each of which reserve little to no role for consultation with local communities.

202 Lwoga (n 132) 1027; Raymond Rastegar, Zohreh Zarezadeh and Ulrike Gretzel, 'World Heritage and Social Justice: Insights from the Inscription of Yazd, Iran' (2020) *Journal of Sustainable Tourism* 1, 8-9.

to ‘moments of empowerment [and] real instances of emergent agency’ for marginalised groups,²⁰³ for example by using World Heritage status as a bargaining chip in negotiations with local or national authorities. While listing might – metaphorically – invite the world into the heritage site, it may also ‘open up avenues for site communities to the wide world’.²⁰⁴

Aboriginal activists in *Kakadu National Park* (1981) in Australia were thus able to tactically deploy its World Heritage status in order to halt the development of the Jabiluka uranium mine, as well as limit logging in the *Tasmanian Wilderness* (1982) site.²⁰⁵ Pocock and Lilley describe both examples as ‘successful glocalisation in which local Indigenous values were protected by enmeshing them with the globalized universal values of the World Heritage framework’.²⁰⁶ Similarly, the Sámi within the *Laponian Area* (1996) site in Sweden have, after initial conflicts about usage of the site, ensured that management passed into the hands of a newly created Sámi management authority. This body seeks to take decisions with the consent of all involved parties, taking into account both the cultural and natural heritage elements of the site.²⁰⁷ Returning the management of the site, and therefore the control of cultural heritage, into the hands of the Sámi can thus be seen as an expression of their right to self-determination.²⁰⁸

Recent years have seen the proliferation of sites such as the *Laponian Area*, which rely upon customary management systems in which Indigenous communities assume decision-making powers in respect of the site, such as in the case of *Tongariro National Park* (1990) in New Zealand, *SĠang Gwaay* (1981) and *Pimachiowin Aki* (2018) in Canada, *Uluru-Kata Tjuta National Park* (1987) in Australia, *Chief Roi Mata’s Domain* (2008) in Vanuatu, and *Kuk Early Agri-*

203 Kuutma (n 23) 33. See International World Group for Indigenous Affairs, International Indigenous Peoples’ Forum on World Heritage, Indigenous Peoples of Africa Co-ordinating Committee, Submission to the UN Special Rapporteur on the Rights of Indigenous Peoples for his Report to the 77th Session of the UN General Assembly (30 March 2022) 2.

204 Brumann and Berliner, ‘Introduction: UNESCO World Heritage – Grounded?’ (n 22) 3–4.

205 Celmara Pocock and Ian Lilley, ‘Who Benefits? World Heritage and Indigenous People’ (2018) 10 *Heritage & Society* 171, 14.

206 Ibid.

207 Gro B. Ween and Lars Risan, ‘Exploring Heritage Lives: Indigenous Peoples in World Heritage Sites’ in Herdis Hølleland and Steinar Solheim (eds), *Between Dream and Reality: Debating the Impact of World Heritage Listing* (Primitive tider 2014) 70. However, it is noteworthy that in 2022 Sweden issued a license for an iron ore mine close the boundaries of the Laponian Area site, despite concerns being expressed by the Special Rapporteur on the rights of Indigenous peoples as well as by ICOMOS and IUCN: Mandates of the Special Rapporteur on the Rights of Indigenous Peoples and the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (3 February 2022) AL SWE/2/2022.

208 Leena Heinämäki, Thora Herrmann and Carina Green, ‘Towards Sámi Self-determination over Their Cultural Heritage: The UNESCO World Heritage Site of Lapponia in Northern Sweden’ in Alexandra Xanthaki and others (eds), *Indigenous Peoples’ Cultural Heritage: Rights, Debates, Challenges* (Brill 2017) 81.

cultural Site (2008) in Papua New Guinea.²⁰⁹ Indigenous peoples are moreover increasingly playing a direct role not only in site management, but also in the nomination process: both in the case of *Pimachiowin Aki* and *Budj Bim Cultural Landscape* (2019) Indigenous communities played an integral role in initiating and preparing the nominations.²¹⁰ Simultaneously, these recent experiences underline the difficulty of bridging the divide between the local and the global in World Heritage governance: thus the initial nomination of Pimachiowin Aki was deferred as First Nations peoples did not wish to articulate their relationship to the site in such a way as to be 'exceptional', or 'better' than the relationship of other Indigenous communities to their lands,²¹¹ as was required by the nomination form.

5.3.7 Conclusion

As can be seen by the above, while the process of World Heritage listing can lead to positive consequences for individuals and local communities, it is often associated with the further empowerment of the state and the marginalisation of the individuals and local communities living in or around a given World Heritage site. Local communities are subjected to far-reaching restrictions on the conduct of their day-to-day lives, ranging from the limitation of the full exercise of property rights relating to their homes to the curtailment of traditional practices related to the site, whether for subsistence purposes or religious or cultural use. At its most extreme, on numerous occasions World Heritage listing has resulted in the displacement of not only individuals but also entire communities from a World Heritage site, through forced relocation and the subsequent demolition of their homes. These processes are frequently characterised by a problematic absence of community participation and con-

209 On such customary systems of management, see Anita Smith and Cate Turk, 'Customary Systems of Management and World Heritage in the Pacific Islands' in Sally Brockwell, Sue O'Connor and Denis Byrne (eds), *Transcending the Culture-Nature Divide in Cultural Heritage: Views from the Asia-Pacific Region* (ANU Press 2013).

210 Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples (19 July 2022) UN Doc A/77/238, paras 60, 63. See also Sophia Rabliuskas, 'An Indigenous Perspective: the Case of Pimachiowin Aki World Mixed Cultural and Natural Heritage, Canada' [2020] *Journal of World Heritage Studies* 9.

211 IWGIA, IIPFWH and IPACC Submission to the UN Special Rapporteur (n 203) 16. See also ICOMOS, Evaluations of Nominations of Cultural and Mixed Properties to the World Heritage List (June 2013) WHC-13/37.COM/INF.8B1, 39. See also Christina Cameron, 'The UNESCO Imprimatur: Creating Global (In)significance' (2020) 26 *International Journal of Heritage Studies* 845, 849. See also Rabliuskas (n 210) who was involved with the nomination process and who writes: 'We have always believed we have no right to say we are better than anyone else, especially other Indigenous groups. This statement is a clear example of an oppressive colonized term' (at 12).

sultation, and a broader lack of monitoring by the World Heritage Committee on the impact of its decisions on individuals and local communities.

While many of these effects are not necessarily the result of direct requests formulated at the intergovernmental level, they nonetheless appear to be the end-result desired by the Committee when one reads between the lines of its recommendations to States Parties. The case studies examined above thus provide numerous examples of situations in which the Committee has commended a State Party for taking action that might have protected the outstanding universal value of a site but which was ultimately detrimental to certain individuals and communities living in or around the site. More broadly, World Heritage status grants further power to the state by expanding the reach of what is considered to fall within the realm of the 'public interest', and by deepening the urgency of acting in support of that public interest in light of its status as a specifically *global* public interest. The invocation of an international heritage label can moreover help to elevate decision-making on the management of a heritage site from the local level by appearing to depoliticise it, thereby removing it from the purview of input by local residents.²¹² These trends indicate a need for greater awareness within the World Heritage Committee, the World Heritage Centre and the advisory bodies of the potential impact of their recommendations.

However, several of the case studies examined above also demonstrate that the negative consequences of World Heritage listing can sometimes be considered as the direct *result* of decisions adopted by the World Heritage Committee. This is particularly the case for decisions in which the Committee has requested the State Party to remove so-called 'illegal constructions' or 'illegal encroachments' within the boundaries of the site, resulting in evictions or forced relocations of residents. While the Committee has increasingly made reference in these contexts to the need for States Parties to engage in consultations with residents and provide compensation to those evicted – and more broadly on the importance of safeguarding the living heritage values associated with a World Heritage site – it is often inconsistent in making such recommendations and frequently fails to follow up on recommendations already made. In any event, the Convention does not set out clear guidelines for what such consultations should look like or when the compensation provided to individuals can be considered to be appropriate.

By contrast, issues related to the OUV of a site remain central in the Committee's decision-making. Given that a perceived loss of OUV by the Committee can lead to inscription on the Convention's Danger List or deletion from the World Heritage List entirely, it is perhaps only natural that states seek to prioritise heritage protection over community interests. Above all, the inconsistent approach of the Committee to issues surrounding individuals and local

212 Ronström (n 73)16.

communities – not only with respect to different sites, but also with respect to the same sites over time – indicates a problematic lack of institutional memory and leads to uncertainties for all actors involved in World Heritage governance processes in terms of reasonable expectations of the outcome of inscription processes.

Even when acknowledging the need for States Parties to undertake community consultations, the Committee's starting point often remains that individuals and local communities form a threat to the effective safeguarding of cultural heritage rather than an integral element thereof. Many of the Committee's requests for States Parties to engage in community consultation thus become an empty shell, as the desired outcome of such consultations – the removal of residents or the changing of certain practices by community members – is effectively already set out in the Committee's decision. As such, these calls for community participation and consultation continue to deny agency to individuals and local communities to define the 'problem' of heritage safeguarding on their own terms, forcing them to remain the passive subjects of measures undertaken in the name of World Heritage protection rather than participants in World Heritage governance in their own right.

5.4 IMPACT OF THE 2003 INTANGIBLE CULTURAL HERITAGE CONVENTION

Although the 2003 Intangible Cultural Heritage Convention is of a more recent vintage than the World Heritage Convention, there is an ever-growing body of state practice implementing the convention within domestic heritage regimes since its entry into force in 2006. As of 2023, 644 elements located in 140 states have been inscribed on the Representative List and the Urgent Safeguarding List. The total number of States Parties is 181.

A number of broad trends – positive and negative – surface from the range of case studies which examine the implementation of the Convention in relation to specific practices which have been inscribed on the Representative List and the Urgent Safeguarding List. Although community participation is a central element of the Convention, even actors within UNESCO have acknowledged that the participation of communities, groups and individuals remains one of the weak links in the chain of implementation of the Convention.²¹³ One important reason for this is the fact that for a long time the Convention's governing bodies could not independently verify if community participation had actually taken place during inscription processes nor could they monitor the implementation of the Convention beyond the information provided to them by States Parties in their periodic reports.²¹⁴ More broadly, the consent and participation of local communities in processes related to inscription and

213 Ibid v.

214 Ibid 51.

safeguarding are usually presented through signed consent forms, which are ultimately of dubious merit if, for instance, the communities in question are illiterate.²¹⁵

Indeed, an analysis of the Intergovernmental Committee's responses to States Parties' periodic reports reveals that the Committee generally refrains from openly criticising states.²¹⁶ This can perhaps partially be blamed on the fact that States Parties do not often explicitly discuss threats to intangible heritage in their periodic reports,²¹⁷ and a lack of community involvement in the preparation of periodic reports.²¹⁸ Similarly, with respect to its examination of periodic reports of elements on the Urgent Safeguarding List, the Committee is generally deferential to the State Party in question, simply encouraging it to undertake the safeguarding activities which it has indicated in its report. Many of the recommendations made by the Intergovernmental Committee thus largely mirror the concerns already raised in States Parties' own reports,²¹⁹ with the exception of occasional admonitions relating to managing the threat of commercialisation of inscribed elements and the need to incorporate local community members in safeguarding activities.²²⁰ This approach thus differs greatly from that taken with respect to the monitoring systems of the World Heritage Convention, where the World Heritage Commit-

215 On the role of consent forms, see Chiara Bortolotto and others, 'Proving Participation: Vocational Bureaucrats and Bureaucratic Creativity in the Implementation of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage' (2020) 28 *Social Anthropology* 66, 72. For a specific example of the role of consent forms in illiterate communities, see Ayla Joncheere, 'Intangible Inventions: The Kalbeliya Gypsy Dance Form, From Its Creation to UNESCO Recognition' (2015) 83 *Archiv Orientální* 71–86; Ruchika Ranwa, 'Heritage, Community Participation and the State: Case of the Kalbeliya Dance of India' (2021) 27 *International Journal of Heritage Studies* 1038–1044.

216 However, for exceptions see e.g. Intergovernmental Committee, Decision 7.COM 6 (2012), which recalled 'the obligations of States Parties to ensure respect for customary practices governing access to specific aspects of intangible cultural heritage (Article 13(d)(ii) of the Convention), inter alia in nominations, inventorying and awareness-raising activities, and invites them to address this subject more explicitly in their reports' (para 12), as well as cautioned states against equating the protection of the intangible cultural heritage of CGIs with the safeguarding of 'national identity' (para 13).

217 As noted by the Intergovernmental Committee in Decision 8.COM 6.A (2013) para 10.

218 Intergovernmental Committee, Decision 8.COM 6.A (2013) para 13; Decision 9.COM 5.A (2014) paras 8–9; Decision 10.COM 6.A (2015) paras 9–10; Decision 11.COM 9.A (2016) para 7; Decision 13.COM 7.B (2018) para 9; Decision 16.COM 7.A (2021) para 8.

219 However, some exceptions include: Intergovernmental Committee, Decision 13.COM 7.B.11 (2018) para 7; Decision 13.COM 7.B.13 (2018) paras 6–7; Decision 16.COM 7.A.9 (2021); Decision 17.COM 6.A.10 (2022) para 7; Decision 17.COM 6.A.12 (2022) para 6.

220 See e.g. Intergovernmental Committee, Decision 14.COM 9.A.3 (2019); Decision 15.COM 7.1 (2020); Decision 15.COM 7.5 (2020); Decision 16.COM 7.A.4 (2021); Decision 16.COM 7.A.6 (2021); Decision 17.COM 6.A.1 (2022); Decision 17.COM 6.A.6 (2022).

tee has regularly endorsed far-reaching recommendations made by the World Heritage Centre and the advisory bodies.²²¹

Until recently, the situation 'on the ground' with respect to inscriptions has thus remained largely out of sight in the documents of the Convention's governing bodies. However, as noted in the previous chapter, the secretariat of the Convention has received increasing amounts of third-party communications with respect to elements inscribed on the Lists of the Convention. While these third-party communications are generally not made available to the public, they are partly summarised by the secretariat for the purposes of the Committee's work; a closer examination of these communications reveals important impacts of the Convention on communities, groups and individuals associated with inscribed elements. Communications thus discuss issues relating to a lack of community involvement in safeguarding, '[r]estriction on the practice of an element including through legislative and regulatory measures', '[l]and use affecting spaces associated with an element', '[i]nfrastructure construction', and '[e]xploitation of natural resources affecting spaces associated with an element'.²²²

Thus far, third-party communications have led to the Committee gradually adopting decisions in which they (modestly) challenge the information presented by States Parties with respect to elements inscribed on the Lists. Thus in 2022, the Committee noted a communication with respect to the *Suiti cultural space* submitted by representatives of the local community 'on the impact of the administrative territorial reform implemented in 2021' by the Latvian government.²²³ Ultimately the Committee did not make any concrete proposals for the State Party in order to take these concerns into account, indicating that it still remains largely deferential to state sovereignty in matters concerning the substantial safeguarding of inscribed elements of intangible cultural heritage. The most notable exception to this trend is the 2019 deletion of *Aalst Carnival* from the Representative List in 2019, described in the previous chapter – a process which was also initiated on the basis of third-party communications.

As such it is unlikely that the decisions of the Intergovernmental Committee itself are likely to be harmful for individuals and local communities in the same manner as has been the case for the World Heritage Convention – namely as the result of direct requests formulated at the intergovernmental level in

221 However, as noted in the previous chapter, this may change in the near future as the monitoring procedures of the Intangible Cultural Heritage Convention have recently been revised in order to allow for closer continuous monitoring of inscribed elements.

222 Intergovernmental Committee, Issues Concerning the Follow-up of Inscribed Elements on the Lists of the Convention (29 October 2018) ITH/18/13.COM/9, 4. See also Intergovernmental Committee, Follow-up on elements inscribed on the Lists of the Convention (14 December 2021) LHE/21/16.COM/11 Rev; Intergovernmental Committee, Follow-up on Elements Inscribed on the Lists of the Convention (31 October 2022) LHE/22/17.COM/8.

223 Decision 17.COM 6.A.16 (2022) para 7.

relation to the limitation of community practices and the forced relocation of residents in a given World Heritage site. However, this does not mean that the impact of the Intangible Cultural Heritage Convention upon individuals and local communities is necessarily wholly positive; whereas many of the negative consequences described above flow from the active position granted to the World Heritage Centre, the Advisory Bodies, and the World Heritage Committee, the possible negative consequences of inscription on the Lists of the Intangible Cultural Heritage Convention described below largely result from the inaction of the Intergovernmental Committee in responding to (potentially) harmful consequences of inscription for communities, groups and individuals.²²⁴

5.4.1 State control over minority cultures

The foremost example of the potentially negative impact of inscription on communities, groups and individuals is when such inscription is (ab)used by the State Party in question to tighten control over minorities located within its territory.²²⁵ Given that the state is the sole actor granted the ability to propose inscriptions on the Lists of the Convention, it often retains the final authority on how intangible cultural heritage is represented to the world at large; as such, it can decide to represent the intangible heritage of a community in ways that do not align with the group's self-conception of their culture or which depict the cultures of the group as a form of folklore, frozen in time and separate from 'normal' society. This process is often accompanied by a

224 See Lucas Lixinski, 'Heritage Listing as a Tool for Advocacy: The Possibilities for Dissent, Contestation, and Emancipation in International Law Through International Cultural Heritage Law' (2015) 5 *Asian JIL* 387.

225 While there is no internationally agreed upon definition of the term 'minority', it is used here to signify numerically inferior groups with certain features (commonly on the basis of ethnicity, religion or language, as in the case of article 27 of the ICCPR) which distinguish them from the majority group within a given state, and which occupy a non-dominant position within that state: see Kristin Henrard, 'Minorities, International Protection', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013). For examples in relation to cultural heritage protection, see e.g. Aykan, 'How Participatory is Participatory Heritage Management? The Politics of Safeguarding the Alevi Semah Ritual as Intangible Heritage' (n 39); Salemink (n 37); Amy Mountcastle, 'Safeguarding Intangible Cultural Heritage and the Inevitability of Loss: A Tibetan Example' (2010) 22 *Studia Ethnologica Croatica* 338; Sarina Wu, 'To Share or not to Share: Contested Heritage in Inner Mongolia, China – A Case of Overtone Singing (Khoomei)' (2020) 26 *International Journal of Heritage Studies* 267. For an example of heritage *not* listed on the ICHC but demonstrating similar trends, see Denes (n 36).

lack of genuine participation of the community in the preparation of the inscription file and the measures subsequently taken to safeguard it.²²⁶

As a result of the state-centric nature of the Intangible Cultural Heritage Convention – itself being a creature of international law – the state is also usually not identified as a threat to the safeguarding of a given manifestation of intangible cultural heritage. Of particular interest in this regard is the categorisation of threats to elements inscribed on the Urgent Safeguarding List in the overview developed for the purposes of the Convention's website. Many of these threats are amorphous and cannot be directly attributed to a single actor, and therefore evade the question of the responsibility of the state for potentially harming intangible cultural heritage – such as aging practitioners, environmental degradation, or industrialisation.²²⁷ That being said, a number of threats can be more clearly identified as shortcomings by the state, such as 'repressive policies', 'intolerance' and 'disrespect'. However, a closer analysis of the elements which have been assigned to these threats (presumably by the Secretariat) reveals that inscriptions are very rarely critical of state policies,²²⁸ and instead often focus on limitations imposed on the practice by non-state actors, for example through the emergence of religions which prohibit traditional practices.²²⁹ When inscriptions are critical of state policies, these mainly refer to policies imposed by past (frequently repressive) regimes,²³⁰ such as in the former countries of the Soviet Union,²³¹ the former

226 Aykan, 'How Participatory is Participatory Heritage Management? The Politics of Safeguarding the Alevi Semah Ritual as Intangible Heritage' (n 39); Anaïs Leblon, 'A Policy of Intangible Cultural Heritage between Local Constraints and International Standards: "The Cultural Space of the Yaaral and the Degal"' in Regina Bendix, Aditya Eggert and Arnika Peselmann (eds), *Heritage Regimes and the State* (Universitätsverlag Göttingen 2012).

227 UNESCO Intangible Cultural Heritage, 'Dive into intangible cultural heritage' (UNESCO, n.d.) <<https://ich.unesco.org/en/dive&display=threat#tabs>>.

228 For a notable exception, see the nomination form for *Traditional hand puppetry in Egypt*, which draws attention to the threat posed to the viability of the practice by 'laws concerning public gatherings, [and the] rise of religious radicalism': Nomination file No. 01376, 4. Also compare the statements made with respect to a number of inscriptions of the negative impacts of extractive industries on the availability of cultural spaces for communities, despite such extractive industries presumably being authorised by the state authorities: see e.g. the inscription of *Yaokwa, the Enawene Nawe people's ritual for the maintenance of social and cosmic order* (2011) by Brazil; the *Mapoyo oral tradition and its symbolic reference points within their ancestral territory* (2014) by Venezuela; the *Colombian-Venezuelan llano work songs* (2017) by Colombia and Venezuela; and the *Mongolian traditional practices of worshipping the sacred sites* (2017) by Mongolia.

229 E.g. *Cultural practices and expressions linked to the 'M'Bolon', a traditional musical percussion instrument* (2021); *Male-child cleansing ceremony of the Lango of central northern Uganda* (2014).

230 See also the nomination of *Mevlevi Sema ceremony* by Türkiye (2008), which refers to past secularization policies adopted by the Turkish state.

231 E.g. *Suiti cultural space* (2009); *Cultural space of Boysun District* (2008); *Georgian polyphonic singing* (2008); *Xhubleta, skills, craftsmanship and forms of usage* (2022); *Pilgrimage to the St. Thaddeus Apostle Monastery* (2020).

communist regime in Mongolia,²³² or the Khmer Rouge in Cambodia.²³³ This is of course only logical, as only States Parties are empowered to propose inscriptions on the Lists of the Convention, and they are unlikely to criticise themselves in their nomination files.

Yet a range of case studies illustrate the potentially problematic role played by the Convention in mediating States Parties' relationships with marginalised communities situated within their territories. An example in point is Türkiye's inscription of the *semah* dance ritual (2010) practiced by the Alevi sect, a Shia group in predominantly Sunni Türkiye.²³⁴ Several Alevi organisations disagreed with the inscription of *semah* on the Representative List, as they view it not as a cultural practice but as a manifestation of their religious beliefs. In turn, they viewed the Turkish government's attempts to brand *semah* as 'culture' as a way to suppress those beliefs and assimilate the Alevis within Sunni Islam against the background of historical oppression of Alevis. While these Alevi organisations were initially involved in the development of the *semah* nomination, their views were side-lined once they diverged from that of the government, who viewed *semah* as a 'folk dance'.²³⁵ These dissensions are largely invisible in the nomination file and subsequent periodic reports; the potentially vulnerable position of the Alevi within Türkiye thus did not figure in the discussions of the Intergovernmental Committee upon inscription, with the Committee adopting the nomination without objections.²³⁶ Nor has

232 E.g. *Mongolian traditional practices of worshipping the sacred sites* (2017); *Traditional music of the Tsuur* (2009); *Mongolian calligraphy* (2013); *Mongol Biyelgee Mongolian traditional folk dance* (2009).

233 E.g. *Lkhon Khol Wat Svay Andet* (2018); *Chapei Dang Veng* (2016); *Sbek Thom, Khmer shadow theatre* (2008); *Royal ballet of Cambodia* (2008).

234 Aykan, 'How Participatory is Participatory Heritage Management? The Politics of Safeguarding the Alevi Semah Ritual as Intangible Heritage' (n 39). For a similar discussion in relation to the nomination of tangible cultural heritage linked to the Alevis, see Helen Human, 'Ethical or Empty Gestures?: World Heritage Nominations in Turkey' in Helaine Silverman, Emma Waterton and Steve Watson (eds), *Heritage in Action: Making the Past in the Present* (Springer 2017).

235 Aykan, 'How Participatory is Participatory Heritage Management? The Politics of Safeguarding the Alevi Semah Ritual as Intangible Heritage' (n 39) 393–4. Compare also the inscription of *Nevruz* (2016): Bahar Aykan, 'Whose Tradition, Whose Identity? The Politics of Constructing "Nevruz" as Intangible Heritage in Turkey' (2014) *European Journal of Turkish Studies* 1.

236 Intergovernmental Committee, Adoption of the Summary Records of the Fifth Session of the Committee (5 November 2011) ITH/11/6.COM/CONF.206/4 Rev, para 250. As the records of the Subsidiary Body do not provide an overview of the Body's discussions with respect to individual nominations, it is not possible to determine whether any of the members of the Subsidiary Body noted this; however, the records do note that '[t]he Subsidiary Body was informed by the Secretariat of several letters of protest received from organizations concerned with specific nominations. In this regard, the Subsidiary Body directed that letters of protest concerning a nomination should not be brought to its attention during the examination process in order not to influence its recommendation. Subsequent to its decision on each nomination so concerned, the Subsidiary Body was informed of the

the Committee discussed semah in light of Türkiye's 2012 and 2021 periodic reports.²³⁷

Similarly, researchers have argued that the *space of gong culture* listing in Vietnam (2005) was a way for the state to exercise control over ethnic groups located at the border of its territory, forcing them to adhere to Indigenous religious practices that they largely no longer ascribed to following their conversion to Christianity. Inscription was therefore a way for the state to exercise power over communities' cultural practices – and indirectly also their lives.²³⁸ Here the silence of the Committee in response to these problematic practices by the State Party is once again deafening. Vietnam has thus far only submitted one periodic report on its inscriptions on the Lists of the Convention in 2011; the phrasing of the periodic report with respect to the *space of gong culture* is undeniably problematic, with the State Party noting that ethnic groups in the region 'followed provocations from outsiders to abandon their traditional beliefs to pursue the newly introduced religions, thus discarded the gongs along with many other aspects of practicing the gong culture',²³⁹ noting that the communities with the lowest number of preserved gongs were Christian communities. Despite this, once again, the issue was not discussed by the Intergovernmental Committee.

As such, whilst inscription is presented as a way for the state to safeguard endangered cultures within its territory, it is often used to 'freeze' these cultures in time,²⁴⁰ and to blame the disappearance or adaptation of cultural traditions on a lack of safeguarding by the community itself – necessitating governmental intervention. Of particular concern are the inscriptions of the Uyghur dance practices of *muqam* (2005) and *meshrep* (2010) by China. Since these practices were inscribed, the international community has expressed mounting concern with regards to the treatment of the Uyghur by the Chinese

substance of the protests received, and reaffirmed in each instance its original recommendation. Any such protests, the Subsidiary Body decided, could be made available to the Committee, but should not figure into the Body's own examinations': Intergovernmental Committee, Evaluation of Nominations for Inscription in 2010 on the Representative List of the Intangible Cultural Heritage of Humanity (6 October 2010) ITH/10/5.COM/CONF.202/6, para 30.

237 Although the Secretariat did draw attention to Türkiye's assertion in its 2012 periodic report that Semah 'practised for many years in secret, can now be publicly celebrated by the concerned community and groups with dance and music, and in the company of friends, families and strangers': Intergovernmental Committee, Examination of the Reports of States Parties on the Implementation of the Convention and on the Current Status of Elements Inscribed on the Representative List of the Intangible Cultural Heritage of Humanity (4 November 2013) ITH/13/8.COM/6.A, para 72.

238 Salemink (n 37).

239 Intergovernmental Committee, Periodic Report No. 00792/Viet Nam (2012) 36.

240 Or, alternatively, to present newly created cultural practices as 'ancient', contrary to the self-perception of practitioner communities: see e.g., in relation to *kalbeliya*, Joncheere (n 215) 78-80; Ayla Joncheere, 'Kalbeliya Dance from Rajasthan: Invented Gypsy Form or Traditional Snake Charmers' Folk Dance?' (2017) 49 Dance Research Journal 37.

government, including their ability to freely exercise their religion and take part in the cultural life of their community.²⁴¹ Performances of Uyghur cultural practices such as muqam and meshrep have thus been limited and practitioners have been arrested and imprisoned; when practitioners are permitted to perform Uyghur cultural practices, they must do so in a manner that is officially circumscribed by the Chinese state, for example by changing lyrics and by minimising or wholly removing references to the religious origins of these practices.²⁴²

As such, while on paper the cultural practices of Uyghurs are protected through their inscription on international and national heritage lists, these inscriptions often do not provide the necessary support for the safeguarding of the practices in question; moreover, the underlying practices have become divorced from day-to-day life and have been exoticized for outside audiences. As such, these developments in fact interrupt the processes of intergenerational transmission which form such a central element of the definition of ICH in the Intangible Cultural Heritage Convention.²⁴³ However, the issue has thus far gone without comment from the Convention's Intergovernmental Committee, indicating a problematic lack of monitoring.

Thus in the case of muqam, China's most recent periodic report (2018) in fact noted an increased viability of the practice;²⁴⁴ since its inscription, the Committee has not discussed the element, despite receiving two periodic reports from China in 2012 and 2018. Similarly, in the case of meshrep, in 2017 the Committee commended China's efforts to 'increase the viability of the element and respond to existing threats and risks'.²⁴⁵ In response to the most recent periodic report to the element submitted in 2021, the Committee merely recalled the need for community participation in the preparation of the report

241 Rachel Harris, 'Uyghur Heritage under China's "Antireligious Extremism" Campaigns' in James Cuno and Thomas G. Weiss (eds), *Cultural Heritage and Mass Atrocities* (Getty Publications 2022); Rachel Harris and Aziz Isa Elkun, 'Music, Terror, and Civilizing Projects in China's Xinjiang Uyghur Autonomous Region' in Julian Fifer and others (eds), *The Routledge Companion to Music and Human Rights* (Routledge 2022).

242 On these developments, see e.g. Amy Anderson and Darren Byler, "'Eating Hanness": Uyghur Musical Tradition in a Time of Re-education' [2019] *China Perspectives* 17; Qian Mu and Rachel Harris, "'Force Majeure": An Ethnography of the Canceled Tours of Uyghur Sufi Musicians' in Rachel Harris, Guangtian Ha and Maria Jaschok (eds), *Ethnographies of Islam in China* (University of Hawaii Press 2021).

243 Anonymous, 'You Shall Sing and Dance: Contested "Safeguarding" of Uyghur Intangible Cultural Heritage' (2021) 22 *Asian Ethnicity* 121, 127.

244 People's Republic of China, Report on the Implementation of the Convention and on the Status of Elements Inscribed on the Representative List of the Intangible Cultural Heritage of Humanity (December 2017) <<https://ich.unesco.org/en/state/china-CN?info=periodic-reporting>>, 39.

245 Intergovernmental Committee, Decision 12.COM 8.C.5 (2017) para 4. See also Intergovernmental Committee, Adoption of the Summary Records of the Twelfth Session of the Committee (4 May 2018) ITH/18/13.COM/4, para 252, on the adoption without discussion of the decision relating to the report.

and the elaboration and implementation of the safeguarding plan,²⁴⁶ once again adopting its decision in relation to the element without any further discussion.²⁴⁷

Another problematic example is that of the Mexican inscription of *Pirekua, traditional song of the P'urhépecha* (2010), a musical practice of the Indigenous communities of the P'urhépecha. The inscription led to a conflict between the state and federal authorities and a number of *pirekua* practitioners, who argued that there was a lack of free, prior and informed consent of the P'urhépecha in the nomination process – as the nomination file only mentioned the consent of a select group of *pirekua* practitioners 'closely linked with the state government' who sought to nominate the practice in order to promote tourism.²⁴⁸ This conflict in turn led to the filing of a complaint with the Mexican National Human Rights Commission,²⁴⁹ as well as the submission of several communications by P'urhépecha representatives to the Secretariat of the Convention in 2017 and 2021 in response to the periodic reports submitted by Mexico.²⁵⁰ On these occasions, the P'urhépecha drew attention to the fact that they had not been consulted in the preparation of the nomination or subsequent periodic reports submitted by Mexico, broadly contesting the lack of consent in the development of safeguarding plans for *pirekua* and drawing attention to the factors which *they* considered as endangering the practice – which differed from those identified by the State Party.²⁵¹

The existence of these tensions between community members and the State Party is effectively made invisible by the structures of the Intangible Cultural Heritage Convention, which minimise the contributions of non-state actors in favour of those of the governing bodies of the Convention and its States Parties. While both the 2017 and 2021 communications were made available to the Intergovernmental Committee during the discussion of Mexico's periodic reports in these years, the issues which they raised surrounding community

246 Intergovernmental Committee, Decision 16.COM 7.A.11 (2021) paras 6-7.

247 Intergovernmental Committee, Adoption of the Summary Records of the Sixteenth Session of the Committee (8 June 2022) LHE/22/17.COM/4.A, para 84.

248 Georgina Flores Mercado, 'The Safeguarding of the *Pirekua*, the Traditional Song of the P'urhépecha, Michoacan, Mexico: Between Institutional and Community Practices' (2022) 28 *International Journal of Heritage Studies* 609, 610.

249 Ibid. See also 'Queja ante la Comisión Nacional de Derechos Humanos (*Pirekua*, n.d.) <<https://www.pirekua.org/espanol/queja-ante-la-comision-nacional-de-derechos-humanos/index.html>>.

250 'Letter to Timothy Curtis' (*Pirekua*, 2018) <<https://www.pirekua.org/docs/RespuestaInformePirericha2018.pdf>>; 'Letter to Dra. Gabriela Molina Aguilar' (*Pirekua*, 20 March 2022) <<https://www.pirekua.org/docs/RespuestaPirerichaInformeEnglish2022.pdf>>.

251 Such as the danger of being involved in road accidents when travelling to other communities to perform *pirekua*: 'Letter to Dra. Gabriela Molina Aguilar' (n 250).

consent are not alluded to in the Committee's decisions on the periodic reports,²⁵² nor do they surface in the summary records of the Committee's meetings.²⁵³

However, it is clear that the increased transparency of procedures surrounding third-party communications have driven Mexico to more openly address issues surrounding the community in its periodic reports: whereas its first periodic report only obliquely alluded to the tensions outlined above, Mexico's most recent report is more open about the issues surrounding the element and notes the initiation of a consultation process with the P'urhépecha with regards to the safeguarding plan. Nonetheless, once again, the starting point of these discussions is that the ultimate decision for inscription and safeguarding rests with the state and that the wholesale refusal of international inscription is off the table; similarly, any mediation between the wishes of the local community and the state occurs strictly at the domestic level, with international fora remaining largely out of reach for non-state actors.

5.4.2 Nationalism and inter-community conflict

Along similar lines, the inscription of intangible heritage is often used to consolidate the national identity of the state.²⁵⁴ This can occur when the state seeks to inscribe a cultural practice, but downplays the role played by a community in its continuation. A case in point is the attempted nomination of the *Teskoto* dance in North Macedonia, which Silverman argues ignored the role of the Roma in maintaining the tradition, thereby giving the appearance of national unity and papering over cultural diversity within the state.²⁵⁵ In some situations, inscription can lead to tensions within the state when practitioners of one cultural practice feel maligned if their practice is not

252 Intergovernmental Committee, Decision 13.COM 7.A (2018); Decision 16.COM 7.B (2021). See the Secretariat's report in 2018, which merely notes that '[t]he tourism marketing approach has ... raised concerns and disagreements in communities and among researchers, as acknowledged by Mexico regarding the consequences of the inscription of Pirekua': Intergovernmental Committee, Examination of the Reports of States Parties on the Implementation of the Convention and on the Current Status of Elements Inscribed on the Representative List of the Intangible Cultural Heritage of Humanity (20 November 2018) ITH/18/13.COM/7.A.Rev, para 50. By comparison, the discussion of the 2021 report by the Secretariat does not mention the communication: Intergovernmental Committee, Examination of the Reports of the First Regional Cycle of Periodic Reporting on the Implementation of the 2003 Convention and on the Current Status of Elements Inscribed on the Representative List of the Intangible Cultural Heritage of Humanity by States Parties in Latin America and the Caribbean (15 November 2021) LHE/21/16.COM/7.B.

253 LHE/22/17.COM/4.A (n 247).

254 Bernard Debarbieux and others, 'Sharing Heritage? Politics and Territoriality in UNESCO's Heritage Lists' (2021) 11 *Territory, Politics, Governance* 608.

255 Carol Silverman, 'Macedonia, UNESCO, and Intangible Cultural Heritage: The Challenging Fate of *Teškoto*' (2015) 52 *Journal of Folklore Research* 233.

inscribed, but another – very similar – form of intangible cultural heritage *is* inscribed. Communities can interpret this as favouring one version of history over another and considering one practice more representative of the broader national community.²⁵⁶

Numerous States Parties also set out to strategically inscribe heritage practices in order to claim what they perceive to be a form of 'ownership' over the tradition against other states, such as in the case of *lavash* bread making, which was listed for the first time by Armenia in 2014, and for a second time in 2016 by Azerbaijan, Iran, Kazakhstan, Kyrgyzstan and Türkiye.²⁵⁷ Other examples of such competing inscriptions include Türkiye's inscription of *karagöz* (with a similar practice, *karagiozis*, existing in Greece) and the inscriptions of *Gangneung Danoje* by Korea and the *Dragon Boat Festival* by China. Practices such as these understandably foster inter-state conflict and lead to situations in which states compete to ensure that 'their' heritage is inscribed first on the Representative List – considered as staking a national claim to the heritage in question.²⁵⁸

Parallel inscriptions from neighbouring states can also lead to the disruption of relations between members of cross-border communities, as in the case of the dual inscriptions of Mongolian overtone singing (also known as *khoomei*) by China and Mongolia.²⁵⁹ Overtone singing is practiced in both Inner and Outer Mongolia; China's listing of *khoomei* in 2009 without prior consultation of practitioner communities in Mongolia temporarily strained the political relationship between the two and frustrated the relationship between Mongolian *khoomei* practitioners on both sides of the border.²⁶⁰ Whilst it was clearly acknowledged upon the inscription of both elements (in 2009 and 2010, respect-

256 Guillaume Samson and Carlos Sandroni, 'The Recognition of Brazilian Samba de Roda and Reunion Maloya as Intangible Cultural Heritage of Humanity' (2013) 10 *Vibrant* 530, 546-9.

257 Other examples include Turkey's inscription of *karagöz* (2009) (with a similar practice, *karagiozis*, existing in Greece); Spain's inscription of *flamenco* (2010); and competing inscriptions of the *Gangneung Danoje Festival* (2008) by Korea and the *Dragon Boat Festival* (2009) by China.

258 Aykan, "'Patenting" Karagöz: UNESCO, Nationalism and Multinational Intangible Heritage' (n 47); Bahar Aykan, 'The Politics of Intangible Heritage and Food Fights in Western Asia' (2016) 22 *International Journal of Heritage Studies* 799; Wu (n 225); Jung-eun Park, 'The Legal Protection of the Intangible Cultural Heritage in the Republic of Korea' in Pier Luigi Petrillo (ed), *The Legal Protection of the Intangible Cultural Heritage: A Comparative Perspective* (Springer 2019); Juheon Lee, 'Promoting Majority Culture and Excluding External Ethnic Influences: China's Strategy for the UNESCO "Intangible" Cultural Heritage List' (2020) 26 *Social Identities* 61. See also Internal Oversight Service, Evaluation of UNESCO's Standard-setting Work of the Culture Sector – Part I – 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (October 2013) IOS/EVS/PI/129 Rev., at 50.

259 Listed as *Mongolian art of singing, Khoomei* by China (2009) and *Mongolian traditional art of Khöömei* by Mongolia (2010).

260 Wu (n 225).

ively) that such parallel inscriptions were undesirable,²⁶¹ the issue of potential tensions between and within the communities associated with the practice has not been addressed by the Committee either upon the inscription of the elements or in its discussion of the States Parties' periodic reports in 2012 and 2018.²⁶²

Similarly, inscription on the Lists of the Convention can sometimes be perceived as one community illegitimately staking a claim to a particular form of intangible cultural heritage at the expense of other communities with highly similar practices, thereby exacerbating intra-community tensions. This can be discerned, for example, in relation to the *Nan Pa'ch ceremony* (2013) inscribed by Guatemala. The inscription led to disputes between local cultural organisations as to who represented the community responsible for the ceremony, as well as disputes during the inventorying process for the element with regards to whether the groups consulted were sufficiently represented.²⁶³ Despite assertions to the contrary by the Intergovernmental Committee, local communities thus feared that the inscription effectively granted an exclusive license to practice the tradition to one segment of the community and not another.²⁶⁴

5.4.3 Exacerbation of social inequality

Issues in the broad participation of the 'community' in nomination files are not necessarily limited to those countries with a strained relationship between majority and minority groups. Thus in the case of the listing of the *cultural space of Jemaa el-Fna Square* (2008) in Morocco,²⁶⁵ the involvement of the local community was marginal in the initial listing process as the inscription was largely driven by cultural heritage experts.²⁶⁶ The inscription of the square exacerbated existing inequalities; for some residents, the protection of the square even led to loss of income due to the changing nature of the cultural

261 Subsidiary Body, Report by the Rapporteur (26 August 2009) ITH/09/4.COM/CONF.209/INF.6, para 34; Subsidiary Body, Report by the Rapporteur (18 October 2010) ITH/10/5.COM/CONF.202/INF.6, para 31.

262 Intergovernmental Committee, Adoption of the Draft Summary Records of the Fourth Session of the Committee (14 October 2010) ITH/10/5.COM/CONF.202/4, para 271; ITH/11/6.COM/CONF.206/4 Rev. (n 236) para 232.

263 Intergovernmental Committee, Examination of Reports of States Parties on the Current Status of Elements Inscribed on the List of Intangible Cultural Heritage in Need of Urgent Safeguarding (29 October 2018) ITH/18/13.COM/7.B, paras 45-6.

264 Intergovernmental Committee, Decision 13.COM 7.B.5 (2018) para 9.

265 Although it was initially inscribed on the Masterpieces List and thus predates the adoption of the Convention.

266 Thomas Beardslee, 'Whom Does Heritage Empower, and Whom Does it Silence? Intangible Cultural Heritage at the Jemaa el Fnaa, Marrakech' (2016) 22 International Journal of Heritage Studies 89; Hafstein (n 24).

practices carried out within it and the loss of the physical spaces in which these activities could be performed.²⁶⁷ The end result was thus – to a certain extent – the loss of the values and activities for which the Square was initially inscribed. Like many of the examples above, these issues have never been discussed by the Intergovernmental Committee, despite Morocco's single periodic report (2014) explicitly noting the threats posed to the local community by growing tourism as a result of inscription.²⁶⁸

Inequalities amongst community members thus carry over into the post-listing effects of inscription. In the case of the *vimbuza healing dance* in Malawi (2008), Gilman notes that the majority of the vimbuza practitioners experienced very little difference in their day-to-day lives after listing: the little resources that were distributed as a result of inscription were unequally distributed amongst practitioners.²⁶⁹ Moreover, many practitioners remained unaware of the inscription itself; when informed of the fact that the vimbuza ritual had been listed as intangible heritage, they disagreed with this denomination – viewing vimbuza as a form of medicine, rather than a cultural practice. By contrast, Malawi's sole periodic report argues that the inscription of vimbuza has led to a greater acceptance of the practice within society at large, demonstrating a disconnect between the observed impact of the inscription on the ground and from the perspective of heritage experts.²⁷⁰ Like many other inscriptions on the Lists of the Intangible Cultural Heritage Convention, vimbuza thus demonstrates a detachment between the values ascribed to a given form of heritage variously by the state and by members of the local community.

A similar trend can be observed in the post-inscription status of the *Kutiyattam* dance performance in India (2008): while many Kutiyattam dancers observe that inscription has brought benefits, such as increased income, this has been paired with increased state regulation and new power imbalances amongst practitioners, based on who has received official recognition from the state – thereby individualising the practice.²⁷¹ As such, the benefits of inscription were distributed unequally amongst members of the local community.²⁷² Moreover, the local values ascribed to Kutiyattam were ultimately lost in the process of translation from the local to the (inter)national level: whereas

267 Beardslee (n 266).

268 Periodic Report No. 00823/Morocco (2014) 18-19. See also Intergovernmental Committee, Examination of the Reports of States Parties on the Implementation of the Convention and on the Current Status of Elements Inscribed on the Representative List of the Intangible Cultural Heritage of Humanity (22 October 2014) ITH/14/9.COM/5.A, para 85.

269 Lisa Gilman, 'Demonic or Cultural Treasure? Local Perspectives on Vimbuza, Intangible Cultural Heritage, and UNESCO in Mali' (2015) 52 *Journal of Folklore Research* 199.

270 ITH/18/13.COM/7.A Rev. (n 252) para 47.

271 Leah Lowthorp, 'Kutiyattam, Heritage, and the Dynamics of Culture: Claiming India's Place within a Global Paradigm Shift' (2020) 79 *Asian Ethnology* 21, 31.

272 Leah Lowthorp, 'Voices on the Ground: Kutiyattam, UNESCO, and the Heritage of Humanity' (2015) 52 *Journal of Folklore Research* 157.

the dance has religious roots, being primarily practiced in temples, the inscription within UNESCO was primarily aimed at the protection of the secular variant of the dance, which was arguably less in need of international recognition and support.²⁷³ These effects once again remain more or less invisible in the processes of international inscription and monitoring, as the Committee has never explicitly commented on the safeguarding of Kutiyattam by India, despite the State Party having submitted two periodic reports which call attention to the concerns of practitioners who are unable to live off Kutiyattam performances alone due to low levels of remuneration for their performances.²⁷⁴

5.4.4 Positive effects

Yet it is also crucial to underscore the positive effects of international heritage listing. Although the economic benefits of inscription thus may not always be equally distributed, in many cases it can undoubtedly lead to economic benefits for individuals and local communities.²⁷⁵ Thus in the case of *batik* in Indonesia (2009), international inscription revitalised the status of batik and increased the economic perspectives of its practitioners.²⁷⁶ Similarly, the inscription of the *Kopachkata* dance in Northern Macedonia (2014) led to an increase in popularity, accompanied by greater financial support for dancers from the national government, allowing the dance to gain new life at the local level. All in all, the increased opportunities for funds and interest in practicing amongst younger generations helped to revitalise the tradition.²⁷⁷ Broadly speaking, the increased interest in a given form of intangible cultural heritage that results from inscription can lead to greater opportunities for the communities associated with the practice; in the case of practices associated with intangible heritage, it can moreover provide some level of assurance to younger generations that the practice presents a viable career path – thereby contributing to the sustainable development of local communities.²⁷⁸

273 Parasmoni Dutta, 'Intangible Cultural Heritage in India: Reflections on Selected Forms of Dance' in Michelle L Stefano and Peter Davis (eds), *The Routledge Companion to Intangible Cultural Heritage* (Routledge 2017) 233.

274 India, Report on the Implementation of the Convention and on the Status of the Intangible Cultural Heritage of Humanity (UNESCO, 15 December 2017) <<https://ich.unesco.org/en/state/india-IN?info=periodic-reporting>>, 36.

275 IOS/EVS/PI/129 Rev. (n 258) 48-9.

276 Natsuko Akagawa, 'Batik as a Creative Industry: Political, Social and Economic Use of Intangible Heritage' in Natsuko Akagawa and Laurajane Smith (eds), *Safeguarding Intangible Heritage: Practices and Politics* (Routledge 2019).

277 Velika Stojkova Serafimovska, Dave Wilson and Ivona Opetčeska Tatarčevska, 'Safeguarding Intangible Cultural Heritage in the Republic of Macedonia' (2016) 48 Yearbook for Traditional Music 1.

278 Dutta (n 273) 231-2.

The international listing of intangible heritage can also induce positive effects with regards to the reach of domestic heritage laws with particularly narrow views on the nature of heritage and conservation. In the case of the *Gangneung Danoje festival* in South Korea (2008), international listing facilitated the protection of local heritage practitioners – and the festival – from more stringent national heritage protection laws which sought to freeze the heritage as it stood upon inscription, as opposed to allowing the continuation of 'living' heritage. In this sense, the Intangible Cultural Heritage Convention, with its focus on the role of the community in listing and protection provided more flexibility to the local community in safeguarding their tradition in the ways they saw fit.²⁷⁹ Similarly, in the case of the inscription of *Vanuatu sand drawings* (2008), Alivizatou argues that the inscription changed the approaches of local preservationists from one of 'pure' preservation to an approach in which the community was included.²⁸⁰

Finally, numerous case studies of inscriptions on the Lists of the Convention underline the positive psychological effects of international listing on individuals. Foster argues with regards to the inscription of *Toshidon* in Japan (2009) that inscription brought pride to the local community: it was 'an objective confirmation of [their] own subjective values'.²⁸¹ Such feelings of pride and recognition of the uniqueness of one's cultural practice are present across the board in many inscriptions on the Representative List.²⁸² Thus Alivizatou notes with regards to the *sandroing* inscription in Vanuatu that whilst the inscription has undoubtedly led to changes in the traditional practices which occurred prior to inscription, it was experienced by local communities as a tool of empowerment which helped them to act upon the global stage.²⁸³ Deacon similarly emphasises in relation to the inscription of the *Art of the Neapolitan 'Pizzaiuolo'* (2017) by Italy that the listing amounted to more than a facile 'appropriation' of the tradition by the national government: it was also

279 Cedarbough T. Saeji, 'Replacing Faith In Spirits with Faith in Heritage: a Story of the Management of the Gangneung Danoje Festival' in Natsuko Akagawa and Laurajane Smith (eds), *Safeguarding Intangible Heritage: Practices and Politics* (Routledge 2019).

280 Marilena Alivizatou, 'Debating Heritage Authenticity: Kastom and Development at the Vanuatu Cultural Centre' (2012) 18 *International Journal of Heritage Studies* 124.

281 Michael Dylan Foster, 'Imagined UNESCOs: Interpreting Intangible Cultural Heritage on a Japanese Island' (2015) 52 *Journal of Folklore Research* 217. The Toshidon inscription was replaced in 2018 by the *Raiho-shin, ritual visits of deities in masks and costumes* inscription, which encompassed similar practices across Japan in a single inscription.

282 IOS/EVS/PI/129 Rev. (n 258) 49.

283 Alivizatou (n 280). Yet speaking to an (imagined) global audience also has its disadvantages. See e.g. the example of *kutiyattam* once again, as per Dutta (n 273) 232: a number of practitioners noted a substantial change in the type of performances (plays were substantially shortened, for example); in addition, as the audience for the plays changed from a predominantly Malayali audience to non-Malayali audiences, this led to the omission of Malayali-spoken sections of the plays.

a way for the local community to 'exercise its own agency', in order to assert 'symbolic stewardship' over their practice.²⁸⁴

Such opportunities for local communities to symbolically 'speak' on the international stage are particularly resonant in the case of groups who can usually only express their right to self-determination in the internal sphere, such as in the case of Indigenous groups or residents of non-self-governing territories. An example in point is the inscription of the *gwoka* drum performance in Guadeloupe (2014), an overseas territory of France; in cases such as these, inscription can provide a venue for 'non-independent nations, ethnic minorities and citizens of micro-states' to not only act on the global stage, but to be seen as equal players on that stage.²⁸⁵ Although the State Party ultimately remains in control of the decision to inscribe elements on the Lists, they can nonetheless function as a pathway for 'self-definition and validation' of subaltern groups within the state.²⁸⁶ There are thus many examples of inscriptions where communities, groups and individuals have retained their autonomy and control over their cultural practices during international inscription processes; however, such outcomes are often dependent on the internal organisation of these groups and their familiarity with navigating bureaucratic processes such as those found within UNESCO.²⁸⁷

5.4.5 Conclusion

As such, the Intangible Cultural Heritage Convention similarly shows some positive aspects, but also serious weaknesses in its implementation with regards to the role of individuals and local communities, despite the central role that these stakeholders play in the text of the Convention. The above shows examples where inscription has taken place in a manner contrary to the wishes of communities, demonstrating how the Convention is used as a tool for the state to extend or strengthen its (symbolic) power over these communities. There are also numerous examples in the practice of the Convention where inscription has resulted in heightened tensions not only between states, but between the members of cross-border communities of practice. In addition, the case studies demonstrate that often local communities feel marginalised post-inscription, either remaining unaware of the Convention entirely, or

284 Harriet Deacon, 'Safeguarding the Art of Pizza Making: Parallel Use of the Traditional Specialities Guaranteed Scheme and the UNESCO Intangible Heritage Convention' (2018) 25 *International Journal of Cultural Property* 515.

285 Jerome Camal, 'Putting the Drum in Conundrum: Guadeloupean Gwoka, Intangible Cultural Heritage and Postnationalism' (2016) 22 *International Journal of Heritage Studies* 395.

286 Laura Jeffery and Rebecca Rotter, 'Safeguarding Sega: Transmission, Inscription, and Appropriation of Chagossian Intangible Cultural Heritage' (2018) 25 *International Journal of Heritage Studies* 1020, 1021.

287 Debarbieux and others (n 254) 621.

missing out on the benefits flowing from inscription, which only reach part of the community.

While each of these negative effects certainly runs counter to the object and purpose of the Convention, as already noted above, they are not strictly speaking the result of decisions made by the Convention's governing bodies. Similarly, they are also not necessarily the result of a lack of standards with respect to the role of individuals and local communities in the Convention itself. Instead, they are largely the result of the inability of the Intergovernmental Committee to respond to detrimental uses of the Representative List and Urgent Safeguarding List by the States Parties due to a lack of effective monitoring procedures. This is made more difficult due to the fact that, until very recently, the Intergovernmental Committee had no way of officially obtaining additional information on the implementation of the Convention beyond the periodic reports submitted by the States Parties.

5.5 EXCURSUS: THE ROLE OF HUMAN RIGHTS IN THE DECISIONS OF THE WORLD HERITAGE COMMITTEE AND INTERGOVERNMENTAL COMMITTEE

As the previous two sections demonstrate, the decisions of the World Heritage Committee and the Intergovernmental Committee have the potential to impact upon the exercise of certain human rights by individuals and communities, such as the right to housing, the right to take part in cultural life, the right to self-determination, and the right to freedom of religion. Simultaneously, calls for the adoption of a human-rights based approach to international heritage governance have mounted over the past two decades,²⁸⁸ also specifically from within UNESCO as an international organisation.²⁸⁹ These developments can be seen as part of a broader shift within international governance towards granting a central role to human rights-based approaches, particularly within the context of international development programmes.²⁹⁰ Despite these

288 Stener Ekern and others, 'Human Rights and World Heritage: Preserving Our Common Dignity through Rights-based Approaches to Site Management' (2012) 18 *International Journal of Heritage Studies* 213; Anne-Laura Kraak and Bahar Aykan, 'The Possibilities and Limitations of Rights-Based Approaches to Heritage Practice' (2018) 25 *International Journal of Cultural Property* 1; Ana Filipa Vrdoljak, Claudia Liuzza and Lynn Meskell, *UNESCO, World Heritage, and Human Rights Compliance* (Duke Global Working Paper, 2021). See also Human Rights Council, Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed (21 March 2011) UN Doc A/HRC/17/38; UN Doc A/77/238 (n 210).

289 In the case of UNESCO, see General Conference of UNESCO, Draft UNESCO Strategy on Human Rights (22 September 2003) 32 C/57; Executive Board of UNESCO, UNESCO Policy on Engaging with Indigenous Peoples (9 August 2017) 202 EX/9.

290 United Nations Development Group, 'The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding among UN Agencies' (*UNSDG*, September 2003) <<https://unsdg.un.org/resources/human-rights-based-approach-development-cooperation-towards-common-understanding-among-un>>. See further Fons Coomans, 'On the

developments, the role of human rights remains minimal in the decisions of both the World Heritage Committee and the Intergovernmental Committee – with the overall role of human rights within UNESCO remaining fraught.²⁹¹

Thus in the case of the World Heritage Convention, despite the fact that the Operational Guidelines and several policy documents of the Convention draw attention to the need for States Parties to adopt a human rights-based approach, human rights only rarely figure in the decisions of the World Heritage Committee. In all cases these discussions have focused on large-scale natural heritage sites which have figured heavily in civil society discourse, such as *Kaeng Krachan Forest Complex* and *Ngorongoro Conservation Area*. However, here the approach of the Committee is not consistent: whereas the inscription of Kaeng Krachan was referred by the Committee in 2015 and 2016, with the Committee requesting Thailand to '[a]ddress in full the concerns that have been raised by the Office of the United Nations High Commissioner for Human Rights',²⁹² the site was ultimately inscribed several years later, with the inscription decision making no mention of human rights.

While the Committee has on several other occasions requested the State Party concerned to act in accordance 'with relevant international standards' and the Convention's Sustainable Development Policy, it thereby only implicitly refers to the importance of respecting human rights standards in the implementation of the Convention by states.²⁹³ In addition, with the exception

Right(s) Track? United Nations (Specialized) Agencies and the Use of Human Rights Language' (2012) 45 *Verfassung in Recht und Übersee* 274; Morten Broberg and Hans-Otto Sano, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development – an Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences' (2017) 22 *The International Journal of Human Rights* 664. For a critique of the HRBA, see Gustavo Arosemena and Bart Kleine Deters, 'Conflicts in Human Rights-Based Development' in Jan Wouters and others (eds), *Can We Still Afford Human Rights? Critical Reflections on Universality, Proliferation and Costs* (Elgar 2020).

291 Francesco Seatzu and Andrea Lai, 'Mission Impossible: Revitalizing the Role of UNESCO as a Human Rights Organization' (2017) 11 *Human Rights & International Legal Discourse* 222; Stefan Disko and Dalee Sambo Dorrough, '"We Are Not in Geneva on the Human Rights Council": Indigenous Peoples' Experiences with the World Heritage Convention' (2022) 29 *International Journal of Cultural Property* 487. More broadly on the development of human rights policies within UNESCO, see Yvonne Donders, 'UNESCO and Human Rights' in Gerd Oberleitner (ed), *International Human Rights Institutions, Tribunals, and Courts* (Springer 2018).

292 World Heritage Committee, Decision 39 COM 8B.5 (2015) para 2(a); Decision 40 COM 8B.11 (2016) para 4.

293 In the case of the *Sangha Trinational* site in Cameroon, the Central African Republic and Congo; numerous natural sites within the Democratic Republic of the Congo; *Chitwan National Park* in Nepal; *South China Karst* in China; *Ha Long Bay* in Vietnam; *Rock-Hewn Churches, Lalibela* in Ethiopia; *Wulingyuan Scenic and Historic Interest Area* in China; *Manas Wildlife Sanctuary* in India; *Petra* in Jordan; *Abu Mena* in Jordan: Decision 42 COM 7B.54 (2018) para 4(b); Decision 43 COM 7B.4 (2019); Decision 43 COM 7B.6 (2019) para 8; Decision 43 COM 7B.30 (2019) para 7; Decision 44 COM 7A.5 (2021) para 6; Decision 44 COM 7A.42 (2021) para 6; Decision 44 COM 7A.44 (2021) para 7; Decision 44 COM 7A.46 (2021) para 4;

of one site, each of these requests were made in recent sessions of the Committee (2019 and 2021). As such it too early to determine whether the Committee will follow up on these requests in future and whether this might represent the start of a new trend in the Committee's practice.

By comparison, the Intergovernmental Committee of the Intangible Cultural Heritage Convention has referred to human rights more explicitly in its decisions. In 2014, in relation to the examination of nominations, it requested that States Parties provide 'more information ... in nominations to demonstrate how practices comply with existing human rights instruments'.²⁹⁴ However, when mentioning human rights the Committee predominantly focuses on whether potential elements respect human rights, for example in relation to gender equality, rather than whether the inscription process itself meets human rights standards with respect to participation.²⁹⁵ The Committee has accordingly rejected nominations which do not provide sufficient information on whether the proposed element respects human rights.²⁹⁶ As already noted in the previous chapter, the same can be said with respect to the treatment of human rights in the monitoring processes established by the Convention, where the Intergovernmental Committee explicitly considered that a lack of

Decision 44 COM 7B.174 (2021) para 4; Decision 44 COM 7B.98 (2021) para 5(d); Decision 44 COM 7B.118 (2021) para 14; Decision 44 COM 7B.174 (2021) para 4; Decision 44 COM 7B.181 (2021); Decision 44 COM 7B.183 (2021) para 9; Decision 44 COM 7B.185 (2021) para 5; Decision 44 COM 7B.188 (2021) para 10.

294 Intergovernmental Committee, Decision 9.COM 9.A (2014) para 6; see also Decision 11.COM 10 (2016) para 16.

295 See e.g. Intergovernmental Committee, Decision 11.COM 10.B.4 (2016) para 2; Decision 11.COM 10.B.3 (2016) para 2; Decision 11.COM 10.B.11 (2016) para 2; Decision 11.COM 10.B.12 (2016) para 2; Decision 11.COM 10.B.16 (2016) para 2; Decision 11.COM 10.B.17 (2016) para 2; Decision 11.COM 10.B.23 (2016) para 2; Decision 11.COM 10.B.25 (2016) para 2; Decision 11.COM 10.B.26 (2016) para 2; Decision 11.COM 10.B.27 (2016) para 2; Decision 11.COM 10.B.29 (2016) para 2; Decision 11.COM 10.B.31 (2016) para 2; Decision 11.COM 10.B.32 (2016) para 2; Decision 11.COM 10.B.33 (2016) para 2; Decision 11.COM 10.B.34 (2016) para 2; Decision 11.COM 10.B.35 (2016) para 2; Decision 11.COM 10.B.36 (2016) para 2; Decision 11.COM 10.B.37 (2016) para 2; Decision 12.COM 11.B.12 (2017) para 2; Decision 12.COM 11.B.14 (2017) para 2; Decision 15.COM 8.B.38, para 2; Decision 15.COM 8.B.42, para 2; Decision 16.COM 8.A.4, para 2; Decision 16.COM 8.A.3 (2021) para 2; Decision 16.COM 8.A.5 (2021) para 2; Decision 16.COM 8.B.5 (2021) para 2; Decision 16.COM 8.B.14 (2021) para 2; Decision 16.COM 8.B.16 (2021) para 2; Decision 16.COM 8.B.17 (2021) para 2; Decision 16.COM 8.B.18 (2021) para 2; Decision 16.COM 8.B.25 (2021) para 2; Decision 16.COM 8.B.35 (2021) para 2; Decision 16.COM 8.B.40 (2021) para 2; Decision 16.COM 8.B.41 (2021) para 2; Decision 16.COM 8.B.43 (2021) para 2; Decision 16.COM 8.B.44 (2021) para 2; Decision 17.COM 7.B.2 (2022) para 2; Decision 17.COM 7.B.13 (2022) para 2; Decision 17.COM 7.B.14 (2022) para 2; Decision 17.COM 7.B.31 (2022) para 2; Decision 17.COM 7.B.38 (2022) para 2; Decision 17.COM 7.B.39 (2022) para 2.

296 Intergovernmental Committee, Decision 11.COM 10.A.1 (2016) para 3 (in relation to a female initiation rite in Botswana).

respect for human rights constituted sufficient grounds to remove *Aalst Carnaval* from the Representative List.²⁹⁷

Yet even here the Intergovernmental Committee's treatment of human rights issues often remains inconsistent, as most discussions of human rights in inscription decisions have occurred at a select number of sessions of the Committee; nor do the decisions provide any comprehensive analysis of *why* an element meets human rights standards, appearing to be largely based on assertions of the State Party in the nomination file.²⁹⁸ All in all, the Intergovernmental Committee's approach to questions of human rights does not focus on the potential human rights impacts of inscription itself – similarly to the World Heritage Convention.

5.6 CONCLUSION

This chapter has sought to illustrate the possible impacts – both positive and negative – of international heritage protection, viewed from the perspective of the individuals and local communities connected to the sites and practices which are granted international status pursuant to UNESCO's cultural conventions. The changes wrought by cultural heritage inscription are certainly not always problematic; to the contrary, cultural heritage law has facilitated the protection of tangible and intangible forms of cultural heritage in a spirit of cooperation and burden-sharing between states which would have been difficult to imagine one century ago. Many of these benefits have also reached local communities, with numerous examples from practice demonstrating that international heritage inscriptions can bring pride and revitalisation to such communities. However, a necessary (if not sufficient) condition for the achievement of these goals is that the inscription process respects individuals and local communities, and that they feel that they can meaningfully influence decision-making processes post-inscription.

It is for this reason that a number of the impacts of international heritage listing are undeniably problematic, either from the perspective of the protection of heritage value itself – given that the underlying motivation of contemporary international heritage law is to safeguard living heritage values – as well as, in some cases, procedural or substantive human rights. A common threat across these more problematic consequences is the decoupling of local and universal forms of interest in heritage protection, in which the former continues to assume a hierarchically lower position than the latter. This relationship is expressed in a number of ways within contemporary international heritage protection.

²⁹⁷ See also Intergovernmental Committee, Decision 17.COM 6.B (2022) para 11 (in relation to the examination of periodic reports).

²⁹⁸ See e.g. Decision 11.COM 10.B.4 (2016) para 2; Decision 12.COM 11.B.14 (2017) para 2.

The first of these is the position of communities in international heritage management. As the case studies above show, there is generally a lack of community involvement in the inscription, monitoring and management of cultural heritage, whereby the interests of individuals and local communities are assumed to be subsumed in the universal interest in the protection of heritage. In this process, the values attached to the heritage by the local community are seen as separate from its universal heritage value.²⁹⁹ If the wishes of the local community run contrary to those taken in the name of universal heritage value, then the community is frequently posited as the 'enemy' of or a 'threat' to conservation – thereby denying that the local community often plays an important role in shaping the heritage values of the site.³⁰⁰ Moreover, opportunities for members of the local community to speak on behalf of *their* interest in the heritage – as opposed to the universal interest – are few and far between; in the rare circumstances in which the community is granted the right to intervene, it is expected to speak with one voice.³⁰¹

A further problematic development relates to the conflicting values assigned to cultural heritage, and the uses of heritage which are permitted in line with these values. This is particularly prevalent in relation to tangible heritage: residents of a cultural heritage site will predominantly see it as a place to live and work, and therefore are less inclined to agree to restrictions imposed on the site in the interests of the conservation of its universal heritage value. This is sometimes expressed in limitations of uses of the site. Such limitations can relate to quotidian usage of the site, such as for agriculture or subsistence purposes or housing; limitations that could potentially conflict with the human rights to food, water, or housing. Other limitations focus on uses of the site which might in fact contribute to its intangible heritage value, such as worship, particularly if such worship entails the modification, destruction, or removing from public view certain aspects of the physical heritage fabric.³⁰² These limitations can in turn potentially infringe upon religious and cultural rights. In these situations, the inability of the community to use, and if necessary modify, 'their' heritage 'is keenly felt as a cost ... in that it is perceived to place restrictions on their interactions and cultural associations with listed properties.'³⁰³ For these communities, preservation of the heritage does not carry the same connotations as it does within UNESCO and its expert bodies.

299 Poullos, *The Past in the Present: A Living Heritage Approach – Meteora Greece* (n 133) 18.

300 Ibid 17; Brumann (n 2) 298.

301 Nonström (n 73) 12. As Gillman suggests, this 'satisfies symmetry but at the expense of the realities of possession and control': Derek Gillman, *The Idea of Cultural Heritage* (Cambridge University Press 2010) 15.

302 Noel B. Salazar, 'One List, a World of Difference? The Dynamis of Global Heritage at Two Neighbouring Properties' in Christoph Brumann and David Berliner (eds), *World Heritage on the Ground: Ethnographic Perspectives* (Berghahn 2016) 151-2.

303 Pocock and Lilley (n 205) 8.

Similarly, in the case of intangible heritage inscriptions, locals might not see a given practice as 'heritage', but as religion, showing a similar disconnect between the values ascribed by the international community and those ascribed by the local community. When these values diverge, conflict is likely to arise over which measures are most appropriate in order to maintain the intangible cultural heritage. As Brumann and Berliner argue, 'heritage struggles are not just over benefits, but also over meanings',³⁰⁴ and who is granted the power to define these meanings. This relationship is particularly expressed in situations where the state extends its control over the cultural practices of groups which form a numerical minority within the state (whether on the basis of ethnicity, language, or religion) by virtue of international inscriptions. For these groups, it is the distinctiveness of their culture which sets them apart: to label that culture as 'universal' undermines their status as distinct from the majority, and by implication their autonomy.³⁰⁵ If states subsequently limit or alter the practices of these communities this can potentially entail a breach of their cultural rights; in the case of minorities or Indigenous peoples, it can also entail a limitation of the right to self-determination.

The ultimate step – after limiting a community's use of a heritage site or shaping the way in which a tradition is to be carried out – is the physical removal of members of the local community from a tangible heritage site through their eviction or relocation, an action which can potentially violate the right to housing of members of the local community.³⁰⁶ In these situations, international heritage law functions as a tool to remove decision-making about heritage from the sphere of local politics: '[t]he net result is the displacement of not just people but also the political questions that surround preservation claims.'³⁰⁷ All too often, states see the removal of residents as being in line with the World Heritage Convention; they do not tend to receive any counter-arguments to this point from their fellow States Parties in the World Heritage Committee. It is thus very easy for individuals and local communities to fall by the wayside within the 'bureaucracy of care'³⁰⁸ which springs into being around World Heritage sites, in which no actor is assigned clear responsibility for ensuring their wellbeing.

Evictions of residents are particularly prevalent in relation to archaeological World Heritage sites, in which the outstanding universal value of the site is primarily seen as manifesting itself in archaeological terms, thereby ignoring

304 Brumann and Berliner, 'Introduction: UNESCO World Heritage – Grounded?' 24-5.

305 Pocock and Lilley (n 205) 6.

306 This phenomenon is only present in relation to tangible cultural heritage, insofar as the very definition of intangible cultural heritage guarantees the central position of the community.

307 Shepherd (n 124) 558.

308 Rajangam, 'A Bureaucracy of Care in Managing Hampi World Heritage Site' (n 165).

the social ties of contemporary communities to the site.³⁰⁹ Even in areas which are not wholly archaeological in nature, interventions by the local population with a potential impact on the physical elements of the World Heritage Site are more likely to be seen as a threat to the outstanding universal value of the site than as a demonstration of its living heritage value. The livelihoods of residents are often branded as destructive and contrary to conservation of the site.³¹⁰

As has been noted above, international heritage status is used as a justification for the state to take far-reaching measures, even if such measures were not recommended by the governing bodies of the convention in question, or by expert bodies such as ICOMOS. These situations pinpoint one of the chief limitations of cultural heritage law: a lack of monitoring, compounded by the state-centric nature of international law.³¹¹ Above all, the system of international heritage management is reliant upon the presumption that states will carry out their obligations in good faith, with issues of local dissent surrounding inscriptions effectively being made invisible within the international monitoring systems established by the cultural conventions due to the marginalisation of individuals and local communities within intergovernmental fora.³¹² Damningly, Shepherd argues that international heritage management as envisaged by UNESCO is most likely to succeed in situations where the state can proceed unchallenged by a robust civil society and democratic procedures.³¹³

While the position of individuals and local communities within international heritage governance has undeniably improved over the course of the past two decades, a number of important issues thus remain in practice. Whilst issues relating to community participation and human rights are occasionally raised in the decisions of the World Heritage Committee and the Intergovernmental Committee, these decisions are often inconsistent, adopting a different position not only with respect to similar sites but also with respect to the same site over time. Whereas the problems outlined above differ in nature between the two conventions – with the World Heritage Convention being characterised by a highly active intergovernmental body chiefly focused on the outstanding universal value of World Heritage sites, whereas the Intergovernmental Committee of the Intangible Cultural Heritage Convention is often hampered by a lack of autonomy from States Parties – both conventions can be seen to

309 Ronda L. Brulotte, 'Archaeological Replica Vendors and an Alternative History of a Mexican Heritage Site: The Case of Monte Albán' in Laurent Bourdeau, Maria Gravari-Barbas and Mike Robinson (eds), *World Heritage Sites and Tourism: Global and Local Relations* (Routledge 2017).

310 Salemink (n 37) 311-2, discussing the *Citadel of the Ho Dynasty* (2011) in Viet Nam.

311 Brumann (n 2) 296-8, 299-300.

312 Ibid 299-300.

313 Shepherd (n 124) 572.

illustrate the broader tension within common interest treaties between ‘form and function’.

Ultimately, the imbalance between local and universal values in international heritage protection can thus be traced back to the predominant role granted to the state and the nature of the field’s monitoring systems as chiefly reliant upon the good faith of States Parties. Cultural heritage law invariably empowers the state by extending the nature and extent of its reach over spaces and practices labelled as ‘cultural heritage’, and by granting the state – above all other actors – the power to decide what constitutes ‘universal’ cultural heritage to be shared with the world at large. This is linked to the transformation of what might have originally been within the remit of private property rights into the public domain, a transformation paired with the expansion of the power of the state to expropriate property in the pursuit of the public good. These impacts are often overlooked within international heritage governance.

The irony is that these interventions can ultimately be detrimental to living heritage in the long run. In doing so, state practice runs contrary to evolving expert and legal views on the inseparable link between tangible and intangible forms of heritage.³¹⁴ It also runs counter to developments which emphasise not only the importance of living heritage value, but also the need for community participation and rights-based cultural heritage management.³¹⁵ It is precisely these mechanisms which hold the potential for returning some semblance of balance to the relationship between global and local interests in cultural heritage law. As such, the following chapter will explore a number of legal concepts which have been developed in neighbouring areas of international law in order to safeguard the interests of individuals and local communities within international governance, asking whether it is possible to draw any lessons from these developments for cultural heritage law.

314 The most exemplary codification of this link can be found in article 2(1) of the Intangible Heritage Convention. For expert practice, see e.g. the *Nara Document on Authenticity* (ICOMOS 1994); *The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance* (Australia ICOMOS 2013), as well as the ‘people-centred approach’ advocated by ICCROM: Court and Wijesuriya (n 3).

315 See e.g. World Heritage Committee, Decision 31 COM 13B (2007); General Assembly of the World Heritage Convention, Policy for the Integration of a Sustainable Development Perspective into the Processes of the World Heritage Convention (2015) Resolution 20 GA 13; World Heritage Convention Operational Guidelines, para 12.

This chapter examines whether lessons can be drawn from areas of international law closely allied to cultural heritage law, such as international human rights law and international environmental law. It asks to what extent the elaboration of legal concepts in these regimes could shape efforts to strengthen the position of individuals and local communities in international heritage law. It thus evaluates whether the systems of protection and governance adopted in these areas of international law would also be suitable in the context of addressing the issues previously identified with regards to cultural heritage law.

The chapter will focus in particular on the increasing emphasis in international legal instruments on the importance of public participation as an element of international governance, zooming in on the role of public participation in the implementation of international law, as opposed to participation in the development of new legal norms. In the realm of cultural heritage protection, public participation, and the related concepts of consultation and the requirement to obtain free, prior and informed consent (FPIC), have the potential to bridge the divide between international governance and local lived realities.

The chapter begins by briefly recapping the problems identified in the previous chapter with regard to the shortcomings of the current system of international heritage protection from the perspective of individuals and local communities. It subsequently addresses three core techniques adopted in other international legal regimes: firstly, the principle of public participation, as elaborated upon in particular within international environmental law; secondly, the requirements of consultation of affected communities and free, prior and informed consent, developed *inter alia* in the context of UNDRIP and ILO Convention No. 169; and finally, the use of impact assessments in environmental and human rights law.

6.1 REVISITING THE PROBLEMS FACED BY INDIVIDUALS AND LOCAL COMMUNITIES IN THE CONTEXT OF INTERNATIONAL HERITAGE PROTECTION

As has been outlined in Chapter 5, international heritage treaties sometimes – albeit unintentionally – frustrate their ability to achieve their goal to safeguard living heritage in ways that are problematic from the perspective of

the procedural and substantive human rights of individuals and local communities.

The most obvious example of this trend is a lack of community involvement in the inscription of cultural heritage on international lists of cultural heritage, as well as in the subsequent management of cultural heritage which has been inscribed on such lists. This runs counter to the growing awareness within public international law that such communities must be involved in decision-making with potential impacts upon them.¹ Conceptually speaking, the implementation of cultural heritage treaties often presupposes that the interests of individuals and local communities with regards to the management of cultural heritage sites will be subsumed in universal interests; conversely, if their interests run counter to these universal interests, then they will be conceived of as automatically in opposition, or lower in the hierarchy than such interests.

This dynamic is translated into a range of effects for local communities, particularly limitations on prior uses of the heritage site, such as agriculture, active worship or rituals, or even simply living or working in and around the site. This is sometimes known as the 'freezing' of cultural heritage; once heritage has been officially recognised as such pursuant to domestic or international protection mechanisms, decisions on its management or use are elevated beyond the local realm. As a result, individuals or communities are no longer able to use or modify that which they had traditionally considered as 'their' heritage. When taken to its extreme, individuals or communities might be forcibly removed from the heritage site, for example through eviction procedures.

While evictions are generally problematic in relation to tangible cultural heritage, similar dynamics are also visible in relation to the international protection of intangible cultural heritage. A situation may thus emerge in which a community does not view a given practice as 'heritage', but rather as simply an element of day-to-day life; accordingly, they experience the label of heritage as inappropriate. Along similar lines, international inscription can become a pathway through which interference by the state with the practices of minority groups becomes officially sanctioned. In these situations, inscription becomes a tool for the state to extend its control over the cultural practices of minority groups.

In short, in certain situations cultural heritage law helps to transform places and practices which would have normally been considered part of the private sphere into the public domain,² thereby paving the way for intervention by

1 The reasons *why* such participation is desirable will be discussed further below in section 6.2.

2 Although the public/private distinction is admittedly perhaps not the most appropriate to make here, given that what is meant by the 'private sphere' here effectively means the local public domain. However, the distinction is chiefly made here to distinguish between the public domain of the state, and the domain of the individual and the community in which they are situated.

the state in the name of the public – or, in the case of international law, the universal – interest. This trend is particularly problematic from the perspective of individuals and local communities who are impacted, sometimes in far-reaching ways, by the decisions of states to protect cultural heritage pursuant to public international law. This state of affairs raises the question how this problem – that is to say, the representation of the interests of individuals and local communities in international legal decision-making – has been tackled in other areas of international law.

While this question can be addressed from a range of angles, both theoretical and practical, the present chapter focuses on three specific legal techniques: the principle of participation; the joint concepts of consultation and FPIC; and impact assessments. Each of these techniques is centred around the core idea of participation in international law. The choice for these topics was made not only in light of the overarching theoretical framework of the dissertation (the humanisation of international law), but also in light of the fact that these techniques have been proposed in response to similar problems arising in the areas of international human rights law and international environmental law.

The goal here is not to provide an exhaustive overview of the development of these legal norms over time, but instead to focus on their current content – given that the aim of the dissertation is to propose contemporary solutions to the problems faced by cultural heritage law with respect to individuals and communities. There are moreover compelling legal reasons to discuss the content of these participation obligations, namely that they are also binding upon the states involved in cultural heritage law, either by virtue of participation in the legal regimes in which they have been codified, or by virtue of their incorporation into customary international law. Finally, as discussed in Chapter 4, some of these concepts have been incorporated into cultural heritage treaties; their elaboration in other legal regimes could be used to inform their definition and implementation in cultural heritage law.

6.2 THE PRINCIPLE OF PUBLIC PARTICIPATION

As a term, ‘public participation’ in international law carries a range of meanings. Participation can take place across a broad spectrum of geographic levels, from the local, to the national, the regional, or the international. These geographic levels can similarly be applied to the ‘public’ seeking to participate: whereas local publics are often easy to identify, the closer one gets to the international level, the more nebulous the definition of the public is likely to become.³ Participation can also assume a variety of substantive forms, although it is often left unspoken which form of participation a given author is speaking

3 Nonetheless, it is also possible that participation at the *international* level will involve a *local* public, if the decision affects the local level but is taken at the international level.

of. As such, it can be used to refer to participation in the *creation* of international law; the participation of civil society organisations in the drafting of international treaties provides an example of this particular form. Conversely, participation in international law can also relate to participation in the *implementation* of international law, for example in the form of community management of a shared resource, the monitoring of implementation of international norms by states or other actors, and participation in activities such as public education or training programmes.⁴

Finally, public participation can also refer to participation in *decision-making* processes surrounding international legal norms. In this regard, Sherry Arnstein's so-called 'ladder of participation' has proven particularly influential in shaping ideas with regards to the nature of public participation in decision-making processes.⁵ Each rung of the 'ladder' refers to a greater delegation of decision-making powers to the public, ranging from simply providing information, to consultation, and to the complete delegation of decision-making to the public.⁶ The process of participation in decision-making is often guaranteed as an independent legal norm, through which the participation of individuals and communities is guaranteed in decision-making processes likely to affect them, for example through the right to consultation.⁷

Facilitating public participation is considered to be desirable for a variety of reasons.⁸ Some thus see participation as intrinsically valuable, in light of concerns surrounding the legitimacy of decision-making procedures as well

4 Evan Hamman, 'Cultural Perceptions and Natural Protections: A Socio-legal Analysis of Public Participation, Birdlife and Ramsar Wetlands in Japan' (2018) 21 *Asia Pacific Journal of Environmental Law* 4, 14-15.

5 Sherry R. Arnstein, 'A Ladder Of Citizen Participation' (1969) 35 *Journal of the American Institute of Planners* 216.

6 Elizabeth A. Kirk, 'The Role of Non-State Actors in Treaty Regimes for the Protection of Marine Biodiversity' in Michael Bowman, Peter Davies and Edward Goodwin (eds), *Research Handbook on Biodiversity and Law* (Elgar 2016) 99. See also Otto Spijkers and Arron Honniball, 'Developing Global Public Participation (1)' (2015) 17 *International Community Law Review* 222, 233-5.

7 Hamman (n 4) 14-15.

8 On the motivations behind the facilitation of public participation in environmental law, particularly within the context of the tripartite procedural rights guaranteed by the Aarhus Convention, see Emily Barritt, *The Foundations of the Aarhus Convention: Environmental Democracy, Rights and Stewardship* (Hart Publishing 2020). Barritt proposes that the Aarhus Convention is motivated by three core purposes: ensuring environmental democracy, securing environmental rights, and safeguarding environmental stewardship. See also Nicola Sharman, 'Objectives of Public Participation in International Environmental Decision-Making' (2023) 72 *International & Comparative Law Quarterly* 333. More broadly on the justifications of a potential right to participation under international human rights law drawn from republican theories, see Nicholas McMurry, *Participation and Democratic Innovation under International Human Rights Law* (Routledge 2023) 44-63.

as a broader belief in the value of democratic decision-making.⁹ These legitimacy concerns are heightened due to the nature of international law: whereas the legitimacy of international law for domestic publics was traditionally founded on the basis of state consent, with the state deemed to represent the views of its populace; as international law has grown in scope, so too has the role for public participation, in order to ensure the legitimacy of decisions adopted within international organisations with respect to often far-removed publics within the domestic sphere.¹⁰ As such, in the case of common interest regimes such as environmental law, the ability of the public to participate in decision-making is an 'essential [indicator] of public control over public values'.¹¹ However, participation is also promoted for a range of instrumental goals,¹² such as ensuring that the public will accept the decision once it has been made,¹³ or 'to curtail popular unrest ... [to] improve the quality of policies and plans',¹⁴ with the idea being that 'including many voices and knowledges in decision-making ... [improves] the quality of decisions'.¹⁵ These goals in turn inform who is granted the ability to participate and the extent to which they are allowed to participate.¹⁶

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- 9 Jonas Ebbesson, 'Public Participation and Privatisation in Environmental Matters: An Assessment of the Aarhus Convention' (2011) 4 *Erasmus Law Review* 71, 88. As Ebbesson notes, public participation, 'and the related rights to access to information and justice, are essential indicators of public control over public values' (at 88). See also Kirk (n 6) 96. From practice, see e.g. UNEP, *Putting Rio Principle 10 into Action: An Implementation Guide* (2015 UNEP) 63. This perspective can be traced back to the role of participation in theories on deliberative democracy: Nicholas McMurry, 'Applying Human Rights to Enable Participation' (2019) 23 *The International Journal of Human Rights* 1049, 1050; Maria Lee, 'The Aarhus Convention 1998 and the Environment Act 2021: Eroding Public Participation' (2023) 86 *Modern Law Review* 756, 757.
 - 10 Simon Marsden, 'Public Participation in Transboundary Environmental Impact Assessment' in Brad Jessup and Kim Rubenstein (eds), *Environmental Discourses in Public and International Law* (Cambridge University Press 2012) 243.
 - 11 Ebbesson (n 9) 88.
 - 12 Anna Wesselink and others, 'Rationales for Public Participation in Environmental Policy and Governance: Practitioners' Perspectives' (2011) 43 *Environment and Planning A: Economy and Space* 2688, 2690.
 - 13 Jonas Ebbesson, 'Public Participation' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2008) 687.
 - 14 Spijkers and Honniball (n 6) 229-233.
 - 15 Lee (n 9) 757.
 - 16 Kirk (n 6) 99; Gerd Winter, 'Theoretical Foundations of Public Participation in Administrative Decision-Making' in Gyula Bándi (ed), *Environmental Democracy and Law* (Europa Law Publishing 2014) 23-4. However, as Wesselink and others (n 12) point out, the goals of participation may sometimes be conflicting, and as such may call for divergent groups of participants and the types concerns that are included and when (2690); see also Sharman (n 8) 334.

6.2.1 Codification in international environmental law

Within international law, public participation emerged most clearly as a legal principle within the context of international environmental law in the 1990s.¹⁷ While the trend towards emphasising public participation already materialised before this period in the context of domestic law, particularly in the United States, these trends were 'consolidated' with respect to international law through the codification of the principle of public participation in the 1992 Rio Declaration.¹⁸ Principle 10 of the Rio Declaration thus provides that:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.¹⁹

The division within Principle 10 of the principle of public participation into three elements – the right to information, the right to participation, and the right to a judicial remedy – is echoed throughout the majority of international legal instruments which seek to address public participation in environmental law. These rights are also more broadly referred to as 'procedural environmental rights'; procedural in the sense that they do not set out substantive norms for states to follow, but rather steps to be followed in the fulfilment of these substantive norms.²⁰

17 For earlier international precedents, such as the Stockholm Conference and the World Charter for Nature, see Jonas Ebbesson, 'The Notion of Public Participation in International Environmental Law' (1997) 8 *Yearbook of International Environmental Law* 51, 51-2.

18 Ebbesson, 'Public Participation' (n 13) 684. Furthermore, as noted in Jonas Ebbesson, 'Principle 10' in Jorge Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press 2015), 'Principle 10 was instrumental for changing the substance of global environmental treaties in support of participatory opportunities for members of the public. Whereas essentially *no* global environmental agreement predating UNCED included any provision on Principle 10 issues, just about *all* such treaties adopted at or after UNCED provide for public access to information and/or public participation, albeit with different degrees of ambition' (at 308). On the development of public participation requirements at the domestic level, see *inter alia* Benjamin J. Richardson and Jona Razzaque, 'Public Participation in Environmental Decision-Making' in B.J. Richardson and S. Wood (eds), *Environmental Law for Sustainability* (Hart 2006) 168-9.

19 UN General Assembly, Report of the United Nations Conference on Environment and Development (12 August 1992) UN Doc A/CONF.151/26 (Vol. I), Annex I, Rio Declaration on Environment and Development, Principle 10.

20 Birgit Peters, 'Unpacking the Diversity of Procedural Environmental Rights: The European Convention on Human Rights and the Aarhus Convention' (2018) 30 *Journal of Environmental Law* 1, 2.

Following on from 1992, the formulation of the principle of public participation was subsequently refined, *inter alia* in the Rio+20 Declaration²¹ and the 2010 UNEP Bali Guidelines; the latter provides a range of guidelines which elaborate further upon the elements of Principle 10.²² It has also emerged in subsequent soft law developments not directly related to the Rio Declaration which '[express] an emerging global view on an expansive interpretation' of Principle 10,²³ such as the Sustainable Development Goals,²⁴ the Framework Principles on Human Rights and the Environment formulated by the UN Special Rapporteur on Human Rights and the Environment,²⁵ and the ILA New Delhi Declaration.²⁶ These developments underline the general recognition within international environmental law of the importance of ensuring public participation in environmental decision-making processes.

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- 21 In the Rio+20 Declaration, the members of the UN General Assembly underscored the importance of 'broad public participation and access to information and judicial and administrative proceedings', and '[agreed] to work more closely with the major groups [defined as 'women, children and youth, workers and trade unions, business and industry, the scientific and technological community, and farmers] and other stakeholders, and encourage their active participation, as appropriate, in processes that contribute to decision-making, planning and implementation of policies and programmes for sustainable development at all levels': UN General Assembly, 'The Future We Want' (11 September 2012) UN Doc A/RES/66/288, para 43.
 - 22 Governing Council of UNEP, Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice (26 February 2010) Decision SS.XI/5 (Bali Guidelines). See Lalanath De Silva, 'Public Participation in Biodiversity Conservation' in Jona Razzaque and Elisa Morgera (eds), *Elgar Encyclopedia of Environmental Law*, vol III (Elgar 2017) 470.
 - 23 Stephen Stec and Jerzy Jendroska, 'The Escazú Agreement and the Regional Approach to Rio Principle 10: Process, Innovation, and Shortcomings' (2019) 31 *Journal of Environmental Law* 533, 535.
 - 24 In particular SDG Goal 16.7, which seeks to '[e]nsure response, inclusive, participatory and representative decision-making at all levels'; see also goal 16.3 (on access to justice) and 16.10 (on access to information): UN General Assembly, 'Transforming Our World: the 2030 Agenda for Sustainable Development' (21 October 2015) UN Doc A/RES/70/1.
 - 25 Human Rights Council, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles on Human Rights and the Environment (24 January 2018) UN Doc A/HRC/37/59, Annex. Principle 7 thus provides that '[s]tates should provide public access to environmental information by collecting and disseminating information and by providing affordable, effective and timely access to information to any person upon request' (at 11). Principle 9 provides that '[s]tates should provide for and facilitate public participation in decision-making related to the environment, and take the views of the public into account in the decision-making process' (at 12). Finally, principle 10 provides that '[s]tates should provide access to effective remedies for violations of human rights and domestic laws relating to the environment' (at 13).
 - 26 ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development (April 2002), annexed to Letter dated 6 August 2002 from the Permanent Representative of Bangladesh to the United Nations and the Chargé d'affaires a.i. of the Permanent Mission of the Netherlands to the United Nations addressed to the Secretary-General of the United Nations (9 August 2002) UN Doc A/57/329, Annex, para 5.1-3.

This trend is underscored by the fact that these procedural rights have also become embedded in numerous multilateral environmental agreements (MEAs),²⁷ such as the Convention on Biological Diversity (CBD),²⁸ the UN Framework Convention on Climate Change (UNFCCC)²⁹ and the Paris Agreement,³⁰ the UN Convention to Combat Desertification,³¹ the International Treaty on Plant Genetic Resources for Food and Agriculture,³² the Stockholm Convention on Persistent Organic Pollutants,³³ and the Minamata Convention on Mercury.³⁴ Moreover, two agreements have been adopted which specifically address procedural environmental rights, albeit at the regional level: the Aarhus Convention³⁵ and the Escazú Agreement.³⁶ A range of other international (environmental) agreements also provide for the raising of public awareness of environmental issues and making information publicly available about them, such as the Convention on International Trade in Endangered

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- 27 For a discussion of these trends, see inter alia Lara Ognibene and Angela Kariuki, 'Standards in the Procedural Rights of Multilateral Environmental Agreements' in Stephen J. Turner and others (eds), *Environmental Rights: The Development of Standards* (Cambridge University Press 2019).
- 28 Convention on Biological Diversity (adopted 5 June 1992, entry into force 29 December 1993) 1760 UNTS 79 (CBD) art 14(1)(a); Cartagena Protocol on Biosafety to the Convention on Biological Diversity (adopted 29 January 2000, entered into force 11 September 2003) 2226 UNTS 208 (Cartagena Protocol) art 23; Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (adopted 29 October 2010, entered into force 12 October 2014) UNEP/CBD/COP/DEC/X/1 (Nagoya Protocol) art 12.
- 29 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entry into force 21 March 1994) 1771 UNTS 107 (UNFCCC) art 6.
- 30 Paris Agreement (adopted 12 December 2015, entry into force 4 November 2016) 3156 UNTS 79 (Paris Agreement) art 12.
- 31 UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (adopted 14 October 1994, entered into force 26 December 1996) 1954 UNTS 3 (UN Convention to Combat Desertification) arts 3, 5, 9, 10.
- 32 International Treaty on Plant Genetic Resources for Food and Agriculture (adopted 3 November 2001, entered into force 29 June 2004) 2400 UNTS 303, art 9.
- 33 Stockholm Convention on Persistent Organic Pollutants (adopted 22 May 2001, entered into force 17 May 2004) 2256 UNTS 119 (Stockholm Convention) arts 10(1)(d), 7(2).
- 34 Minamata Convention on Mercury (adopted 10 October 2013, entered into force 16 August 2017) 3202 UNTS (Minamata Convention) arts 12, 20.
- 35 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention). While the Aarhus Convention is open to ratification by non-UNECE member states (see art 19(3)), thus far none have done so.
- 36 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted 4 March 2018, entered into force 22 April 2021) 3397 UNTS (Escazú Agreement).

Species of Wild Fauna and Flora (CITES)³⁷ and the Convention on Migratory Species.³⁸

While many of these agreements explicitly stipulate duties for the state or rights of the public in terms of access to information, participation in environmental decision-making, and access to justice, in many cases these obligations and rights have been formulated at a highly abstract level. Thus, while the CBD and its protocols call upon states to provide for public participation at the domestic level in a number of specific circumstances,³⁹ the precise modalities of such participation remain unfixed⁴⁰ and the implementation of these obligations accordingly often remains wanting.⁴¹ Similarly, in the area of climate change law, the Paris Agreement has been critiqued for omitting the right to a judicial remedy,⁴² and establishing normatively weak obligations with respect to access to information and public participation.⁴³ As such,

37 Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243 (CITES) art VIII.6-8 and XII.2.

38 Convention on the Conservation of Migratory Species of Wild Animals (adopted 23 June 1979, entered into force 1 November 1983) 1651 UNTS 333 (CMS) art V.5, IX.4.

39 See e.g. CBD art 14(1)(a); Cartagena Protocol arts 23(1)(a)-(b), 23(3); Nagoya Protocol art 12(2). On the implementation of the provisions in the Cartagena Protocol, see e.g. COP-MOP Cartagena Protocol, Implementation Plan for the Cartagena Protocol on Biosafety (19 December 2022) CBP/CP/MOP/DEC/10/3, 11.

40 Although in the case of the Nagoya Protocol, guidelines have been formulated in the context of subsequent voluntary guidelines adopted by the CBD COP, such as the Tkarihwaiei:ri Code of Ethical Conduct on Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant for the Conservation and Sustainable Use of Biological Diversity adopted by the CBD COP in 2010, as well as broader human rights obligations and standards: Elisa Morgera, Elsa Tsioumani and Matthias Buck, *Unraveling the Nagoya Protocol: A Commentary on the Nagoya Protocol on Access and Benefit-Sharing to the Convention on Biological Diversity* (Brill 2014) 224.

41 De Silva (n 22) 475. For examples of the implementation of obligations concerning public participation in the context of the Cartagena Protocol, see the contributions in Marie-Claire Cordonier Segger, Frederic Perron-Welch and Christine Frison (eds), *Legal Aspects of Implementing the Cartagena Protocol on Biosafety* (Cambridge University Press 2013). See also COP-MOP Cartagena Protocol, Public Awareness, Education and Participation (17 October 2016) UNEP/CBD/BS/COP-MOP/8/15, 7-8. More broadly on the role of Indigenous and local communities in the CBD, see Louisa Parks, 'Spaces for Local Voices? A Discourse Analysis of the Decisions of the Convention on Biological Diversity' (2018) 9 *Journal of Human Rights and the Environment* 141; Federica Cittadino, *Incorporating Indigenous Rights in the International Regime on Biodiversity Protection* (Brill Nijhoff 2019).

42 Jelena Bäumlér and Thomas Schomerus, 'Article 12: Education and Training' in Geert van Calster and Leonie Reins (eds), *The Paris Agreement on Climate Change: A Commentary* (Elgar 2021) note that this is an 'unfortunate' omission, in light of the rising number of climate change cases being brought before domestic courts (at 296).

43 Article 12 of the Paris Agreement thus merely provides that States Parties are obliged to 'cooperate' to ensure access to information and public participation 'as appropriate'; both concepts furthermore remain undefined in the Agreement. See further Jeniffer Hanna Collado, 'Article 12' in Daniel Klein and others (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press 2017) 296-7; Bäumlér and Schomerus (n 42) 285.

developments at the international level do not necessarily provide a great deal of guidance for the implementation of public participation within cultural heritage law, beyond underlining the importance of its incorporation in the regime.

6.2.2 Regional application

By comparison, the principle of public participation has been extensively elaborated upon at the regional level under the aegis of two conventions: the Aarhus Convention, formulated in the framework of the UN Economic Commission for Europe (UNECE), and the Escazú Agreement, open to signature to countries in Latin America and the Caribbean and adopted in the context of the UN Economic Commission for Latin America and the Caribbean (ECLAC).⁴⁴

Both the Aarhus Convention and the Escazú Agreement follow the same division as Principle 10 of the Rio Declaration, providing for access to information, public participation in decision-making, and access to justice specifically in relation to environmental matters.⁴⁵ The preamble and first article of both the Aarhus Convention and Escazú Agreement draw a direct line between the fulfilment of the environmental procedural rights guaranteed by the agreements, and the protection of the right of individuals – both of present and future generations – to a healthy environment.⁴⁶

Similarly, both conventions are unique in comparison to many other MEAs due to the prominent role they grant to their compliance mechanisms. The Aarhus Convention thus provides for the creation of an independent ‘non-confrontational, non-judicial and consultative’ body empowered to consider issues related to compliance with the convention by the States Parties:⁴⁷ the Compliance Committee.⁴⁸ Most notably, the Compliance Committee can not only consider submissions from States Parties, but also individual communications submitted by members of the public and referrals by the Convention’s secretariat.⁴⁹ The Committee can subsequently gather information of its own

44 These developments have in fact also been mirrored at the regional level with respect to cultural heritage governance, in the form of the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (adopted 27 October 2005, entered into force 1 June 2011) CETS No. 199 (Faro Convention).

45 The Aarhus Convention also explicitly recalls Principle 10 in its preamble. On the emergence of the Aarhus Convention within international law, see UNECE, *The Aarhus Convention: An Implementation Guide* (UNECE 2nd ed, 2014) 16–17. See Escazú Agreement art 1, 2(a).

46 Aarhus Convention art 1; Escazú Agreement art 1.

47 Aarhus Convention art 15.

48 MOP Aarhus Convention, Decision I/7 (2 April 2004) ECE/MP.PP/2/Add.8.

49 Ibid, Addendum, Structure and Functions of the Compliance Committee and Procedures for the Review of Compliance, paras 15–24. In comparison to many other international human rights communications procedures, acceptance of the competence of the Compliance Committee to consider individual communications is effectively compulsory (as States

accord in order to assess the issue of compliance.⁵⁰ With the agreement of the State Party concerned, the Committee can make recommendations to the State Party;⁵¹ the Meeting of Parties can take a number of additional steps, such as the issuance of declarations of non-compliance or cautions, the suspension of the State Party's rights and privileges under the Convention, and any 'other non-confrontational, non-judicial and consultative measures as may be appropriate'.⁵² Thus far, the majority of the situations of non-compliance considered by the Committee have been the result of communications from the public: as of 2023, the Committee has received 198 such communications.

The Escazú Agreement provides for the establishment of a comparable Committee to Support Implementation and Compliance, a subsidiary body 'of a consultative and transparent nature', which is 'non-adversarial, non-judicial and non-punitive'.⁵³ Given that the Convention has only just entered into force, the Committee has yet to discuss any situations of non-compliance. However, like the Aarhus Convention's Compliance Committee, it can also consider communications not only from States Parties but also from members of the public. It can subsequently make recommendations to the State Party concerned, and report a case to the Conference of Parties of the Convention if it considers that the State Party has failed to implement its recommendations.⁵⁴ In these situations, the Conference of Parties can take any measures which it considers necessary to facilitate compliance, such as formulating declarations of non-compliance, issuing cautions, or suspending the State Party's rights and privileges.⁵⁵

Parties can only delay such acceptance by four years after the entry into force of the Convention for the country in question).

50 Ibid para 25.

51 Ibid para 36.

52 Ibid para 37. On the legal status of the Compliance Committee's findings, which are not legally binding in and of themselves but are generally considered as authoritative interpretations of the Aarhus Convention, see Elena Fasoli and Alistair McGlone, 'The Non-Compliance Mechanism Under the Aarhus Convention as "Soft" Enforcement of International Environmental Law: Not So Soft After All!' (2018) 65 *Netherlands International Law Review* 27; Áine Ryall, 'The Aarhus Convention: Standards for Access to Justice in Environmental Matters' in Stephen J. Turner and others (eds), *Environmental Rights: The Development of Standards* (Cambridge University Press 2019) 127. However, compare Gor Samvel, 'Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice' (2020) 9 *Transnational Environmental Law* 211.

53 Escazú Agreement art 18(2).

54 COP Escazú Agreement, Rules Relating to the Structure and Functions of the Committee to Support Implementation and Compliance of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (2022) UN Doc LC/COP-EZ/1/5, art V.

55 Ibid art VIII.

6.2.2.1 Aarhus Convention

The Aarhus Convention provides extensive guidance to states on the fulfilment of the procedural rights established under the Convention. With regards to the right to information, public authorities must make environmental information available to the public upon request;⁵⁶ in addition, they must ensure the dissemination of information to the 'public who may be affected' if there is an 'imminent threat to human health or the environment', and if the information held by public authorities could help to prevent or mitigate this harm.⁵⁷ Information should moreover be accessible to the public; the Convention provides for a range of modalities through which to guarantee this accessibility.⁵⁸

In the case of the right to public participation, the right is divided into three categories within the Convention: firstly in the case of a number of specific activities outlined in the annex of the Convention,⁵⁹ as well as activities for which an EIA is required under domestic law or more broadly any activities which 'may have a significant effect on the environment';⁶⁰ secondly with respect to participation in plans, programmes and policies relating to the environment; and finally with respect to participation in the preparation of generally applicable regulations and normative instruments. The degree to which the public must be allowed to participate in decision-making relating to each of these three categories effectively becomes less intense – and the provisions of the Convention less strictly stipulated – the more abstract the level of decision-making.⁶¹ In doing so, the Convention draws a distinction between the 'public' and the 'public concerned' in relation to a number of obligations which set out more stringent obligations with respect to participation in decisions on specific activities;⁶² the latter is defined as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making';⁶³ this definition includes environmental NGOs, provided

56 Aarhus Convention art 4.

57 Ibid art 5(1).

58 For example through establishing '[p]ublicly accessible lists, registers or files' or by creating contact points for the public: Aarhus Convention art 5(2).

59 These include, for example, activities in the energy sector (such as those relating to nuclear reactors), those relating to the production and processing of metals (such as steel mills), in waste management (such as incineration installations), or activities relating to dam or gas or oil pipelines.

60 Aarhus Convention art 6(1)(b).

61 Ebbesson, 'Public Participation and Privatisation in Environmental Matters: An Assessment of the Aarhus Convention' (n 9) 75-6.

62 Specifically in relation to article 6 (concerning public participation in decisions on specific activities) and article 9(2) (concerning access to justice for review procedures challenging the 'legality of any decision, act or omission' relating to public participation in decisions on specific activities, in particular).

63 Aarhus Convention art 2(5).

that they meet requirements established under national law. By contrast, 'the concept of the "public" ... is constructed with a view to covering almost everyone and with a very limited room for discretion left for the Parties'.⁶⁴

As such, in the case of specific activities with a (likely) significant effect on the environment, the 'public concerned' must be informed, 'either by public notice or individually as appropriate', of the proposed activity and the decisions relating to it.⁶⁵ Such notice must be 'effective',⁶⁶ meaning that 'all those who potentially could be concerned have a reasonable chance to learn about proposed activities and their possibilities to participate'.⁶⁷ Most important in this regard is that public participation should be made possible at an early stage,⁶⁸ 'when all options are open and effective public participation can take place' (also known as the 'zero option').⁶⁹ The public must be allowed to submit comments; in return, the state must 'ensure that in the decision due account is taken of the outcome of the public participation',⁷⁰ and that once a decision has been made that the public is informed and provided with the reasons upon which the decision has been based. While the obligation for the state to take 'due account' of the outcome of the participation processes does not entail that the public is granted a 'veto' over the decision,⁷¹ public author-

64 Jerzy Jendroška, 'Public Participation in Environmental Decision-Making: Interactions Between the Convention and EU Law and Other Key Legal Issues in its Implementation in the Light of the Opinions of the Aarhus Convention Compliance Committee', in Marc Pallemerts (ed) *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing 2011) 125.

65 Aarhus Convention art 6(2). The Implementation Guide provides a number of examples of possible means of public participation, such as 'mass media (TV, radio), through electronic means or posting of notices in areas with heavy traffic or places frequented by the local population (e.g. bus stations, churches, shops, etc.)', noting that it is most effective to rely upon several means of communication simultaneously. In the case of individual notice, the Guide notes that this is 'especially important where individual interests might be affected by the decision': UNECE (n 45) 134-5.

66 Aarhus Convention art 6(2).

67 Aarhus Convention Compliance Committee, Findings and Recommendations with Regard to Communication ACCC/C/2006/16 concerning compliance by Lithuania (4 April 2008) ECE/MP.PP/2008/5/Add.6, para 67. Here the Implementation Guide once again notes that, as a result, 'a small announcement in a newspaper among hundreds of advertisements would perhaps not be considered effective. Local television broadcasting at a time when most people are at work might also be ineffective': UNECE (n 45) 135-6.

68 Aarhus Convention art 6(4).

69 Ibid. UNECE, Maastricht Recommendations on Promoting Effective Public Participation in Decision-Making in Environmental Matters prepared under the Aarhus Convention (UN 2015) 16.

70 Aarhus Convention art 6(8).

71 Aarhus Convention Compliance Committee, Findings and Recommendations with Regard to Communication ACCC/C/2008/24 Concerning Compliance by Spain (8 February 2011) ECE/MP.PP/C.1/2009/8/Add.1, para 98; Aarhus Convention Compliance Committee, Findings and Recommendations with Regard to Communication ACCC/C/2012/68 concerning Compliance by the European Union and the United Kingdom of Great Britain and Northern Ireland (13 January 2014) ECE/MP.PP/C.1/2014/5, para 93.

ities 'should be able to show why a particular comment was rejected on substantive grounds', and 'any failure to take due account of the outcome of public participation is a procedural violation that may invalidate the decision'.⁷²

While less stringent criteria are laid down with respect to plans and programmes concerning the environment,⁷³ the state must still ensure that participation takes place at a time when all options are open, and that the outcome of the participation is taken account of in the making of the decision, incorporating the obligations established in relation to activities.⁷⁴ An even looser framework is laid out for environmental policies, for which each State Party shall merely 'endeavour to provide opportunities for public participation in the preparation of policies'.⁷⁵ Finally, a separate regime is also established for participation in the preparation of 'regulations and generally applicable legally binding normative instruments',⁷⁶ where the parties to the Convention simply are expected to 'strive to promote effective public participation', *inter alia* by making drafts of the proposed rules available to the public, and allowing the public to comment 'directly or through representative consultative bodies'.⁷⁷ In this situation, 'the result of the public participation shall be taken into account as far as possible', thereby clearly establishing a lower standard than in relation to activities, plans and programmes (and simultaneously indicating that the abovementioned requirement to take 'due account' of the outcome of public participation must be strictly construed).⁷⁸

The third set of substantive obligations in the Aarhus Convention relates to the right of access to justice;⁷⁹ here the Convention provides that the public should have access to review procedures for decisions denying requests for information, either by a court or another independent impartial body.⁸⁰ Similarly, with regards to the right to participate in decision-making procedures with respect to activities with a significant effect on the environment, the Convention provides that members of the public concerned should be able

72 UNECE (n 45) 155-6. See also ECE/MP.PP/C.1/2014/5 (n 71), which notes that 'the obligation to take due account of the outcome of the public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account': para 93.

73 Aarhus Convention art 7.

74 See Aarhus Convention Compliance Committee, Findings and Recommendations with Regard to Communication ACCC/C/2012/70 concerning Compliance by the Czech Republic (4 June 2014) ECE/MP.PP/C.1/2014/9, paras 60-3.

75 Aarhus Convention art 7.

76 Ibid art 8. Ebbesson, 'Public Participation and Privatisation in Environmental Matters: An Assessment of the Aarhus Convention' (n 9) notes at 75-6 that this category is 'not to be mixed with legislation'.

77 Aarhus Convention art 8(c).

78 Ibid art 8. See UNECE (n 45) 155-6.

79 Aarhus Convention art 9.

80 Ibid art 9(1).

to challenge the 'substantive and procedural legality of any decision, act or omission' relating to public participation in decision-making procedures concerning specific activities (or 'other relevant provisions' of the Convention).⁸¹ In order to do so, the members of the public concerned must be able to demonstrate a 'sufficient interest' or the impairment of their rights, in the case that the latter is required by domestic administrative procedural law in order to access a review procedure.⁸² Furthermore, such procedures 'shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive'.⁸³

6.2.2.2 *Escazú Agreement*

The Escazú Agreement contains a number of adaptations of the rights outlined in Aarhus,⁸⁴ although the focus in the present chapter will be on its elaboration of procedural environmental rights insofar as this is relevant for the potential application of similar concepts in the context of cultural heritage law. The Agreement thus specifically guarantees the right of access to environmental information for 'persons or groups in vulnerable situations':⁸⁵ for these groups, the State Party must facilitate their access to information by 'establishing procedures for the provision of assistance, from the formulation of requests through to the delivery of the information, taking into account their conditions and specificities, for the purpose of promoting access and participation under equal conditions'.⁸⁶ More broadly, the Agreement provides a number of specific guarantees for vulnerable groups and environmental defenders.⁸⁷

With regards to public participation in environmental decision-making, the Agreement requires states to '[commit] to implement open and inclusive participation ... based on domestic and international normative frameworks'.⁸⁸ The Escazú Agreement differs from the Aarhus Convention in that it in principle only differentiates between projects, activities, and processes granting environmental permits which (may) have a significant environmental impact,

81 Ibid art 9(2).

82 Article 9(2) provides that '[w]hat constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of [the] Convention'.

83 Ibid art 9(4).

84 Contrary to the Aarhus Convention, the Escazú Agreement also provides for a number of substantive principles which the Agreement must be implemented in light of (art 3), and also pays specific attention to the rights of vulnerable persons and groups and environmental defenders (e.g. arts 4(5), 5(3), 5(4), 6(6), 7(14), 8(5)).

85 Escazú Agreement art 5(3).

86 Ibid.

87 E.g. ibid art 9. See also Stec and Jendroška (n 23), who consider this one of the main innovations of the Agreement as compared to the Aarhus Convention.

88 Escazú Agreement art 7(1).

on the one hand, and all other environmental matters of public interest, including policies, plans, programmes, rules and regulations, on the other hand. In relation to the first category, the Agreement establishes that states must 'guarantee' participation mechanisms for the public.⁸⁹ The Agreement moreover contains a number of specific provisions with regards to what type of information must be provided to the public, as well as guarantees that the state should make summaries available that are comprehensible to a non-expert audience.⁹⁰ In the case of the second category – that of policies, plans, programmes, rules and regulations which have or may have a significant environmental impact – the state must merely 'promote', rather than guarantee, public participation, thereby setting a lower standard than in the Aarhus Convention.⁹¹

However, the Agreement does simultaneously establish a broad general framework in relation to public participation in environmental decision-making processes (including both of the above categories).⁹² In line with this general framework, the state must ensure that public participation can take place in the early stages of the decision-making process, so that the contributions of the public can actually be considered.⁹³ The conditions for public participation shall moreover be 'adapted to the social, economic, cultural, geographical and gender characteristics of the public',⁹⁴ with specific consideration for languages,⁹⁵ and the elimination of barriers for those in vulnerable situations.⁹⁶ Moreover, the right of the public to participate 'shall include the opportunity to present observations through appropriate means available, according to the circumstances of the process'.⁹⁷ The state must inform the public once the decision has been made, providing the grounds for the decision

89 Ibid art 7(2).

90 This includes '(a) a description of the area of influence and physical and technical characteristics of the proposed project or activity; (b) a description of the main environmental impacts of the project or activity and, as appropriate, the cumulative environmental impact; (c) a description of the measures foreseen with respect to those impacts; (d) a summary of (a), (b) and (c) of the present paragraph in comprehensible, non-technical language; (e) the public reports and opinions of the involved entities addressed to the public authority related to the project or activity under consideration; (f) a description of the available technologies to be used and alternative locations for executing the project or activity subject to assessment, when the information is available; and (g) actions taken to monitor the implementation and results of environmental impact assessment measures': *ibid* art 7(17).

91 *Ibid* art 7(3).

92 ECLAC, *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean: Implementation Guide* (UN 2023) LC/TS.2021/221/Rev.2, 101.

93 Escazú Agreement art 7(4).

94 *Ibid* art 7(10).

95 *Ibid* art 7(11).

96 *Ibid* art 7(14).

97 *Ibid* art 7(7).

and an explanation of how the public participation has been considered in the making of the decision.⁹⁸

As can be seen from the framework established by the Agreement with respect to public participation, the Agreement does not distinguish between the 'public' and the 'public concerned' with respect to establishing the requisite standard of public participation, unlike the Aarhus Convention. Instead, the majority of the Agreement's provisions simply apply to the 'public',⁹⁹ establishing additional safeguards for 'persons and groups in vulnerable situations',¹⁰⁰ as already noted above. The Agreement thereby casts a wider net with respect to potential rights-holders than the Aarhus Convention.

Nonetheless, the Agreement does distinguish between the broader public and the 'directly affected' public on two occasions in relation to the right to public participation in the environmental decision-making process.¹⁰¹ Of particular interest for the present discussion is the use of this concept in relation to 'projects or activities that have or may have a significant impact on the environment'; in such situations, the public authority 'shall make efforts to identify the public directly affected ... and shall promote specific actions to facilitate their participation'.¹⁰² In doing so it approximates the more stringent standards established with respect to the rights of the 'public concerned' under the Aarhus Convention in relation to specific activities. However, no further guidance is provided as to when members of the public may be considered 'directly affected'.

98 Ibid art 7(8). Similarly to the Aarhus Convention, the state is required to 'give due consideration to the outcome of the participation process' (art 7(7)); however, as the Implementation Guide notes, this 'does not grant the public veto power nor does it shift the responsibility for taking the decision from the public authority to the public. Furthermore, the Agreement does not establish that the result of the public participation process is binding on the public authority and thus, the decision maker retains its full competence, power and authority, in accordance with applicable law, to make the final decision as it considers appropriate ... In this sense, public participation as recognized in the Escazú Agreement does not entitle the public to have the final say or enable it to accept or reject a decision': LC/TS.2021/221/Rev.2 (n 92) 145.

99 Defined as 'one or more natural or legal persons and the associations, organizations or groups established by those persons, that are nationals or that are subject to the national jurisdiction of the State Party': Escazú Agreement art 2(d).

100 Defined as 'those persons or groups that face particular difficulties in fully exercising the access rights recognized in the present Agreement, because of circumstances or conditions identified within each Party's national context and in accordance with its international obligations': *ibid* art 2(e).

101 Ibid arts 7(11), (16). In addition to this, the Agreement also establishes an additional category of 'particularly affected' members of persons or groups in vulnerable situations in the context of the right of access to information, providing that the state 'shall endeavour, where applicable, to ensure that the competent authorities disseminate environmental information in the various languages used in the country, and prepare alternative formats that are comprehensible to those groups': *ibid* art 6(6).

102 Ibid art 7(16).

The Agreement also provides for access to justice in environmental matters, requiring states to ensure 'access to judicial and administrative mechanisms to challenge and appeal' decisions, actions or omissions relating to access to information,¹⁰³ participation in decision-making,¹⁰⁴ and any decisions, actions or omissions that '[affect] or could [affect] the environment adversely or violate laws and regulations related to the environment.'¹⁰⁵ In doing so, States Parties must guarantee due process and are required to have *inter alia* 'broad active legal standing in defence of the environment, in accordance with domestic legislation'.¹⁰⁶ In comparison to the Aarhus Convention, the Agreement does not provide guidance on whether those seeking to avail themselves of their right of access to justice pursuant to the Agreement need to demonstrate a sufficient interest.

6.2.2.3 Public participation in international forums

A final noteworthy point in light of the current inquiry is that both the Aarhus Convention and the Escazú Agreement provide for modalities of public participation in environmental decision-making in international forums. Thus the Aarhus Convention provides in article 3(7) that each state 'shall promote the application of the principles of [the] Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment';¹⁰⁷ this provision has been elaborated upon in the 2005 Almaty Guidelines adopted by the Meeting of the Parties, which reaffirm the importance of the rights guaranteed by the Convention at the international level.¹⁰⁸

The Almaty Guidelines note that public participation in decision-making at the international level 'should be allowed at all relevant stages of the decision-making process',¹⁰⁹ that it 'should be as broad as possible', drawing attention to the position of members of the public likely to be 'most directly affected' by the decision-making processes.¹¹⁰ Possible points at which such public participation would be desirable include both 'the negotiation and application of conventions' and 'the preparation, formulation and implementation of decisions'.¹¹¹ A range of modalities for participation are suggested,

103 Ibid art 8(2)(a).

104 Ibid art 8(2)(b).

105 Ibid art 8(2)(c).

106 Ibid art 8(3)(c).

107 Aarhus Convention art 3(7).

108 MOP Aarhus Convention, Decision II/4: Promoting the Application of the Principles of the Aarhus Convention in International forums (20 June 2005) ECE/MP.PP/2005/2/Add.5, Annex, para 11.

109 Ibid para 29.

110 Ibid para 30.

111 Ibid para 32.

including the granting of observer status, the creation of advisory committees for particular groups of stakeholders, and calls for comments from members of the public.¹¹² However, at minimum the public should 'have access to all documents relevant to the decision-making process produced for the meetings, to circulate written statements and to speak at meetings';¹¹³ the public should also be granted the opportunity to participate at a moment in the decision-making process when all the options are still open and their participation has the potential to change the outcome of these processes.¹¹⁴ Finally, 'due account should be taken of the outcome of public participation' in the making of decisions within international forums; the Guidelines call for transparency with regards to the impact of public participation on these outcomes, which 'should be promoted through, *inter alia*, facilitating the public availability of documents submitted by the public'.¹¹⁵

Similarly, the Escazú Agreement explicitly stipulates in article 7(12) that:

Each Party shall promote, where appropriate and in accordance with domestic legislation, public participation in international forums and negotiations on environmental matters or with an environmental impact, in accordance with the procedural rules on participation of each forum. The participation of the public at the national level on matters of international environmental forums shall also be promoted, where appropriate.¹¹⁶

Article 7(12) has subsequently been put into practice with respect to the Agreement's own Conference of Parties: in the recently adopted rules of procedure of the COP, a provision has been included which provides that '[t]he public shall participate meaningfully in the Conference of the Parties and the subsidiary bodies established'.¹¹⁷ According to the rules of procedure, the public may not only attend the meetings of the COP, but also 'make statements', 'circulate documents and make oral and written contributions', and 'make written text proposals' which can be 'formally collected and submitted by at least one Party for consideration in the negotiation of an official text of the

112 The guidelines thus note that '[e]ffective participation of the public concerned may be ensured through a variety of forms, depending on different factors, such as the type of international forum concerned and the nature and phase of the decision-making process. Such forms could include, at meetings in international forums, observer status, advisory committees open to relevant stakeholders, forums and dialogues open to members of the public and webcasting of events, as well as general calls for comments': *ibid* para 33.

113 *Ibid* para 34.

114 *Ibid* para 35.

115 *Ibid* para 37.

116 Escazú Agreement art 7(12). The Implementation Guide notes: 'The verb "promote" and the qualifiers used throughout the paragraph clearly point to its guiding and flexible character and limit the scope of the obligation': LC/TS.2021/221/Rev.2 (n 92) 115.

117 COP Escazú Agreement, Rules of Procedure of the Conference of the Parties to the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (2022) LC/COP-EZ.1/4, art XIV(1).

Conference of the Parties or its subsidiary bodies’.¹¹⁸ In doing so, the Rules of Procedure of the Escazú COP go much further in establishing modalities for public participation than most other intergovernmental bodies.

However, it is important to underline that the scope of these provisions remains limited.¹¹⁹ In the case of the Escazú Agreement, the application of article 7(12) remains hortatory, as states merely need to ‘promote’ public participation ‘where appropriate’, and only ‘in accordance with the procedural rules on participation of each forum’: states are thus not expected to go above and beyond the limits on public participation which frequently exist in international forums, such as limits on how long non-state actors are permitted to take the floor, their ability to circulate statements to States Parties, or their ability to table proposals to be voted upon. Article 7(12) thus largely has a ‘guiding and flexible character’.¹²⁰ That being said, the Escazú COP has nonetheless taken significant steps in order to fulfil the spirit of the Agreement within its own decision-making procedures, as is evident in the recently adopted rules of procedure described above.

Similarly to Escazú, the applicability of the Aarhus Convention’s Almaty Guidelines is limited by the important caveat that parties to the Aarhus Convention are merely expected to ‘seek to apply [them] to the extent appropriate in light of reasonable considerations such as the institutional integrity and particular characteristics of each international forum concerned, its procedures and decision-making processes, and the nature and availability of its resources’.¹²¹ In addition, the Meeting of Parties to the Aarhus Convention have noted that while some important progress has been made in facilitating the implementation of the Almaty Principles in practice, ‘considerable challenges’ still remain.¹²² Moreover, the Aarhus Convention Compliance Committee has yet to issue substantive conclusions on any communications relating to article 3(7) of the Convention or the Almaty Guidelines.¹²³

118 Ibid art XIV(2).

119 Sharman (n 8).

120 LC/TS.2021/221/Rev.2 (n 92) 115.

121 ECE/MP.PP/2005/2/Add.5 (n 108) Annex, para 1.

122 MOP Aarhus Convention, Decision VII/4, Promoting the Application of the Principles of the Convention in International Forums (18-20 October 2021) ECE/MP.PP/2021/2/Add. 1.

123 As of 2023, the Compliance Committee has only received three communications (out of a total of 198) relating to article 3(7) of the Convention: ACCC/C/2014/117 (alleging violations by Belgium, Luxembourg and the Netherlands flowing from the transfer of certain competences concerning environmental matters to the Benelux Union), ACCC/C/2019/163 (alleging violations by Austria concerning the exclusion of foreign citizens from participation in a transboundary EIA procedure), and ACCC/C/2022/194 (alleging violations by the United Kingdom with regards to the inability of the public to participate in the negotiation and ratification procedures of free trade agreements). Of these, one complaint has been considered inadmissible (ACCC/C/2014/117); while the other two complaints have been considered admissible by the Committee, their outcome is still pending. Of these, only the most recent complaint (ACCC/C/2022/194, filed in 2022) directly addresses issues relating

Finally, both the Almaty Guidelines and the Escazú Agreement neglect to provide any guidance on the content of the right of access to justice in the context of international organisations,¹²⁴ thereby omitting an important limb of the tripartite procedural rights guaranteed by both conventions. As such, despite the inclusion of provisions on participation in international forums in Escazú and Aarhus and a broader shift within international law towards the promotion of public participation,¹²⁵ developments have thus far not been forthcoming on the promotion of public participation within intergovernmental bodies, as opposed to at the domestic level.¹²⁶ There are nonetheless indications that it is likely that the law will continue to develop in this regard in order to facilitate a right of public participation in international organisations,¹²⁷ particularly for groups with a recognised right to self-determination, such as Indigenous peoples, as decision-making at the international level has an undeniable ability to impact upon their enjoyment of this right.¹²⁸

to participation in international decision-making processes as envisaged by article 3(7) and the Almaty Guidelines.

124 Although the Almaty Guidelines do note that: 'Each Party should encourage the consideration in international forums of measures to facilitate public access to review procedures relating to any application of the rules and standards of each forum regarding access to information and public participation within the scope of these guidelines': ECE/MP.PP/2005/2/Add.5 (n 108) Annex, para 40.

125 Jones thus argues that 'peoples are entitled, by virtue of the right to self-determination, to participate in matters concerning them at the global level', although '[w]hile there [is] a widespread – albeit not universal nor uniform – practice, found in the conduct and policies of IOs and states, there [is] little to indicate that such practice was carried out in the belief that it was required by law ... Notwithstanding the lack of CIL ... the consistent pattern of practice whereby IOs and states enable peoples to participate in matters affecting them at the international level evidences a standard of conduct which is widely adhered to by IOs and states', and that as a result 'peoples have a legitimate expectation to participate in global governance processes concerning them': Natalie Jones, 'Towards a Right of Peoples to Participation in Global Governance' (DPhil thesis, University of Cambridge 2020) 225-6.

126 Jonas Ebbesson, 'Public Participation' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2021) 364. However, see Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (6th rev edn, Brill Nijhoff 2018) paras 188-197A, noting the increasing involvement of civil society actors in decision-making processes within international organisations (and at the same time the relative paucity of the involvement of non-expert actors such as individuals within these processes).

127 Sharman (n 8)

128 Natalie Jones, 'Self-Determination and the Right of Peoples to Participate in International Law-Making' (forthcoming) *British Yearbook of International Law*, doi: 10.1093/bybil/brab004, 30.

6.2.3 Towards a global right of public participation in environmental decision-making?

With the recent adoption of the Escazú Agreement in 2018, it seems unlikely that a global convention on public participation in (environmental) decision-making will follow in the near future, as it appears that '[t]he international community has settled upon the regional level as the appropriate means' for achieving the goal of facilitating procedural environmental rights.¹²⁹ Indeed, the creation of the Agreement partly stemmed from the rejection by states of the possibility of such a global convention at the Rio+20 Conference in 2012.¹³⁰ The Escazú Agreement also provides a greater amount of discretion to States Parties in a number of areas,¹³¹ drawing into question to what extent it is possible to define global standards in relation to the principle of public participation. That the approach towards the continuing codification of the principle of public participation should be primarily tackled at the regional level is perhaps not so strange, given that regional approaches are also widely adopted in the scope of human rights agreements – which both Aarhus and Escazú profile themselves as.¹³²

Moreover, the fact that issues relating to environmental democracy are often largely internal rather than transboundary in nature – unlike the subject-matter of many other multilateral environmental agreements – means that the codification of global principles on public participation in environmental decision-making remains a sensitive topic for many states.¹³³ Some commentators thus consider that a regional approach is inherently suited to the codification of environmental procedural rights, given that regional agreements allow for innovations specific to each region which might not have been adopted if the drafters had sought to make the agreement in question global in scope.¹³⁴ In the case of the Escazú Agreement, authors have moreover argued that the Agreement provides an effective counterweight to the Aarhus Convention's focus on environmental democracy, which many developing countries

129 Stec and Jendroška (n 23); see also Ebbesson, 'Public Participation' (n 13) 685-6; Karl-Peter Sommermann, 'Transformative Effects of the Aarhus Convention in Europe' (2017) 77 *ZaöRV* 321, 337.

130 Stec and Jendroška (n 23) 534. For further discussion of the development of the Agreement, see LC/TS.2021/221Rev.2 (n 92) 9-14; and Lalanath De Silva, 'Escazú Agreement 2018: A Landmark for the LAC Region' (2018) 2 *Chinese Journal of Environmental Law* 93, 94-5.

131 Such as the ability of states to refuse to provide access to information on the basis of domestic legislation: Escazú Agreement art 5(6). See De Silva (n 130), 97.

132 Sommermann (n 129) 325.

133 Natalia Gomez Peña and David B. Hunter, 'The Hard Choices in Promoting Environmental Access Rights' in Daniel Bradlow and Daniel Hunter (eds), *Advocating Social Change through International Law: Exploring the Choice between Hard and Soft International Law* (Brill 2020) 117-8.

134 Stec and Jendroška (n 23).

viewed as overly Eurocentric – thereby constituting a barrier to global ratification.¹³⁵

The diversity of legal frameworks which seek to establish procedural environmental rights raises the question whether it is possible to identify any global minimum standards with regards to procedural environmental rights, and more particularly the right to participate in decision-making. The fact that states have thus far eschewed the adoption of a global instrument on procedural environmental rights makes it difficult to identify a common approach within public international law on these issues.¹³⁶ It should also be reason for caution for assuming that the standards set out in the Aarhus Convention or the Escazú Agreement are automatically globally applicable; while there are a wealth of international environmental instruments which provide for procedural environmental rights, they ‘often differ in content, scope and objective’.¹³⁷

Yet this does not mean that one should completely discard the relevance of developments which have occurred over the course of the past thirty years. The principle of public participation can thus be seen as ‘one of the foundational building blocks of international environmental law’.¹³⁸ In this regard, Principle 10 of the Rio Declaration assumes pivotal importance, as almost all environmental agreements adopted after the Rio Declaration in 1992 contain at least some provision on procedural environmental rights, ‘revealing broad support’, albeit ‘at a rather abstract level’.¹³⁹ Further support for this argument can be found in developments such as the adoption of the 2010 UNEP Bali Guidelines mentioned above, which, while framed as voluntary, provide global guidance on the implementation of Principle 10 within national legislation.¹⁴⁰

135 De Silva, ‘Escazú Agreement 2018: A Landmark for the LAC Region’ (n 130) 94; Emily Barritt, ‘Global Values, Transnational Expression: from Aarhus to Escazú’ in Veerle Heyvaert and Leslie-Anne Duvic-Paoli (eds), *Research Handbook on Transnational Environmental Law* (Elgar 2020) 205.

136 Peters (n 20) 7. See also Gomez Peña and Hunter (n 133) 121-2 for a discussion on why adoption of a global instrument proved difficult at Rio+20.

137 Peters (n 20) 4-5.

138 Avidan Kent, ‘The Evolving Concept of Public Participation: from Rio to Mauritius’ in Eric De Brabandere, Tarcisio Gazzini and Avidan Kent (eds), *Public Participation and Foreign Investment Law* (Brill 2021) 58.

139 Ebbesson, ‘Principle 10’ (n 18) 308.

140 UNEP, Report of the Governing Council/Global Ministerial Environment Forum on the Work of its Eleventh Special Session (February 2010) UN Doc A/65/25, Decision SS.XI/5, Annex. However, as Gomez Peña and Hunter (n 133) note, ‘limited financial resources and a lack of political will has hurt implementation of the Bali Guidelines. For example, it was not until 2015 that UNEP was able to publish the implementation handbook for the Bali Guidelines. The lack of knowledge about the existence of the Guidelines and the lack of training for government officials on how to use them have significantly decreased their potential impact’ (at 121).

The Bali Guidelines in part mirror similar provisions which have been codified at the regional level in the Aarhus Convention and Escazú Agreement. The Guidelines thus adopt the same definition of who should be considered part of the 'public concerned' with respect to the right to public participation;¹⁴¹ note that this public should be able to 'participate at an early stage in the decision-making process'; and that they should be informed of this opportunity.¹⁴² Similarly, states are also expected to take 'due account' of the outcome of the public participation, and to ensure that the decision – once taken – is made public.¹⁴³ The Guidelines furthermore set out standards with respect to access to justice, providing that 'States should ensure that the members of the public concerned have access to a court of law or other independent and impartial body to challenge the substantive and procedural legality of any decision, act or omission relating to public participation in decision-making in environmental matters'.¹⁴⁴ As such, the adoption of the Bali Guidelines and the uptake of environmental procedural rights across a range of MEAs indicate that it is possible to identify a minimum core content of the principle of public participation in environmental law which could potentially be taken as a starting point for the incorporation of principles of public participation within cultural heritage law, as will be elaborated upon in Section 6.2.5 below.

6.2.4 The right to public participation in decision-making in human rights instruments

Adding strength to this argument is the fact that the right to public participation in the context of environmental decision-making has also increasingly been developed in the context of human rights instruments,¹⁴⁵ further underlining the argument in favour of a very strong trend towards recognition of

141 Namely as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making'.

142 Bali Guidelines (n 22) Guideline 8.

143 Ibid Guideline 11. UNEP (n 9) states, along similar lines to the Aarhus Convention Implementation Guide, that the phrase 'due account' in Guideline 11 does not amount to a veto for the public, but does entail that 'the relevant authority is ultimately responsible for the decision based on all the information available to it, including all comments received, and should be able to show why a particular comment was accepted or rejected on substantive grounds' (at 87).

144 Bali Guidelines (n 22) Guideline 16. See also Guideline 17 (with respect to violation of substantive or procedural environmental legal norms).

145 On the notion of a human right to public participation in environmental decision-making, see Malgosia Fitzmaurice, 'Some Reflections on Public Participation in Environmental Matters as a Human Right in International Law' (2002) 2 *Non-State Actors and International Law* 1.

these rights.¹⁴⁶ The Special Rapporteur on Human Rights and the Environment has thus argued that international law recognises that states have 'a duty to facilitate public participation in environmental decision-making', drawing upon established civil and political rights such as the right to take part in the conduct of public affairs and the need to protect other rights from being infringed upon as a result of environmental harm.¹⁴⁷ The right of the public to participate in environmental decision-making also extends beyond purely domestic decision-making processes; the Special Rapporteur has thus established that states should ensure participatory rights at the international level in the context of 'projects supported by climate finance mechanisms',¹⁴⁸ an argument could thus be made for the application of the same line of reasoning with respect to other international decision-making processes.

This recognition also stretches beyond the environmental context towards the application of the right to participate in decision-making in a wide range of contexts.¹⁴⁹ At the most basic level, the ICCPR guarantees a broad right of the citizens of a state to 'take part in the conduct of public affairs, directly

146 However, Ebbesson notes with respect to the environmental context of rights of access to information, public participation, and access to justice has been 'geographically asymmetric. While Principle 10 issues have been embodied in human rights jurisprudence in Europe, the Americas, and Africa, there is not yet any corresponding development in international law for Asia and the Pacific': Ebbesson, 'Principle 10' (n 18) 308. However, contrast the argument of Olmos Giupponi, who outlines a number of domestic and regional cases within the Latin American and Caribbean region on environmental access rights: Belén Olmos Giupponi, 'Fostering Environmental Democracy in Latin America and the Caribbean: An Analysis of the Regional Agreement on Environmental Access Rights' (2019) 28 *RECIEL* 136, 138-9; see also CCJ Academy of Law and ECLAC, *Ensuring Environmental Access Rights in the Caribbean: Analysis of Selected Case Law* (2018) UN Doc LC./TS.2018/31.

147 See UN General Assembly, Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (30 December 2013) UN Doc A/HRC/25/53, paras 29, 36. See also UN General Assembly, Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (3 February 2015) UN Doc A/HRC/28/61, para 42; A/HRC/37/59 (n 25) Annex, Framework Principle 9.

148 UN General Assembly, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (1 February 2016) A/HRC/31/52, para 61.

149 Marjolein Schaap, 'An Inclusionary Governance Model for International Institutions: Ensuring Accountability towards Individuals' (PhD thesis, Erasmus University Rotterdam 2020) 121-22; more broadly, see McMurry, 'Applying Human Rights to Enable Participation' (n 9) on the role of participatory principles in securing human rights such as the freedom of association, and McMurry, *Participation and Democratic Innovation under International Human Rights Law* (n 8) on the existence of a general right to participation under human rights law. See also Human Rights Council, Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-making (23 August 2010) UN Doc A/HRC/15/35, paras 7-16.

or through freely chosen representatives’;¹⁵⁰ unlike the right to participate in environmental decision-making, this right is not merely procedural but also a substantive right. Although it has generally been interpreted as being limited to the ability to participate in elections (or declare oneself a candidate in such elections),¹⁵¹ the Human Rights Committee has nonetheless interpreted ‘directly’ as not only encompassing participation as a member of public office, but also by the participation of citizens ‘in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government’.¹⁵² Similar participatory rights have also been elaborated at the regional level.¹⁵³

A number of other human rights treaties also seek to guarantee the participation of various underrepresented groups in public life,¹⁵⁴ such as that of women,¹⁵⁵ children,¹⁵⁶ or persons with disabilities;¹⁵⁷ rights of participa-

150 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 25(a); see also UN General Assembly, Resolution 217 A (III) (10 December 1948) UN Doc A/810, Universal Declaration on Human Rights (UDHR) art 21(1). More broadly, on the elaboration of other access rights in the ICCPR, see also arts 2(3), 14, 19.

151 McMurry, *Participation and Democratic Innovation under International Human Rights Law* (n 8) notes that the Human Rights Committee ‘has tended towards a weak interpretation of the right to direct participation, holding that where representative democracy exists there is no right to direct participation’ (at 31).

152 HRC, General Comment No. 25 (12 July 1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 6.

153 McMurry, *Participation and Democratic Innovation under International Human Rights Law* (n 8) 64-75, pointing towards the Inter-American Democratic Charter (11 September 2001) OAS Doc OEA/SerP/AG/Res.1; the African Charter on Democracy, Elections and Governance (adopted 30 January 2007, entered into force 15 February 2012); the European Charter of Local Self-Government (adopted 15 October 1985, entered into force 1 September 1988) CETS 122; and the Additional Protocol to the European Charter of Local Self-Government on the Rights to Participate in the Affairs of a Local Authority (adopted 16 November 2009, entered into force 1 June 2012) CETS 207. See also Schaap (n 149) 123-4.

154 McMurry, *Participation and Democratic Innovation under International Human Rights Law* (n 8) 76-104.

155 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 7; see also UN Committee on the Elimination of Discrimination Against Women, General Recommendation No. 23 (1997) UN Doc A/52/38 (on political and public life). In the context of rural areas, CEDAW has underlined that it is necessary for the state to ensure that women are granted the right ‘[t]o participate in the elaboration and implementation of development planning at all levels’ (CEDAW art 14(2)(a)).

156 The CRC requires states to ‘assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child’: Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 12; see also UN Committee on the Rights of the Child, General Comment No. 12 (20 July 2009) UN Doc CRC/C/GC/12. This right has been interpreted by the CRC in the context of the development of national and local laws and policies, for example in relation to businesses or the fulfilment of the right to health: UN Committee on the Rights of the Child, General Comment No. 15 (17 April 2014) UN Doc CRC/C/GC/

tion have also been extensively acknowledged in relation to the rights of Indigenous peoples and of minorities.¹⁵⁸ These rights seek to ensure that these groups can fully enjoy their right to take part in political and public life without discrimination,¹⁵⁹ and in certain circumstances create obligations to consult with the group in question in the development and implementation of legislation and policies or otherwise in matters affecting them.¹⁶⁰ The latter is particularly relevant in the case of groups with a right to self-determination such as Indigenous peoples.¹⁶¹

However, moving beyond these broad rights to participate in public affairs, the UN human rights treaty bodies have established guarantees for the involvement of individuals in procedures which have a potential to affect them.¹⁶² Schaap thus notes that, on the basis of its general comments, CESCR 'recognises a right to participation for the poor, the homeless, and the elderly whenever they are affected by an administrative decision', as well as 'for whomever is affected by forced evictions, by decisions on adequate housing, by decisions on water, by decisions interfering with the right to cultural life, and lastly, with decisions related to one's health',¹⁶³ such as forced sterilisation or

15 (on the right to health) para 19; General Comment No. 16 (17 April 2013) UN Doc CRC/C/GC/16 (on the business sector) para 21.

157 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) art 4(3), 29, 33(3). See also UN Committee on the Rights of Persons with Disabilities, General Comment No. 7 (9 November 2018) UN Doc CRPD/C/GC/7.

158 See UNGA Res 61/295, United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007) UN Doc A/RES/61/295; UN Doc A/HRC/15/35 (n 149). See also UNGA Res 47/135, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (3 February 1993) UN Doc A/RES/47/135, art 2(2)-(3).

159 As in the case of CEDAW (art 7); see also International Covenant on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (ICERD) art 5(c) in this regard.

160 As in the case of the CRPD (art 4(3)), the CRC (art 12), minorities, and Indigenous peoples. Cf. CEDAW art 14(2)(a). McMurry notes that 'UN committees have frequently recommended, and required participation in the formulation and review of policies and legislation': McMurry, *Participation and Democratic Innovation under International Human Rights Law* (n 8) 134.

161 Usually in the form of 'internal' self-determination: *ibid* 37-42. On the possibility of interpreting 'external' self-determination as encompassing a right to participate in international decision-making processes, see Jones, 'Towards a Right of Peoples to Participation in Global Governance' (n 125).

162 Schaap (n 149) 123-4; McMurry, *Participation and Democratic Innovation under International Human Rights Law* (n 8) 51 (noting that 'United Nations committees have asserted that persons have a right to participate in decisions affecting their rights', drawing upon the practice of the HRC, CESCR and CERD).

163 Schaap (n 149) 121-22. Similarly, McMurry notes that the UN committees particularly emphasise the importance of participation in case of 'evictions, prevention of communities from accessing or using their land, and industrial projects, particularly with regard to their impact on the right to water, right to life, cultural rights, and labour rights': McMurry, *Participation and Democratic Innovation under International Human Rights Law* (n 8) 145. See

abortion. This right to participation is generally paired with a duty for the state to inform potentially affected individuals.¹⁶⁴

Similar trends have emerged in relation to the other human rights bodies: thus the Human Rights Committee 'recognizes a right to participation in the decision-making for minorities and indigenous people affected by decisions, for those affected by forced evictions and for those subjected to expulsion',¹⁶⁵ the CERD (Committee on the Elimination of Racial Discrimination) has underlined the right to prior consultation for people of African descent 'with respect to decisions which may affect their rights',¹⁶⁶ and in relation to Indigenous peoples that 'no decisions directly relating to their rights and interests are taken without their informed consent';¹⁶⁷ and CEDAW has underlined similar guarantees in the context of rural women, for which the state should 'ensure the active, free, effective, meaningful and informed participation ... in political and public life, and at all levels of decision-making'.¹⁶⁸

However, these guarantees of public participation in decision-making admittedly remain relatively abstract in terms of proposed methods of implementation, and in the case of rights such as the right to water, the right to health and the right to food they mainly relate to ensuring public participation in relation to the formulation of national strategies rather than participation

CESCR, General Comment No. 7 (20 May 1997) UN Doc E/1998/22, para 15(a); CESCR, General Comment No. 12 (12 May 1999) UN Doc E/C.12/1999/5, para 23; CESCR, General Comment No. 14 (11 August 2000) UN Doc E/C.12/2000/4, paras 11, 54; CESCR, General Comment No. 15 (20 January 2003) UN Doc E/C.12/2002/11, paras 24, 37(f), 48; CESCR, General Comment No. 19 (4 February 2008) UN Doc E/C.12/GC/19, para 42(c); CESCR, General Comment No. 21 (21 December 2009) UN Doc E/C.12/GC/21, para 55(e). See further, in relation to the right to water: UN General Assembly, Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (31 July 2014) UN Doc A/69/213.

164 Schaap (n 149) 125-6. See also HRC, General Comment No. 34 (12 September 2011) UN Doc CCPR/C/GC/34.

165 Ibid 122. See HRC, General Comment No. 15 (11 April 1986); HRC, General Comment No. 23 (8 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5, para 7.

166 CERD, General Recommendation No. 34 (3 October 2011) UN Doc CERD/C/GC/34, para 4(d), see also para 42.

167 CERD, General Recommendation No. 23 (1997) UN Doc A/52/18, Annex V, para 4(d)

168 UN Committee on the Elimination of Discrimination against Women (7 March 2016) UN Doc CEDAW/C/GC/34, para 54. The Committee further adds that states should '[e]nsure the participation of rural women in the development and implementation of all agricultural and rural development strategies, and that they are able to participate effectively in planning and decision-making relating to rural infrastructure and services ... Rural women and their representatives should be able to participate directly in the assessment, analysis, planning, design, budgeting, financing, implementation, monitoring and evaluation of all agricultural and rural development strategies' (at para 54(d)) and rural development projects should moreover only be implemented 'after participatory gender and environmental impact assessments ... with the full participation of rural women, and after obtaining their free, prior and informed consent' (at para 54(e)).

in individual decisions. States thus retain a large deal of discretion when it comes to the implementation of a potential right to public participation.¹⁶⁹

Nonetheless, it is possible to sketch the contours of a right to participate in decision-making within international human rights law.¹⁷⁰ While such a right potentially includes the right to participate in the formulation and implementation of policies, the focus of the present contribution is more directly on decisions with a potential to affect the human rights of a given individual or group.¹⁷¹ While the design of such participatory processes is usually left to the discretion of the state, it is generally accepted that meaningful participation must take place at an early stage of the decision-making process when all options are still open, that those affected by the decision must be granted the ability to participate in these decision-making processes, and that the state must take the outcome of the participation by the public into account in its ultimate decision.¹⁷² While this does not amount to the possibility of the public vetoing the decision, there should be a real possibility that the public can influence the outcome of a decision-making procedure.¹⁷³

Moreover, effective public participation is only possible if the public is granted access to the information necessary to form views on the proposed activity or policy.¹⁷⁴ It is not sufficient to simply make information available to the public: provisions must be in place to ensure that this information can be understood and acted upon by non-experts.¹⁷⁵ The state may furthermore need to take additional steps in order to build the capacity of 'marginalised and vulnerable groups' and to ensure that access to information is effective, as certain groups may speak a minority language, have high rates of illiteracy, or have insufficient access to the technologies through which information is

169 McMurry, *Participation and Democratic Innovation under International Human Rights Law* (n 8) 127.

170 UN Doc A/69/213 (n 163) para 17.

171 McMurry, *Participation and Democratic Innovation under International Human Rights Law* (n 8) 130-151.

172 Schaap (n 149) 130-1, see also 133-4; McMurry, *Participation and Democratic Innovation under International Human Rights Law* (n 8) 185; UN Doc A/69/213 (n 163) paras 21, 30. See also UN Doc A/HRC/37/59 (n 25) Annex, Framework Principle 9. However, compare McMurry, who argues that 'participation is not in itself seen as an essential principle of human rights', but rather as a principle to guarantee *other* human rights, such as freedom of association and freedom of expression: McMurry, 'Applying Human Rights to Enable Participation' (n 9) 1063.

173 Ebbesson, 'The Notion of Public Participation in International Environmental Law' (n 17) 59. See UN Doc A/HRC/31/52 (n 148) para 59.

174 UN Doc A/HRC/31/52 (n 148) para 59. See also UN Doc A/HRC/25/53 (n 147) paras 30-5; CESCR, General Comment No. 15 (n 163) para 48; UN Doc A/69/213 (n 163) para 27-8.

175 Human Rights Council, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (24 January 2018) UN Doc A/HRC/37/58, para 44; UN Doc A/HRC/31/52 (n 148) para 59.

often disseminated, such as the internet.¹⁷⁶ This should be seen as part of the requirements for ensuring that participatory processes are non-discriminatory.¹⁷⁷

6.2.5 Relevance for cultural heritage law

The development of the principle of public participation outlined above shows clear promise in contributing to the resolution of the problems faced by individuals and local communities under cultural heritage law.¹⁷⁸ The guarantees set out under human rights law and environmental law are both more far-reaching and detailed than those established with respect to public participation in international cultural heritage instruments, in particular the operational guidelines of the World Heritage Convention and the Intangible Cultural Heritage Convention.¹⁷⁹ Public participation in environmental decision-making has moreover been explicitly connected to the fulfilment of the right to a healthy environment; a parallel could be drawn that public participation in cultural heritage governance should similarly be seen as a basic requirement for the fulfilment of the right to take part in cultural life.¹⁸⁰ As such, the fleshing out of standards relating to public participation should arguably be framed

176 A/HRC/31/52 (n 148) para 59; Human Rights Council, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context (6 August 2009) UN Doc A/64/255, para 63; UN Doc A/HRC/37/58 (n 175) para 45; UN Doc A/HRC/37/59 (n 25) para 44.

177 As McMurtry notes, '[w]hile deliberation in the public sphere might appear to encourage a single decision-making process that is open to all citizens on an equal basis, this is not necessarily fully inclusive. It is important not only that participation is open to all, but also that the process is fully inclusive in operation, otherwise it can even exacerbate marginalisation': McMurtry, *Participation and Democratic Innovation under International Human Rights Law* (n 8) 158.

178 The Special Rapporteur on the Rights of Indigenous Peoples has remarked upon several occasions on the risks of World Heritage nominations for the rights of Indigenous peoples, and the need for procedures to ensure their participation in the nomination and management of World Heritage sites: UN General Assembly, Report of the Special Rapporteur on the Rights of Indigenous Peoples (13 August 2012) UN Doc A/67/301, paras 33-40; UN General Assembly, Report of the Special Rapporteur on the Rights of Indigenous Peoples (19 July 2022) UN Doc A/77/238, paras 39, 72. More broadly on the impact of conservation measures on Indigenous peoples and on World Heritage sites, see UN General Assembly, Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples (29 July 2016) UN Doc A/71/229.

179 UN Doc A/77/238 (n 178) para 44.

180 This has also been recognized by the Special Rapporteur on Cultural Rights, who has noted that '[t]he right of access to and enjoyment of cultural heritage includes the right of individuals and communities ... to participate in the identification, interpretation and development of cultural heritage, as well as to the design and implementation of preservation/safeguard policies and programmes': Human Rights, Council, Report of the Independent Expert in the Field of Cultural Rights (21 March 2011) UN Doc A/HRC/17/38, para 79.

as part of the human rights-based approach which has been promoted in recent years within UNESCO.¹⁸¹

Environmental law and human rights law thus provide a blueprint for the application of principles of public participation to international heritage governance. Both fields underline the necessity of ensuring that information made available to the public in support of participation processes is accessible and understandable to a non-expert audience, with particular attention being devoted to ensuring access to information for marginalised groups within society. Indeed, in certain situations, the state is expected to actively inform members of affected publics. By comparison, the issue of access to information has yet to be broached within cultural heritage law, despite the problems resulting from a *lack* of information amongst members of the public having become increasingly evident. As the case studies of the Intangible Cultural Heritage Convention in the previous chapter showed, community participation in the designation of intangible heritage is primarily demonstrated through the signing of written consent forms, even in communities with high rates of illiteracy. Calls for more participation in cultural heritage decision-making processes are thus not enough: participation processes need to take account of the barriers faced by individuals and local communities in accessing and understanding the information required to participate in cultural heritage decision-making.

The notion of 'affectedness' emerges as a central criterion in the preceding analysis, being deployed to varying extents not only within Aarhus, Escazú and the Bali Guidelines, but also within the development of participatory rights in human rights law. Whereas in the latter the concept is used as a structuring principle to determine when participatory rights enter into play, in the environmental context it is specifically tied to more stringent obligations for states with respect to their duty to facilitate public participation when authorising specific projects or activities. This lends credence to the argument that public participation should at minimum be facilitated in the context of decisions concerning the inscription or management of particular forms of cultural heritage, and indeed that states should in certain situations take active steps to ensure that the public is aware of opportunities to participate in these decision-making processes.

While the majority of the regimes surveyed above do not necessarily define when members of the public can be considered 'affected', the Aarhus Convention provides helpful guidance which could also be used to give shape to similar criteria within cultural heritage law. Departing from the concept of the 'public concerned', the Aarhus Convention thus provides that this can

181 See also UN Doc A/77/238 (n 178) para 72, which describes participation in cultural heritage decision-making processes as part of a human rights-based approach to World Heritage listing; and more broadly UN Doc A/HRC/17/38 (n 180) which calls for a human rights-based approach to cultural heritage matters.

either mean the 'public affected or likely to be affected by, or having an interest in' a decision-making procedure.¹⁸² The motivation behind this distinction is the view that '[t]hose who are most affected by the outcome of [decision-making] should have a greater chance to influence the outcome'.¹⁸³

The Aarhus Convention's Compliance Committee has held in this regard that affectedness 'depends on the nature and size of the activity' and may not be limited to its immediate geographic vicinity;¹⁸⁴ a large number of people may thus be affected by a single project, such as a nuclear power plant.¹⁸⁵ In this respect, the impact on an individual's quality of life which may result from the authorisation of an activity also constitutes a valid ground to consider that that individual may be considered as 'affected', even if such grounds are not necessarily measurable as such.¹⁸⁶ Similarly, members of the public are considered to 'have an interest' in decision-making not only in situations where their legal interests or rights will be potentially impacted by an activity (including their 'social rights', such as the right to a healthy environment),¹⁸⁷ but also in situations which may potentially impact their 'factual interests'.¹⁸⁸ In this regard, the Committee noted that 'for example, in the case of a proposed activity that may affect a waterway, bird watchers interested in keeping nests intact or anglers interested in keeping waters fishable' could be considered to 'have an interest' in decision-making.¹⁸⁹ And finally, the Committee has held that members of the public can also simply express an interest 'without having stated any specific reason' for that interest.¹⁹⁰

182 Aarhus Convention art 2(5).

183 UNECE (n 45) 119. See also Jendroška (n 64) 97.

184 Compliance Committee of the Aarhus Convention, Findings and Recommendations with Regard to Communication ACCC/C/2010/50 concerning compliance by the Czech Republic (2 October 2012) ECE/MP.PP/C.1/2012/11, para 66. See UNECE (n 45) 57.

185 Ibid. See e.g. Compliance Committee of the Aarhus Convention, Findings and Recommendations with Regard to Communication ACCC/C/2004/02 concerning compliance by Kazakhstan (14 March 2005) ECE/MP.PP/C.1/2005/2/Add.2; Compliance Committee of the Aarhus Convention, Findings and Recommendations with Regard to Communication ACCC/C/2009/44 concerning compliance by Belarus (19 September 2011) ECE/MP.PP/C.1/2011/6/Add.1.

186 Compliance Committee of the Aarhus Convention, Findings and Recommendations with Regard to Communication ACCC/C/2013/91 concerning compliance by the United Kingdom of Great Britain and Northern Ireland (24 July 2017) ECE/MP.PP/C.1/2017/14, para 73.

187 UNECE (n 45) 57. In ECE/MP.PP/C.1/2012/11 (n 184), the Compliance Committee held that tenants of an apartment building could be considered to hold the same interests as the owners of the apartment building, even though they did not have ownership rights; certain activities could thus affect their 'social and environmental rights', and for this reason they should be considered part of the 'public concerned' for the purposes of public participation: para 67.

188 ECE/MP.PP/C.1/2017/14 (n 186) para 74.

189 Ibid.

190 UNECE (n 45) 57. See also ECE/MP.PP/C.1/2017/14 (n 186) para 74.

Moreover, both the findings of the Compliance Committee and the practice of States Parties to the Aarhus Convention in the context of the Meeting of Parties have underlined the importance of States Parties interpreting the 'public concerned' as broadly as possible;¹⁹¹ furthermore, while States Parties are free to define the 'public concerned' within their domestic law, this definition 'must be based on objective criteria and not on a discretionary power to pick individual representatives of certain groups'.¹⁹² As such, while public authorities are the primary entity tasked with identifying the public concerned for the purposes of the Aarhus Convention, the Compliance Committee has commended states who allow for members of the public to self-identify as a member of the 'public concerned' and to subsequently participate in the decision-making process.¹⁹³ The reason that the definition of the public concerned can be so broad is precisely because the Aarhus Convention does not grant the public a veto over the decision-making process, merely the right to be heard and to have their interests considered.

There are two key takeaways from the approach of the Aarhus Convention to the notion of 'affectedness' for cultural heritage law. For one, it supports a broad interpretation of who should be considered as relevant participants in public participation processes in cultural heritage law, which is not limited to those who hold strictly legal interests (such as property rights) with respect to a given form of cultural heritage. This means, for example, that members of local communities do not need to be property owners to be considered potentially affected by the measures taken by the state when implementing cultural heritage law; they can also be considered affected if heritage designation will impact a broader panoply of interests (as in the case of the categories of 'social rights' and 'factual interests' described by the Compliance Committee), such as the ability to use a heritage site for traditional practices.¹⁹⁴ Secondly, while the state may be main actor tasked with identifying when actors will be considered to be 'affected' and thus included in participation

191 See e.g. Compliance Committee of the Aarhus Convention, Findings and Recommendations with Regard to Communication ACCC/C/2005 concerning compliance by Belgium (28 July 2006) ECE/MP.PP/C.1/2006/4/Add.2; MOP Aarhus Convention, Report of the Third Meeting of Parties (26 September 2008) ECE/MP.PP/2008/2/Add.1, Addendum: Riga Declaration, para 4(f).

192 Compliance Committee of the Aarhus Convention, Findings and Recommendations with Regard to Communication ACCC/C/2010/51 concerning compliance by Romania (14 July 2014) ECE/MP.PP/C.1/2014/12, para 109.

193 ECE/MP.PP/C.1/2017/14 (n 186) para 78.

194 That being said, there are good reasons to adopt a less broad definition of 'affectedness' than the Aarhus Convention for the purposes of cultural heritage law, chiefly in light of the fact that both cultural heritage law and human rights law recognise that certain individuals or groups deserve *special* consideration in relation to particular manifestations of cultural heritage. Not doing so runs the risk that the interests of local communities will continue to lose out against broadly defined 'public' or 'common' interests over cultural heritage, belonging chiefly to far-removed and diffuse publics.

procedures, this is a rebuttable presumption; most importantly, the Aarhus Convention also supports an interpretation of affectedness in which members of the public can self-identify as being potentially affected.¹⁹⁵

Moving beyond the concept of 'affectedness', international environmental law and international human rights law could similarly help to concretise when public participation is most crucial in the context of decision-making processes surrounding the designation and management of cultural heritage, as well as the desired outcome of such participation – both elements which remain largely unspecified in cultural heritage law. As such, when members of the public are likely to be affected by a decision concerning cultural heritage, their participation should be facilitated at an early stage when all options are open.¹⁹⁶ Decision-makers furthermore need to take due account of the outcome of public participation processes; while this does not amount to a veto by the public of the proposed action, decisions must indicate how the outcome of the public participation was accounted for. Both of these principles flow from the elaboration of the right of public participation in Aarhus and Escazú.

Finally, both fields have also emphasised the importance of guaranteeing public participation in international decision-making processes when such decisions are likely to affect a given individual or community. This insight is of particular interest for the discussion on public participation in cultural heritage law, as decisions taken at the international level can have a far-reaching impact on the day-to-day lives of individuals at the local level, an argument that has been specifically endorsed by the Special Rapporteur on the Rights of Indigenous Peoples in the context of the World Heritage Convention and other protected areas regimes under international law.¹⁹⁷

As such, even within international organisations, the participation of the affected public should take place at a stage when all options are still open, and the entity taking the decision – in this case, intergovernmental bodies such as the World Heritage Committee – should be required to take 'due account' of the outcome of public participation when making its decision. Concrete

¹⁹⁵ Here, the same caveat holds as above (n 194).

¹⁹⁶ As also acknowledged by the Special Rapporteur on Cultural Rights, who has stated that 'general calls for public participation may not be sufficient' (at para 63) and that the guaranteeing of the right to take part in cultural life needs to take into account '[v]arying degrees of access and enjoyment ... taking into consideration the diverse interests of individuals and groups according to their relationship with specific cultural heritages. Distinctions should be made between (a) originators or "source communities", communities which consider themselves as the custodians/owners of a specific cultural heritage, people who are keeping cultural heritage alive and/or have taken responsibility for it; (b) individuals and communities, including local communities, who consider the cultural heritage in question an integral part of the life of the community, but may not be actively involved in its maintenance; (c) scientists and artists; and (d) the general public accessing the cultural heritage of others' (at 62). Specific attention should thus be paid to guaranteeing the participation of source and local communities (at 63): UN Doc A/HRC/17/38 (n 180).

¹⁹⁷ UN Doc A/67/301 (n 178) paras 90-2; UN Doc A/77/238 (n 178) para 72.

measures elaborated under the Aarhus Convention and Escazú Agreement which could be transplanted to the cultural heritage context involve ensuring that information submitted by members of the public is also available to the public at large; the granting of observer status to affected individuals or groups; facilitating the ability of such actors to circulate statements and speak at intergovernmental meetings; or even their ability formulate text proposals which can be debated and subsequently adopted by the States Parties to the convention in question.

6.3 THE DUTY TO CONSULT AND THE RIGHT TO FREE, PRIOR AND INFORMED CONSENT

The principle of public participation is associated with the duty to consult and the right to free, prior and informed consent (FPIC),¹⁹⁸ both of which are more closely linked to specific members of the public and establish more stringent duties upon states.¹⁹⁹ Both obligations have been specifically developed in the context of the rights of Indigenous peoples under international law, such as within ILO Convention No. 169²⁰⁰ and UNDRIP.²⁰¹ They have also been elaborated upon in a wide range of legal regimes, including human rights law, international environmental law (in particular biodiversity law),²⁰² and voluntary standards in relation to development projects and businesses. In certain situations, these standards also apply to non-Indigenous peoples.

The content of the duty to consult and the right to FPIC varies depending on the regime in which it is given shape. One of the thorniest questions in relation to both the duty to consult and the right to FPIC is whether these obligations establish a 'veto' of the affected Indigenous community over

198 As acknowledged by Razzaque, FPIC has variously 'been described as a right, a principle and a standard': Jona Razzaque, 'A Stock-Taking of FPIC Standards in International Environmental Law' in Stephen J. Turner and others (eds), *Environmental Rights: The Development of Standards* (Cambridge University Press 2019) 196. For consistency, the present work shall refer to it as a right, on the basis of its inclusion in UNDRIP and recognition by various human rights courts and bodies.

199 Schaap (n 149) 132; Federica Cittadino, 'The Public Interest in Environmental Protection and Indigenous Peoples' Rights: Procedural Rights to Participation and Substantive Guarantees' in E. Lohse and M. Poto (eds), *Participatory Rights in the Environmental Decision-Making Process and the Implementation of the Aarhus Convention: A Comparative Perspective* (Duncker & Humblot 2015) 6.

200 ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 26 June 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO Convention No. 169).

201 UN Doc A/RES/61/295 (n 158).

202 Razzaque (n 198) 207-14.

activities with a possible impact upon them.²⁰³ As has been argued by scholars such as Barelli and Rombouts, it is possible to identify a sliding scale with regards to the degree in which Indigenous peoples must be consulted prior to the undertaking of a given activity or the initiation of a given plan or policy, whether by the state or by private actors. This sliding scale depends on the level of impact of a given activity on the community in question. At the lowest level, there is a requirement to consult with the affected community, with the aim of achieving consent; if impacts are more far-reaching, this obligation can transform into a requirement to actually obtain the consent of the affected community.²⁰⁴ However, the degree to which each regime implements this sliding scale differs.

6.3.1 ILO Convention No. 169

One of the earliest codifications of the duty to consult can be found in ILO Convention No. 169.²⁰⁵ Article 6 of the Convention provides that states shall consult with tribal and Indigenous peoples ‘whenever consideration is being given to legislative or administrative measures which may affect them directly’. Such consultation should occur ‘through appropriate procedures’, in particular through the ‘representative institutions’ of these peoples; they must furthermore ‘be undertaken, in good faith and in a form appropriate to the circumstances, *with the objective of achieving* agreement or consent to the proposed measures’.²⁰⁶

The obligation to consult was left ambiguous during drafting due to conflicting positions between states and Indigenous organisations.²⁰⁷ The ILO’s Committee of Experts on the Application of Conventions and Recommendations (CEACR), the body tasked with observing the implementation of the ILO’s conventions by its member states, has thus far interpreted the phrase ‘with the objective of achieving agreement or consent’ as not requiring such consent to be actually granted by tribal and Indigenous peoples in relation

203 Mauro Barelli, ‘Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead’ (2012) 16 *The International Journal of Human Rights* 1, 2.

204 *Ibid*; S.J. Rombouts, *Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent* (Wolf Legal Publishers 2014); María Victoria Cabrera Ormaza, *The Requirement of Consultation with Indigenous Peoples in the ILO* (Brill Nijhoff 2018). See further sources cited in Sections 5.3.1-2 below.

205 ILO Convention No. 169 was adopted in order to complement the earlier ILO Convention No. 107, which was adopted in 1957. While Convention No. 107 remains in force it is closed to new ratifications, and a number of States Parties have denounced the Convention and subsequently ratified Convention No. 169. Convention No. 107 does not contain any comparable provisions on states’ duty to consult with Indigenous peoples.

206 ILO Convention No. 169, art 6(2) (emphasis added).

207 Cabrera Ormaza (n 204) 67.

to a certain measure.²⁰⁸ Instead, it has conceptualised it ‘as an obligation of means, understood as the obligation to facilitate “genuine dialogue” characterized by “communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord”’.²⁰⁹ The ability of Indigenous peoples to participate in these decision-making processes thus should not be illusory: there must be a real chance that they can affect the outcome of a decision.²¹⁰

However, Convention No. 169 also provides a number of substantive guarantees, pursuant to which states have specific obligations to consult with Indigenous and tribal peoples in the case of exploration or exploitation of natural resources located on traditional lands,²¹¹ and in the case of the transmission of land rights.²¹² In addition, the Convention establishes what is clearly a more stringent regime with regards to the removal of tribal and Indigenous peoples from their traditional lands: article 16 provides that they ‘shall not be removed from the lands which they occupy’;²¹³ it furthermore establishes that ‘[w]here the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent’.²¹⁴ If this consent cannot be obtained, tribal and Indigenous peoples can only be relocated ‘following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned’.²¹⁵ Moreover, if the tribal or Indigenous peoples cannot return to their lands following the relocation, they must be provided with appropriate compensation.²¹⁶ As such, while there is an obligation of consent in relation to relocation, it is not an absolute requirement and thus still does not provide a ‘veto’ to Indigenous peoples.²¹⁷

208 See e.g. *ibid* 119-20, 146; Cittadino, ‘The Public Interest in Environmental Protection and Indigenous Peoples’ Rights: Procedural Rights to Participation and Substantive Guarantees’ (n 199) 8-9; María Victoria Cabrera Ormaza and Martin Oelz, ‘The State’s Duty to Consult Indigenous Peoples: Where Do We Stand 30 Years after the Adoption of the ILO Indigenous and Tribal Peoples Convention No. 169?’ (2020) 23 *Max Planck Yearbook of United Nations Law* 71, 84.

209 Cabrera Ormaza (n 204) 119-20. On the obligation to consult as an obligation of process, not result, see also Cittadino, ‘The Public Interest in Environmental Protection and Indigenous Peoples’ Rights: Procedural Rights to Participation and Substantive Guarantees’ (n 199) 2; Cabrera Ormaza and Oelz (n 208) 84.

210 Barelli (n 203) 6.

211 ILO Convention No. 169, art 15.

212 *Ibid* art 17.

213 *Ibid* art 16(1).

214 *Ibid* art 16(2).

215 *Ibid*.

216 *Ibid* art 16(3)-(4).

217 Cabrera Ormaza (n 204) 119-20.

6.3.2 UNDRIP

Moving beyond the duty to consult embedded in ILO Convention No. 169, a range of other regimes focus on obligations to obtain FPIC. While there is not necessarily a single definition of FPIC under international law, the principle has been extensively developed in the context of UNDRIP, which was adopted by the UN General Assembly in 2007.²¹⁸ The notion of FPIC emerges in two main contexts within UNDRIP: in response to prior wrongs committed against Indigenous peoples and as a safeguard for future action. In the case of the former, UNDRIP establishes that states must provide redress in relation to the 'cultural, intellectual, religious and spiritual property' of Indigenous peoples which has been taken without their free, prior and informed consent;²¹⁹ they must similarly do so in the case of their 'lands, territories and resources which they have traditionally owned or otherwise occupied or used', and which have been taken without their free, prior and informed consent.²²⁰

In the latter category, FPIC becomes a safeguard which must be met in the dealings of the state with Indigenous peoples. As such, states are obliged to ensure that FPIC is obtained in the case of the 'storage or disposal of hazardous materials' on Indigenous lands or territories,²²¹ and in the case of relocation of Indigenous peoples from their lands or territories.²²² In both situations, the state cannot undertake these activities without obtaining the FPIC of the Indigenous peoples in question, in recognition of 'the importance of the spiritual relationship that Indigenous peoples have with their lands';²²³ in other situations, the state is merely required to 'consult and cooperate ... in order to obtain their free, prior and informed consent',²²⁴ a noticeably lower standard. This obligation is applicable 'prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources',²²⁵ and whenever the state seeks to adopt and implement

218 While UNDRIP's status as a declaration means that it is not strictly speaking formally legally binding, it is still considered to carry significant 'normative weight': S. James Anaya and Luis Rodríguez-Piñero, 'The Making of the UNDRIP' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press 2018) 62.

219 UNDRIP art 11(2).

220 Ibid art 28(1). The full phraseology of the article is 'confiscated, taken, occupied, used or damaged'.

221 Ibid art 29(2).

222 Ibid art 10.

223 Mauro Barelli, 'Free, Prior, and Informed Consent in the UNDRIP: Articles 10, 19, 29(2), and 32(2)' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press 2018) 255.

224 UNDRIP art 19, 32.

225 Ibid art 32(2).

'legislative or administrative measures that may affect [indigenous peoples]'.²²⁶ More broadly, UNDRIP also guarantees the right of Indigenous peoples 'to participate in decision-making matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures'.²²⁷ This also includes decision-making processes with an impact on Indigenous peoples' cultural heritage, particularly when viewed in light of the right to cultural autonomy that emerges from a joint reading of articles 3 and 4 of UNDRIP as an expression of the internal element of their right to self-determination.²²⁸

Commentators have considered that the obligation to obtain the FPIC of Indigenous peoples prior to the adoption and implementation of legislative or administrative measures establishes a broader standard than that established by ILO Convention No. 169: firstly because it establishes a clearer link between the duty to consult and the necessity of obtaining FPIC,²²⁹ and secondly, because consultation is not only required in relation to legislative or administrative measures which may 'directly' affect Indigenous peoples,²³⁰ but simply all measures which may 'affect' them.²³¹ However, some disagreement still exists as to the meaning of the requirement in UNDRIP to consult with Indigenous peoples in order to obtain their FPIC, and whether this requirement amounts to a veto of the proposed project or measure.²³² These disagreements became visible once again upon the adoption of the American Declaration on

226 Ibid art 19.

227 Ibid art 18.

228 Yvonne Donders, 'The UN Declaration on the Rights of Indigenous Peoples: A Victory for Cultural Autonomy?' in Ineke Boerefijn and Jenny Goldschmidt (eds), *Changing Perceptions of Sovereignty and Human Rights: Essays in Honour of Cees Flinterman* (Intersentia 2008) 118-22.

229 Cabrera Ormaza (n 204) 149-50.

230 ILO Convention No. 169 art 6(1)(a).

231 Cabrera Ormaza (n 204) 150.

232 Ibid 150. Compare in this regard Cittadino (n 199), who considers that the requirement of consulting to obtain FPIC requires actually obtaining the consent of Indigenous peoples, not merely attempts to obtain it. By contrast, others, such as Anaya (the former Special Rapporteur on the Rights of Indigenous Peoples), Cabrera Ormaza and Barelli consider that the obligation does not establish a veto power for Indigenous peoples – while simultaneously acknowledging that it establishes a more stringent standard than mere consultation, requiring 'that the relevant consultations should not be a mere formality, but, rather, should be conducted in good faith and with the objective of finding a common agreement': Mauro Barelli, 'Development Projects and Indigenous Peoples' Land: Defining the Scope of Free, Prior and Informed Consent' in Corinne Lennox and Damien Short (eds), *Handbook of Indigenous Peoples' Rights* (Routledge 2016) 70; S. James Anaya and Sergio Puig, 'Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples' (2017) 67 University of Toronto Law Journal 435, 437; Cabrera Ormaza (n 204) 149-50; Cabrera Ormaza and Oelz (n 208) 92. See also UN General Assembly, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People (15 July 2009) UN Doc A/HRC/12/34.

the Rights of Indigenous Peoples (ADRIP) in 2016,²³³ with Colombia explicitly objecting to an interpretation of the FPIC standard which would amount to a veto-power for Indigenous peoples with respect to 'legislative or administrative measures that may affect them'.²³⁴

The chief difficulty in providing an answer to the debate on the role of the 'veto' in UNDRIP is that there is no body which can issue an authoritative interpretation of UNDRIP, nor are there any subsequent agreements which can be called upon as aids in interpretation. While it is possible to rely upon subsequent state practice, either on a unilateral basis or as it has been developed in the context of other international organisations, it is arguably not possible to give an answer to this question in the abstract. However, arguably the most persuasive approach is that which considers that the duty to consult in order to obtain FPIC should be interpreted flexibly, in light of the travaux préparatoires of UNDRIP. During drafting, proposals to provide a veto to Indigenous peoples pursuant to the right to FPIC were thus rejected; however, simultaneously, the phrase in UNDRIP that it is necessary for states to 'consult in order to obtain' the free, prior and informed consent of Indigenous peoples should also not be construed too restrictively, given that such restrictive interpretations were also rejected at the time of drafting.²³⁵

Scholars have thus suggested that article 32(2) should be read in a flexible manner and in light of the rest of the Declaration, in particular articles 25, 26, and most importantly article 3 on self-determination; if a proposed project or measure is likely to have serious negative impacts on an Indigenous community, the obligation transforms into one in which the consent of the affected community becomes critical.²³⁶ Such an approach is ultimately in line with the object and purpose of UNDRIP.²³⁷ In this sense, FPIC becomes a 'process of negotiation and consultation'.²³⁸ Instead of seeing FPIC as an 'all or nothing' decision fixed at a single point in time, it should thus be seen as an iterative process in which Indigenous peoples should have a 'genuine chance to influence the decision-making process'.²³⁹

233 OAS, American Declaration on the Rights of Indigenous Peoples (15 June 2016) AG/RES.2888 (XLVI-O/16) (ADRIP).

234 ADRIP art XXIII(2), fn 3.

235 Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead' (n 203) 11.

236 Ibid 16-17.

237 Barelli, 'Development Projects and Indigenous Peoples' Land: Defining the Scope of Free, Prior and Informed Consent' (n 232) 72.

238 Rombouts (n 204) 220.

239 Ibid 171-2.

6.3.3 Human rights bodies

The notion of FPIC has also found extensive elaboration in the area of human rights, in particular as an element of the right to self-determination of Indigenous peoples.²⁴⁰ It is thus evident in the work of the UN Human Rights treaty bodies, such as the Human Rights Committee,²⁴¹ the CERD,²⁴² and the CESCR,²⁴³ even prior to the adoption of UNDRIP in 2007, as well as in the jurisprudence of the Inter-American Court (and Commission) of Human Rights²⁴⁴ and the African Court (and Commission) on Human and Peoples' Rights.²⁴⁵ In doing so, these bodies have elaborated their interpretation of their respective treaties in light of ILO Convention No. 169 and UNDRIP. Similarly, the UN Special Rapporteur on the Rights of Indigenous Peoples has also

240 See Razzaque (n 198) 199.

241 See e.g. HRC, *Poma Poma v. Peru* (24 April 2009) UN Doc CCPR/C/95/D/1457/2006, para 7.6; HRC, *Campo Agua'e Indigenous Community v. Paraguay* (21 September 2022) UN Doc CCPR/C/132/2552/2015, para 8.7; HRC, *Roy v. Australia* (10 July 2023) UN Doc CCPR/C/137/D/3583/2019, para 8.5. See further e.g. HRC, Concluding observations on the eight periodic report of Colombia (4 September 2023) UN Doc CCPR/C/COL/CO/8, paras 38-9; HRC, Concluding observations on the third periodic report of Brazil (6 September 2023) UN Doc CCPR/C/BRA/CO/3, paras 37, 67-8.

242 See e.g. CERD, *Ågren et al. v. Sweden* (18 December 2020) UN Doc CERD/C/102/D/54/2013, para 8.5. See further CERD, General Recommendation No. 23 (n 167) para 4(d).

243 Chiefly in its concluding observations issued to States Parties of the ICESCR: for an overview, see Yu Kanosue, 'When Land is Taken Away: States Obligations under International Human Rights Law Concerning Large-Scale Projects Impacting Local Communities' (2015) 15 Human Rights Law Review 643, 652, 656; Barelli, 'Development Projects and Indigenous Peoples' Land: Defining the Scope of Free, Prior and Informed Consent' (n 232) 75; Cabrera Ormaza (n 204) 160; Jérémie Gilbert, *Natural Resources and Human Rights: An Appraisal* (Oxford University Press 2018) 72; Cabrera Ormaza and Oelz (n 208) 90-1; Andrea Mensi, *Indigenous Peoples, Natural Resources and Permanent Sovereignty* (Brill Nijhoff 2022) 212. See further CESCR, General Comment No. 21 (n 163) paras 36-7.

244 IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 79 (31 August 2005); IACtHR, *Saramaka People v. Suriname* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 172 (28 November 2007); IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador* (Merits and Reparations) Inter-American Court of Human Rights Series C No. 245 (27 June 2012); IACtHR, *Kaliña and Lokono Peoples v. Suriname* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 309 (25 November 2015); IACtHR, *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 400 (6 February 2020).

245 ACmHPR, *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria* (2001) Communication No. 155/96; ACmHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (4 February 2010) Communication No. 276/2003; ACtHPR, *African Commission on Human and Peoples' Rights v. Republic of Kenya* (Judgment of 26 May 2017) Application No. 006/2012.

placed great emphasis on the fulfilment of FPIC obligations by states since the adoption of UNDRIP.²⁴⁶

The jurisprudence of the Inter-American Court has proven to be highly influential, with the case of *Saramaka People v. Suriname* of 2007 being of particular importance for its interpretation of the requirement to obtain FPIC.²⁴⁷ *Saramaka* was preceded by a number of cases of the Inter-American Commission and Court, primarily on the control of indigenous peoples over their ancestral lands in the context of the right to property under the Inter-American system, such as *Awas Tingni Community v. Nicaragua* in which requirements for the participation of Indigenous peoples in decisions concerning tenure over customary lands were laid out.²⁴⁸ While it is not possible to provide a full account of these developments in the present work, it is nonetheless important to point out the core elements of the approach of the IACtHR from *Saramaka* onwards.

Saramaka concerned the granting of timber concessions by the government of Suriname on the customary land of the Saramaka tribal people. The IACtHR considered that while the Saramaka's right to property – in this case, the right of the Saramaka to the use of the resources on their customary lands – could be limited, this could only be done if the restriction of their rights complied with the requirements that this limitation was 'previously established by law, necessary, proportional and with the aim of achieving a legitimate objective in a democratic society', and if the restriction did not deny the survival of the Saramaka as a people (either physical or cultural).²⁴⁹

In order to assess whether the restriction indeed amounted to a denial of the survival of the Saramaka people, the Court established three criteria: that the effective participation of the Saramaka must be guaranteed in the decision-making processes surrounding development and investment projects; that the Saramaka should derive reasonable benefits from these plans; and that the project is not implemented until an environmental and social impact assessment has been carried out.²⁵⁰ In doing so, the Court explicitly referred to article 32 of UNDRIP and the notion of FPIC embedded within it, considering that 'regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent'.²⁵¹ This approach has been interpreted as implying that the state

246 Cabrera Ormaza (n 204) 163. See e.g. UN Doc A/HRC/12/34 (n 232); Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples (11 August 2014) UN Doc A/HRC/27/52.

247 *Saramaka People v. Suriname* (n 244).

248 *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (n 244). See Rombouts (n 204) 230-42 for an extensive overview of these developments.

249 Rombouts (n 204) 269. See *Saramaka People v. Suriname* (n 244) paras 127-8.

250 Rombouts (n 204) 260-2. See *Saramaka People v. Suriname* (n 244) para 129.

251 *Saramaka People v. Suriname* (n 244) para 134.

must secure the consent of Indigenous peoples prior to undertaking development projects (whether a single large-scale project, or several small-scale projects) which are likely to have a major impact upon them.²⁵²

The criteria established in *Saramaka* have been elaborated upon in later cases of the IACtHR, such as *Sarayaku v. Ecuador*,²⁵³ *Kaliña and Lokono Peoples v. Suriname*²⁵⁴ and *Lhaka Honhat v. Argentina*.²⁵⁵ However, the focus of the Court has gradually shifted away from the firm obligation of obtaining consent established in *Saramaka*, instead seeking to consolidate and clarify safeguards in relation to the duty to consult and affirming its status as a principle of customary law.²⁵⁶ In this context, the Court has underlined that while consent is not necessarily the required final result of the duty to consult, 'agreement' should nonetheless be the aim of such consultations.²⁵⁷

This approach is echoed in the practice of the UN treaty bodies, such as CESCR and CERD; on the basis of ILO Convention No. 169 and UNDRIP, the treaty bodies have thus interpreted the duty to consult as not necessarily requiring consent in all circumstances, nonetheless emphasising that consent should be the ideal end goal of consultations.²⁵⁸ For its part, the Human Rights Committee has emphasised the importance of guaranteeing Indigenous peoples' 'effective participation' in decisions affecting them, particularly in the context of their ability to practice traditional activities within their territories pursuant to article 27 of the ICCPR.²⁵⁹ In doing so, it has increasingly referred to the need for such decision-making processes to be taken with the free, prior and informed consent of the community concerned.²⁶⁰ While the Committee's practice leaves open the question whether the FPIC standard requires obtaining

252 Rombouts (n 204) 264-5, 269; Barelli, 'Development Projects and Indigenous Peoples' Land: Defining the Scope of Free, Prior and Informed Consent' (n 232) 74.

253 *Kichwa Indigenous People of Sarayaku v. Ecuador* (n 244).

254 *Kaliña and Lokono Peoples v. Suriname* (n 244).

255 *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (n 244).

256 Cittadino, 'The Public Interest in Environmental Protection and Indigenous Peoples' Rights: Procedural Rights to Participation and Substantive Guarantees' (n 199) 10-11. See also Stéphanie de Moerloose and C. Ignacio de Casas, 'The Lhaka Honhat Case of the Inter-American Court of Human Rights: The Long-Awaited Granting of 400,000 Hectares under Communal Property Rights' (*EJIL: Talk!*, 16 July 2020) <<https://www.ejiltalk.org/the-lhaka-honhat-case-of-the-inter-american-court-of-human-rights-the-long-awaited-granting-of-400000-hectares-under-communal-property-rights/>>, who consider *Lhaka Honhat* as a missed opportunity for the IACtHR to clarify the distinction between consultation and consent under the Inter-American system.

257 Cabrera Ormaza and Oelz (n 208) 96-7; see *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (n 244) para 174.

258 *Ibid* 91-2; Kanosue (n 243) 658; Razzaque (n 198) 201-3. See e.g. CERD, General Recommendation No. 23 (n 167) para 4(d); CESCR, General Comment No. 21 (n 163) paras 36-7; *Ågren et al. v. Sweden* (n 242) paras 6.7, 6.17-22.

259 HRC, General Comment No. 23 (n 165) para 7; *Poma Poma v. Peru* (n 241) para 7.6.

260 *Poma Poma v. Peru* (n 241) para 7.6; *Campo Agua'ẽ Indigenous Community v. Paraguay* (n 241) para 8.7; *Roy v. Australia* (n 241) para 8.5.

and not merely seeking such consent, it has emphasised that 'effective participation' in any event requires the state to take positive measures.²⁶¹ In this sense, Indigenous peoples must not only have the ability to participate in decisions affecting them according to the law: the state needs to remain aware of potential barriers to their participation.²⁶²

Bodies such as CERD and CESCR have moreover held in several of their concluding observations that in some situations obtaining the consent of Indigenous peoples becomes compulsory, for example in situations of forced eviction or relocation.²⁶³ Both CESCR and the Special Rapporteur on Cultural Rights have moreover affirmed the applicability of the right to FPIC in relation to the fulfilment of cultural rights in the context of development projects,²⁶⁴ with the latter applying this right not only in relation to Indigenous peoples but in the case of any people or community affected by such projects.²⁶⁵ In any event, the practice of human rights bodies and courts thus appears to align with the broader 'flexible' approach to FPIC advocated by scholars, whereby Indigenous peoples cannot veto all decisions with potential impact on their customary lands, but their consent must be obtained 'when a development project is likely to have a serious (negative) impact on their cultures and, ultimately, lives'.²⁶⁶

6.3.4 Voluntary guidelines

Simultaneously, a parallel development has emerged to the discussion on FPIC and consultation within human rights: the growth of a wide range of voluntary guidelines seeking to establish safeguards for Indigenous peoples and local communities. While these frameworks are not legally binding as such, they provide a useful elaboration of the content of FPIC as a legal norm; voluntary guidelines may moreover also be the only way to push the issue forward within cultural heritage law, given that they provide lessons from which it is possible to learn how the problem has been tackled in other sectors.²⁶⁷ These voluntary guidelines have been adopted across several regimes, such as in the context of the implementation of measures to protect biological diversity, to mitigate the effects of climate change, and in projects involving

261 HRC, General Comment No. 23 (n 165) para 7.

262 *Roy v. Australia* (n 241) para 8.7.

263 For an overview, see Kanosue (n 243) 652; Razzaque (n 198) 197-203.

264 CESCR, General Comment No. 21 (n 163) paras 36-7.

265 Report of the Special Rapporteur in the Field of Cultural Rights (15 August 2022) UN Doc A/77/290, para 98. Compare CESCR, General Comment No. 21 (n 163) para 55(e).

266 Barelli, 'Development Projects and Indigenous Peoples' Land: Defining the Scope of Free, Prior and Informed Consent' (n 232) 79.

267 Rombouts (n 204) 321.

international development funds.²⁶⁸ While it is not possible to provide an overview of all these developments, the following section will provide a brief overview of proposals made within the various sectors.

In the case of the Convention of Biological Diversity, the issue of the consent of Indigenous peoples has thus been dealt with in a number of voluntary guidelines adopted by the Conference of the Parties of the CBD,²⁶⁹ of which the Akwé: Kon Guidelines (dealing with impact assessments for development projects taking place on or impacting traditional lands),²⁷⁰ and the Mo'otz Kuxtal Guidelines (dealing with the development of mechanisms for FPIC in relation to access to traditional knowledge) are of particular interest.²⁷¹

The Akwé: Kon Guidelines seek to establish a framework for the participation of Indigenous or local communities in cultural, environmental and social impact assessments relating to developments which 'are proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used' by these communities,²⁷² in order to 'prevent or mitigate any negative impacts of proposed developments'.²⁷³ The state is hereby expected to undertake public consultations prior to the proposed project.²⁷⁴ However, the Guidelines simultaneously note that only '[w]here the national legal regime requires prior informed consent of indigenous and local communities, the assessment process should consider whether such prior informed consent has been obtained', and thus do not establish far-reaching standards with regards to FPIC per se.²⁷⁵

The Mo'otz Kuxtal Guidelines similarly establish a voluntary framework for the obtaining of FPIC or the 'approval or involvement' of Indigenous peoples and local communities in the context of access to their traditional knowledge. The Guidelines provide that such access should be subject to FPIC, and explicit-

268 Razzaque (n 198) 199.

269 Ibid 207-14.

270 CBP COP, Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred sites and on Lands and Waters Traditionally Occupied or Used by Indigenous or Local Communities (13 April 2004) UN Doc UNEP/CBD/COP/DEC/VII/16, p 10. See also CBD art 8(j); Nagoya Protocol arts 6, 7, 10, 13(1)(b), 16(1).

271 CBP COP, Mo'otz Kuxtal Voluntary Guidelines for the Development of Mechanisms, Legislation or other Appropriate Initiatives to Ensure the "Prior and Informed Consent", "Free, Prior and Informed Consent" or "Approval and Involvement", Depending on National Circumstances, of Indigenous Peoples and Local Communities for Accessing their Knowledge, Innovations and Practices, for Fair and Equitable Sharing of Benefits Arising from the Use of their Knowledge, Innovations and Practices Relevant for the Conservation and Sustainable Use of Biological Diversity, and for Reporting and Preventing Unlawful Appropriation of Traditional Knowledge (17 December 2016) UN Doc CBD/COP/DEC/XIII/18.

272 Akwé Kon Guidelines (n 270) para 1, 14.

273 Ibid 3.

274 Ibid 10.

275 Ibid 53.

ly provide that Indigenous peoples and local communities have a 'right not to grant consent or approval' for such access.²⁷⁶ Simultaneously, the Guidelines leave a relatively great deal of leeway to individual states,²⁷⁷ and place Indigenous customary laws on the same footing as national legislation in the elaboration of FPIC within the domestic sphere.²⁷⁸ Yet the Guidelines nonetheless set out a useful framework for the conducting of FPIC processes, calling attention to – where appropriate – '[w]ritten application[s] in a manner and language comprehensible to the traditional knowledge holder';²⁷⁹ '[a]dequate and balanced information from a variety of sources that is made available in indigenous or local languages using terms understood by indigenous peoples and local communities';²⁸⁰ and 'culturally appropriate timing and deadlines'.²⁸¹

Much akin to the biodiversity regime, climate mitigation projects have long faced issues with respect to the safeguarding of the rights of Indigenous peoples and other local communities, with many reports of such projects resulting in human rights violations or forced displacement.²⁸² REDD+, which was developed in the context of the UNFCCC as framework for the adoption of climate mitigation measures, is an example of this dynamic. Projects developed under REDD+ seek to reduce emissions from deforestation or forest degradation, as well as to conserve and enhance existing forest carbon stocks; however, the programme has similarly faced issues with respect to human rights violations.²⁸³ As a result, a number of safeguard programmes have been developed in the context of REDD+. ²⁸⁴ These safeguards have increasing-

276 Mo'otz Kuxtal Guidelines (n 271) para 7(e).

277 Ibid para 9.

278 Ibid para 10.

279 Ibid para 17(c)(i).

280 Ibid para 17(c)(iii).

281 Ibid para 17(c)(iv).

282 Sébastien Duyck, Sébastien Jodoin and Alyssa Johl, 'Integrating Human Rights in Global Climate Governance: An Introduction' in Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 4-5.

283 Deborah Delgado Pugley, 'Rights, Justice, and REDD+: Lessons from Climate Advocacy and Early Implementation in the Amazon Basin' in Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 185-6; Kirsty Gover, 'REDD+, Tenure and Indigenous Property: the Promise and Peril of a "Human Rights-based Approach"' in Christina Voigt (ed), *Research Handbook on REDD+ and International Law* (Elgar 2016) 260.

284 For an overview, see Razzaque (n 198) 216-9. See UNFCCC COP, 'Guidance and Safeguards for Policy Approaches and Positive Incentives on Issues Relating to Reducing Emissions from Deforestation and Forest Degradation in Developing Countries; and the Role of Conservation, Sustainable Management of Forests and Enhancement of Forest Carbon Stocks in Developing Countries' (15 March 2011) UN Doc FCCC/CP/2010/7/Add.1, Appendix I, para 2; UN-REDD Programme Social and Environmental Principles and Criteria (25-26 March 2012) UN Doc UNREDD/PB8/2012/V/1; Guidelines on Stakeholder Engagement in REDD+ Readiness: With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities (20 April 2012); Guidelines on Free, Prior and Informed

ly sought to promote the 'full and effective participation' of Indigenous and local communities in the implementation of REDD+ activities,²⁸⁵ including support for FPIC not only for Indigenous peoples, but in some cases also for forest-dependent communities.²⁸⁶

Finally, in the realm of development banks, the World Bank has adopted a number of environmental and social safeguards, the most recent of which is the World Bank Environmental and Social Framework (ESF).²⁸⁷ The ESF requires FPIC in a number of situations, namely in cases of resettlement; in situations with 'adverse impacts on indigenous peoples' land and resources'; and 'where there are significant impacts on their cultural heritage'.²⁸⁸ However, it has also been critiqued for adopting a less stringent standard of consent than that proposed by human rights bodies given that it considers that 'consent may be achieved even when individuals or groups explicitly disagree'.²⁸⁹ The ESF moreover eschews references to other instruments containing FPIC requirements, such as UNDRIP; moreover, the number of situations in which FPIC is required is more restrictive than those enumerated in UNDRIP.²⁹⁰ That being said, the fact that a requirement for FPIC in cases of resettlement has not only been embedded in the case of the safeguards of the World Bank, but also in the safeguards of other development banks, highlights the lack of attention to this issue in cultural heritage law.²⁹¹

Consent (UN-REDD Programme January 2013).

285 See e.g. UN Doc FCCC/CP/2010/7/Add.1, Appendix I (n 284); UN Doc UNREDD/PB8/2012/V/1 (n 284) Principle 6.

286 UN Doc UNREDD/PB8/2012/V/1 (n 284) Criterion 9; Guidelines on Free, Prior and Informed Consent (UN-REDD Programme January 2013).

287 *The World Bank Environmental and Social Framework* (International Bank for Reconstruction and Development/World Bank 2017) (World Bank ESF). On FPIC in the earlier Operational Policies of the World Bank, see Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead' (n 203) 5. As Barelli notes, the emphasis of the Operational Policies is on consultation, not consent.

288 World Bank ESF (n 287) ESS 5, para 17. See also Corinne Lewis and Carl Söderbergh, 'The World Bank's New Environmental and Social Framework: Some Progress but Many Gaps Regarding the Rights of Indigenous Peoples' (2019) 23 *The International Journal of Human Rights* 63, 72-3.

289 Stéphanie de Moerloose, 'Indigenous Peoples' Free, Prior and Informed Consent (FPIC) and the World Bank Safeguards: Between Norm Emergence and Concept Appropriation' (2020) 53 *Verfassung in Recht und Übersee* 223, 236; see also Margherita Brunori, 'Protecting Access to Land for Indigenous and Non-indigenous Communities: A New Page for the World Bank?' (2019) 32 *LJIL* 501, 501.

290 Lewis and Söderbergh (n 288) 72-3.

291 de Moerloose (n 288) 232; Razzaque (n 198) 204-5.

6.3.5 Relevance for cultural heritage law

FPIC has undoubtedly emerged as a standard within international law which seeks to guide decision-making with a potential to affect Indigenous peoples.²⁹² These developments have frequently been shaped by the conceptualisation of FPIC within UNDRIP. As a result, it is possible to identify a minimum normative content of the standard across the numerous legal regimes where it has been employed: 'if the decision could result in a substantial impact on a people's fundamental rights, consent will be required',²⁹³ whereas if the impact is less severe, the state will simply be expected to undertake consultation with the aim of obtaining of free, prior and informed consent.²⁹⁴ However, it is important to note that the majority of these developments are limited to Indigenous peoples (although the precise definition of Indigenous peoples varies depending on the institutional context in which it is being discussed); standards for consultation or FPIC are much less precise with regards to other groups.

Doubts moreover continue to circulate amongst commentators as to whether the requirement of FPIC is binding upon states (or, for that matter, other legal persons such as businesses or international organisations),²⁹⁵ in light of the varied normative origins of the instruments in which FPIC is elaborated upon, ranging from binding instruments such as ILO Convention No. 169 or the Nagoya Protocol, to formally non-binding texts such as UNDRIP, and explicitly voluntary frameworks such as the Akwé: Kon Guidelines adopted in the context of the CBD and the World Bank's ESF. As such, many commentators remain doubtful as to whether FPIC has entered into customary international law as a legal principle;²⁹⁶ by contrast, the obligation to consult with Indigenous peoples has been more clearly established as being part of customary international law.²⁹⁷

Nonetheless, the conceptualisation of FPIC and consultation standards outlined above could certainly inform the further development of consent and consultation standards in cultural heritage law. In this context, there is still room for clearer application of consultation and FPIC requirements to both

292 Jones, 'Towards a Right of Peoples to Participation in Global Governance' (n 125) 141-2.

293 Ibid.

294 Ibid 159-60; Barelli, 'Free, Prior, and Informed Consent in the UNDRIP: Articles 10, 19, 29(2), and 32(2)' (n 223) 269.

295 However, in relation to international organisations, see the assertion of the Special Rapporteur on Indigenous Peoples that 'agencies, funds, programmes and intergovernmental organizations of the United Nations system should consult with indigenous peoples, in accordance with the same standards of consultation that apply to States under the Declaration, in the development and execution of activities or policies which may affect the rights or interests of indigenous peoples': UN Doc A/67/301 (n 178) para 87.

296 de Moerloose (n 288) 229-30.

297 Barelli, 'Free, Prior, and Informed Consent in the UNDRIP: Articles 10, 19, 29(2), and 32(2)' (n 223) 269.

Indigenous and non-Indigenous peoples, in particular with respect to forced evictions and other activities which might preserve tangible cultural heritage at the expense of intangible cultural heritage. One of the key takeaways in this regard is that almost all regimes which provide for FPIC standards establish an absolute requirement of consent in situations concerning the potential relocation of Indigenous peoples, in addition to decisions concerning their access and use of their traditional lands. This has yet to be clearly formulated within cultural heritage law, despite the fact that many inscription and management decisions do result in such consequences, whether for Indigenous peoples, other minority groups, or simply local communities.

In the context of cultural heritage law, the application of FPIC beyond Indigenous peoples to non-Indigenous local communities seems unlikely; by contrast, there is still room for clearer application of consultation requirements in cultural heritage law to non-Indigenous communities, in particular with respect to forced evictions and other activities which might preserve tangible cultural heritage at the expense of intangible cultural heritage. Moreover, the operationalisation of FPIC for Indigenous peoples, for example in the World Heritage Committee, as well as requirements of consent more broadly within cultural heritage law, could certainly be established more clearly and more ambitiously in light of standards elsewhere; they should also refer to these standards established and thereby build upon the lessons which have been learned in similar forums. Indigenous peoples' right to cultural autonomy, as recognised in UNDRIP,²⁹⁸ further underscores the need for cultural heritage law to guarantee robust FPIC standards for Indigenous peoples in the context of decisions affecting the management of their cultural heritage.

Furthermore, the inclusion within UNDRIP of the need to provide redress in situations where the 'cultural, intellectual, religious and spiritual property' of Indigenous peoples²⁹⁹ or the 'lands, territories and resources which they have traditionally owned or otherwise occupied or used'³⁰⁰ have been taken without their free, prior and informed consent raises interesting questions about the need for the development of similar standards within cultural heritage law. This is particularly the case for the World Heritage Convention, given that there have been many sites which have been designated without the FPIC of Indigenous (or tribal) peoples on whose territories the cultural site in question is located, in many cases leading to the forced displacement of these peoples. These developments thus open up the question of how cultural heritage law can reckon with its historical legacy and its far-reaching impact upon individuals and local communities.

298 Yvonne Donders (n 228) 118-22.

299 UNDRIP art 11(2).

300 Ibid art 28(1).

6.4 IMPACT ASSESSMENTS

A final legal technique with potential for greater application within cultural heritage law is the use of impact assessments, a concept which has been extensively elaborated in the field of environmental law. In this context, impact assessments have been developed as a tool to prevent potential harms to the environment, frequently in the transboundary context. In comparison to the concepts examined above, impact assessments can be seen as a method to facilitate participation in decision-making, rather than a form of participation as such. In addition to their role in preventing environmental harms, impact assessments can also be used in order to assess whether the impact of a proposed plan or project will be such that it is likely to meet the standard required in relation to the obligation to obtain free, prior and informed consent. Impact assessments emerged as a law-making tool in the 1960s in the USA in the context of domestic environmental legislation; since then, the field has expanded to cover not only environmental impact assessments (EIAs) but also other types of impact assessments, such as social impact assessments (SIAs), and human rights impact assessments (HRIAs).³⁰¹

While most of these types of impact assessment have developed in silos, they share a number of similarities, particularly with regards to the basic structure of the impact assessment and the integral role of the participation of the affected public(s) in each stage of the assessment.³⁰² Moreover, a distinction is often made – particularly in the case of EIAs – between EIAs focusing on a particular project (EIAs proper) and those focusing on the impact of plans or policies (known as Strategic Environmental Assessments, or SEAs). Another frequent distinction is made between impact assessments which solely focus on the project or plan under proposal, compared to those which also seek to assess the cumulate impacts of other projects or proposals already underway or in the pipeline; the latter are referred to as cumulative impact assessments.³⁰³

However, the broad variety of impact assessments which are carried out in practice are not necessarily always carried out as a matter of legal obligation; the main obligations under international law have been established in relation

301 On SIAs and HRIAs, see e.g. Rebecca De-Winter Schmitt and Kendyl Salcito, 'The Need for a Multidisciplinary HRIA Team: Learning and Collaboration Across Fields of Impact Assessment' in Nora Götzmann (ed), *Handbook on Human Rights Impact Assessment* (Elgar 2019); Frank Vanclay, 'Reflections on Social Impact Assessment in the 21st century' (2019) 38 *Impact Assessment and Project Appraisal* 126.

302 Nora Götzmann, 'Introduction to the Handbook on Human Rights Impact Assessment: Principles, methods and approaches' in Nora Götzmann (ed), *Handbook on Human Rights Impact Assessment* (Elgar 2019) 7-8.

303 Jill A.E. Blakley, 'Introduction: Foundations, Issues and Contemporary Challenges in Cumulative Impact Assessment' in Jill A.E. Blakley and Daniel M. Franks (eds), *Handbook of Cumulative Impact Assessment* (Elgar 2021) 5-6, 10.

to EIAs. International law thus establishes an obligation to carry out an EIA in transboundary contexts in the case of a likely significant environmental harm.³⁰⁴ The obligation to carry out an EIA is seen as a path through which states can fulfil their due diligence obligations pursuant to the no harm principle under international environmental law, with the ICJ famously noting in *Pulp Mills* that ‘it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource’.³⁰⁵ This obligation has developed over time into a principle of customary international law, but has also been codified in a range of soft law documents³⁰⁶ and treaty law,³⁰⁷ although the modalities of the obligation vary across regimes, with some regimes leaving states a broad deal of discretion in the design and conducting of EIAs.³⁰⁸ International law thus does not set precise standards on how EIAs should be conducted, as this falls within the discretion of individual states and is a matter for domestic regulation.³⁰⁹

Moreover, there is some degree of dissatisfaction amongst commentators on the effectiveness of EIAs in actually preventing environmental harm, given that most frameworks in which EIAs have been established do not necessarily state what should be the outcome of the impact assessment procedure – only that it needs to be conducted.³¹⁰ EIAs are thus essentially procedural: they set out steps for decision-makers, create guarantees in the execution of these

304 Astrid Epiney, ‘Environmental Impact Assessment’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2009) paras 51-4; Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge University Press 2008) 133-4. On the conduct of impact assessments beyond transboundary settings, see Neil Craik and Kristine Gu, ‘Implementing Environmental Impact Assessment in Areas Beyond National Jurisdiction: Epistemic, Institutional and Normativity Challenges’ in Rosemary Rayfuse, Aline Jaeckel and Natalie Klein (eds), *Research Handbook on International Marine Environmental Law* (Elgar 2022).

305 Most famously established by the ICJ in the *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 14, para 204. Timo Koivurova, ‘Transboundary Environmental Impact Assessment in International Law’ in Simon Marsden and Timo Koivurova (eds), *Transboundary Environmental Impact Assessment in the European Union: The Espoo Convention and its Kiev Protocol on Strategic Environmental Assessment* (Routledge 2011) 23; Craik (n 304) 150-1.

306 See e.g. Rio Declaration (n 19) Principle 17.

307 See e.g. Convention on Environmental Impact Assessment in a Transboundary Context (adopted 25 February 1991, entry into force 10 September 1997) 1989 UNTS 309 (Espoo Convention); UNCLOS art 206; CBD art 14; UNFCCC art 4(1)(f); Protocol on Environmental Protection to the Antarctic Treaty (adopted 4 October 1991, entry into force 14 January 1998) 2941 UNTS 3, arts 3, 8.

308 Craik (n 304) contrasts this to the Espoo Convention, which provides detailed requirements on the conducting of EIAs (101).

309 See *Pulp Mills* (n 305) para 205; see also Epiney (n 304) para 65.

310 Craik (n 304) 150-1.

steps, but do not mandate a particular outcome.³¹¹ As Craik notes, EIAs seek to bring the numerous actors involved in a decision together, and ‘to lay bare the choices and tradeoffs between competing objectives’.³¹² Thus in the case of the Espoo Convention, the state needs to provide justifications for its actions taken subsequent to the EIA,³¹³ in doing so, ‘EIAs promote reasoned decision-making by requiring decisions to be made openly, in writing and accompanied by reasons’,³¹⁴ much akin to the procedural guarantees examined above in relation to the principle of public participation and the duty to consult.

As noted above, a number of parallel procedures have developed alongside EIAs, seeking to assess the impact of decision-making through the lenses of social change, health, and human rights.³¹⁵ In some cases, impact assessments seek to combine an assessment of these fields as well as environmental impacts, resulting in categories such as Environmental and Social Impact Assessments and Sustainability Impact Assessments.³¹⁶ While the structure of these assessments remains fairly unsettled in comparison to EIAs,³¹⁷ they have seen increasing rates of adoption in fields such as business and human rights law in the case of human rights impact assessments (HRIAs).³¹⁸ Multiple categories of HRIAs have been developed, with the main distinction between them being who carries out the assessment: either the state, certain non-state actors (such as companies), or even the affected community.³¹⁹

Human rights impact assessments are slightly different in nature compared to EIAs or SIAs, in light of their basis in legally binding human rights frame-

311 Ibid 4; Elizabeth Fisher, ‘Environmental Impact Assessment: “Setting the Law Ablaze”’ in Douglas Fisher (ed), *Research Handbook on Fundamental Concepts of Environmental Law* (Elgar 2016) 424-5.

312 Craik (n 304) 9.

313 Ibid 151.

314 Ibid 160.

315 James Harrison, ‘Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment’ (2011) 3 *Journal of Human Rights Practice* 162, 163.

316 Vanclay (n 301) 126.

317 De-Winter Schmitt and Salcito (n 301) 323-4; Harrison (n 315) 165; James Harrison, ‘Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment’ (2013) 31 *Impact Assessment and Project Appraisal* 107, 110.

318 Vanclay (n 301) 126; Götzmann (n 302) 4-6. See also Harrison, ‘Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment’ (n 317) on the comparison between the approach in the UN Guiding Principles and HRIAs.

319 Caroline Brodeur, Irit Tamir and Sarah Zoen, ‘Community-based HRIA: Presenting an Alternative View to the Company Narrative’ in Nora Götzmann (ed), *Handbook on Human Rights Impact Assessment* (Elgar 2019) 51; Harrison, ‘Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment’ (n 317) 109-10.

works;³²⁰ as such, HRIAs adopt a somewhat different approach to the question of the outcome of the HRIA and states are more likely to be subject to an obligation to conduct HRIAs prior to potentially harmful activities in areas under their jurisdiction.³²¹ This is because, unlike EIAs, HRIAs are based upon human rights obligations which are in and of themselves binding. As such, if an HRIA finds a (possible) violation of human rights, the state will be bound to act. Scholars have thus considered that HRIAs can help to contribute to the due diligence of states (and potentially also other actors) in relation to individuals or communities likely to be adversely affected.³²² Simultaneously, HRIAs are also not considered a panacea, given that there is a risk that they simply become a 'box ticking' exercise in the absence of meaningful external monitoring.³²³

6.4.1 Relevance for cultural heritage law

Impact assessments have also gradually emerged in the context of heritage protection, in the form of heritage impact assessments (HIAs), having for example been introduced into the Operational Guidelines of the World Heritage Convention (along with EIAs and SEAs) at the 43rd session of the World Heritage Committee in 2019,³²⁴ albeit without much further guidance for States Parties on how such impact assessments are to be conducted.³²⁵ In the context of the Intangible Cultural Heritage Convention, impact assessments play an even more marginal role, with the Operational Directives merely calling upon States to 'endeavour' to take account of the impacts of development plans and programmes on intangible cultural heritage by conducting

320 Kamrul Hossain and Anna Petrétei, 'Resource Development and Sámi Rights in the Sápmi Region: Integrating Human Rights Impact Assessment in Licensing Processes' (2017) 86 *Nordic Journal of International Law* 302, 308; Malayna Raftopoulos, 'REDD+ and Human rights: Addressing the Urgent Need for a Full Community-based Human Rights Impact Assessment' (2016) 20 *The International Journal of Human Rights* 509, 520-2.

321 Gauthier de Beco, 'Human Rights Impact Assessments' (2009) 27 *Netherlands Quarterly of Human Rights* 139, 143.

322 Brodeur, Tamir and Zoen (n 319) 50.

323 Harrison, 'Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment' (n 317) 111, 114.

324 World Heritage Convention Operational Guidelines, para 118bis. See also World Heritage Committee, Decision 39 COM 7.11 (2015), which first proposed the use of HIAs and EIAs in the context of development projects being carried out in or around World Heritage Sites.

325 However, see the 2022 Guidance and Toolkit for Impact Assessment in a World Heritage Context (UNESCO, ICCROM, ICOMOS and IUCN 2022). Notably, these guidelines only focus on EIAs and HIA, not HRIAs. See also Patrick R. Patiwaël, Peter Groote and Frank Vanclay, 'Improving Heritage Impact Assessment: an Analytical Critique of the ICOMOS Guidelines' (2019) 25 *International Journal of Heritage Studies* 333; Baharak Ashrafi, Carola Neugebauer and Michael Kloos, 'A Conceptual Framework for Heritage Impact Assessment: A Review and Perspective' (2022) 14 *Sustainability* 27.

impact assessments,³²⁶ without providing any further guidance on the nature of such impact assessments. Moreover, no mention is made in the Directives of the need to carry out impact assessments with regards to the inscription of intangible cultural heritage pursuant to the Convention, even though – as the previous chapter has shown – such impact can be far-reaching for individuals and local communities.

However, even in the event of further incorporation of impact assessment methodologies into international heritage governance, it is important to keep in mind the broader limitations of impact assessments as a methodology which have been described above: as a purely procedural tool, the intended outcomes of impact assessments are often indeterminate, and only a few legal regimes establish obligations for states to conduct EIAs, as opposed to voluntary guidelines. As such, they cannot be considered the sole remedy to the problems which are faced by individuals and local communities within international heritage governance which have been described at the beginning of this chapter, although an increased emphasis on the role of impact assessments – in particular the potential of further developing human rights impact assessments – could ensure that the voices of individuals and local communities likely to be affected by international heritage governance become less invisible within these governance processes.

6.5 CONCLUSION

This chapter has sought to explore whether lessons can be drawn from other areas of international law which have grappled with similar problems to those faced by individuals and communities in the context of cultural heritage law, such as international environmental law and international human rights law, in order to establish greater synergies between cultural heritage law and these fields. The chapter has mapped the contours of a range of legal obligations established in these fields: the principle of public participation, and a corresponding right to public participation; the duty to consult and the allied obligation for states to (seek to) obtain free, prior and informed consent; and the conducting of impact assessments. These developments underline that the participation of affected individuals and communities in decisions which are likely to have an impact upon them or their cultures, homes or ways of life is inescapable within international law.

Some immediate lessons can be drawn from these developments which are of relevance to ongoing discussions on the roles of individuals and communities within international heritage governance. Perhaps the most important of these is the sliding scale approach which has been elaborated upon in numerous contexts in relation to the principle of free, prior and informed

326 Intangible Cultural Heritage Convention Operational Directives, para 172.

consent, in which the obligation for the state to consult with Indigenous peoples hardens into one of actually obtaining their consent in situations with a severe impact upon a given Indigenous people. Such consent will automatically be required in situations where Indigenous peoples are to be relocated from their lands or territories. This also means that there are many situations in which the FPIC standard does not establish an absolute obligation for the state to obtain the consent of Indigenous peoples, as opposed to merely undertaking consultation *with the aim of* obtaining consent. This insight has important consequences for the emerging conceptualisation of FPIC within international heritage governance.

It would also be fruitful for debates on participation within cultural heritage law to distinguish more clearly what is meant when one speaks of such participation: does this entail participation at the local level, at the international level, or both? Does it refer to participation in the creation or implementation of cultural heritage law, or its decision-making processes? And how can we define who needs to be involved within these processes of participation? Drawing upon developments across international law can help international heritage lawyers to answer these questions, and thereby shape emerging legal principles.

As such, while the principle of public participation is firmly embedded within certain areas of international law, the emergence of this principle in relation to participation in international organisations as opposed to participation at the local level remains somewhat hesitant. Striking an appropriate balance between participation at the local and at the international level will be critical in the realm of heritage governance, given that fostering participation at the local level might ultimately be of little use to communities if the bulk of decision-making is taking place within international forums such as the World Heritage Committee. However, regional developments within environmental law hold some promise here, as this chapter has discussed in relation to the Almaty Guidelines established under the Aarhus Convention in Europe and the emerging guidelines of the Escazú Agreement within Latin America.

In any event, the developments surveyed above indicate that if participation does take place, it must take place at a stage when all options are still open, and the members of the public have a genuine chance to (co-)shape the outcome of a given process. In the case of the principle of public participation, practice shows that while the state does not need to follow the outcome of public participation processes – in other words, the public does not hold a ‘veto’ in decision-making – it does need to take due account of the outcome of these processes. The question remains how such obligations could be incorporated into the governance frameworks of international heritage conventions in such a way that they do not simply become another reporting requirement for states, which in many cases already suffer from a lack of resources – whether financial or otherwise – allowing them to meet their reporting obligations. The distinctions made within conventions such as Aarhus and Escazú

in terms of the level of participation required depending on the type of process under examination – such as the distinction between activities, policies, and generally applicable regulations – could be fruitful to explore in the context of cultural heritage law as well.

Surveying the development of the principle of public participation within international environmental law evidences that its conceptualisation in cultural heritage law remains somewhat handicapped. Whereas in environmental law the principle is a tripartite concept – comprised of the right to information, the right to participation, and the right to a judicial remedy – these elements are less clear in relation to cultural heritage law. Thus far, cultural heritage law has neglected that participation can only be successful if individuals and communities have access to the necessary information to form the basis of their participation, and if they also have access to an appropriate judicial remedy, should there be shortcomings in the participation process.

It goes without saying that there are also a number of limitations to relying upon principles of public participation in order to resolve the tensions surrounding community participation in cultural heritage law. All of the standards surveyed in the present chapter are thus procedural and have often been given shape in different ways across different legal regimes. As such, cultural heritage law will need to find its own way to incorporate these obligations within its own instruments, as the path is by no means clearly set out. This also means that this process of incorporation may not necessarily proceed in a uniform manner across all of UNESCO's cultural conventions. Furthermore, as many commentators have noted, implementation has remained wanting for many of these procedural obligations – an issue which should be kept in mind within cultural heritage law as well, although this should not be a reason to not develop such rights at all.

In addition, an overemphasis on principles of public participation runs the risk of putting the onus of improving cultural heritage governance on individuals and communities, rather than on states. In this regard it is important to avoid 'participation fatigue' within communities: it can provoke very real frustration for communities if their participation is solicited and the outcomes of these participatory processes are subsequently not genuinely considered by decision-makers.³²⁷ The very concept of participation has also drawn critique from scholars in neighbouring disciplines, pointing to the 'tyranny of participation',³²⁸ and how participation can reify existing differences within communities and societies,³²⁹ given that the 'barriers to parti-

327 Wesselink and others (n 12) 2689.

328 Bill Cooke and Uma Kothari (eds), *Participation: The New Tyranny?* (Zed Books 2001).

329 Anika Singh Lemar, 'Overparticipation: Designing Effective Land Use Processes' (2021) 90 *Fordham Law Review* 1083.

cipation are unevenly distributed'.³³⁰ Nor is participation a panacea for challenging long-standing held beliefs about the nature of heritage safeguarding, and the role of expert opinion in the construction of heritage value,³³¹ or an immediate solution to the histories of exclusionary heritage conservation strategies which have characterised many cultural heritage sites (let alone broader structural inequalities which certain communities might face).³³² All of these considerations raise the question – which perhaps cannot be resolved within the current legal framework – what approach cultural heritage law should adopt with respect to situations in which local communities explicitly refuse to be co-opted in participatory processes, despite the best efforts of the state to involve them in decision-making.

Ultimately, drawing more closely upon principles of public participation and free, prior and informed consent in the context of international heritage governance does not necessarily entail that the interests of individuals or local communities will automatically prevail over broader public interests or the interests of the international community, as some might fear.³³³ Instead, the core of participation is 'about attending to and staying open to different ways of understanding the world, and different insights into our situation', providing those affected by a decision with 'an opportunity to be heard',³³⁴ and forcing the state to reflect on how it balances competing interests when undertaking heritage protection pursuant to international law.³³⁵ The standards established by human rights law and environmental law simply provide for a framework within which affected publics can be heard and participate, and in which decision-making authorities are required to be transparent in outlining how the outcome of public participation has been taken into account in the making

330 Chiara Armeni and Maria Lee, 'Participation in a Time of Climate Crisis' (2021) 48 *Journal of Law and Society* 549, 557; such barriers include 'time, mobility, literacy and communication skills, as well as often technical or specialist expertise': Lee (n 9) 779.

331 Jodoin draws useful parallels here with the role of participation in environmental law, noting that 'conservationists frequently continue to hold prejudicial views about the knowledge or capabilities of local communities. Moreover, local communities themselves may hold beliefs and adopt defensive strategies that make it more difficult for outsiders to understand their views and concerns and collaborate with them': Sébastien Jodoin, 'Can Rights-Based Approaches Enhance Levels of Legitimacy and Cooperation in Conservation? A Relational Account' (2014) 15 *Human Rights Review* 283, 288.

332 Ibid 297; Armeni and Lee (n 330) 570-1.

333 Indeed, as Donders (n 228) notes, cultural rights are not absolute: 111.

334 Armeni and Lee (n 330) 570-1.

335 For a discussion of similar considerations in the context of the use and exploitation of natural resources, see Nico Schrijver, 'Unravelling State Sovereignty? The Controversy on the Right of Indigenous Peoples to Permanent Sovereignty over their Natural Wealth and Resources' in Ineke Boerefijn and Jenny Goldschmidt (eds), *Changing Perceptions of Sovereignty and Human Rights: Essays in Honour of Cees Flinterman* (Intersentia 2008) 98.

of the decision. Doing so will strengthen, not weaken, the legitimacy of cultural heritage protection under international law.³³⁶

³³⁶ Cf. arguments made in the context of environmental law on the importance of public participation: Gerd Winter, 'Theoretical Foundations of Public Participation in Administrative Decision-Making' in Gyula Bándi (ed), *Environmental Democracy and Law* (Europa Law Publishing 2014).

This dissertation has sought to demonstrate the local impacts of international heritage inscription, exploring how actions taken by state actors in the name of the ‘common interest’ of cultural heritage protection frequently result in the erasure of living heritage value, both in the case of tangible and intangible cultural heritage protected pursuant to public international law. It has argued that the problems faced by individuals and local communities as a result of international heritage inscription – such as displacement or the extension of state control over minority cultural heritage – should not be approached on a case-by-case basis, but should instead be viewed as evidence of a systemic problem within cultural heritage law which can be traced to the field’s utilisation of universalist legal concepts, such as the ‘cultural heritage of humankind’ or the ‘common interest’.

These concepts ultimately obscure the costs which are imposed upon individuals and local communities in order to safeguard cultural heritage, and prevent these actors from engaging in cultural heritage law on their own terms. As the foregoing has demonstrated, cultural heritage law is characterised by opaque decision-making processes and a lack of effective safeguards for the protection of the interests of individuals and local communities against the effects of the invocation of the common interest of cultural heritage protection by states. In this sense, cultural heritage law falls in step with broader trends within international law in which ‘authority is globalised while responsibility is localised’.¹ The result is that it is unclear to those most affected by decisions taken at the international level concerning the safeguarding of cultural heritage how they can influence and challenge these decisions.

This chapter brings together the various strands of the research project: the issues currently facing individuals and local communities in international heritage governance; the possible alternative approaches to the treatment of individuals and communities drawn from other areas of international law; and the potential solutions that could result from viewing international heritage law through the lens of theories on the humanisation of international law and

1 Julia Dehm, *Reconsidering REDD+: Authority, Power and Law in the Green Economy* (Cambridge University Press 2021) 7.

the role of a potential 'particularistic legal universalism' therein. In doing so, the chapter asks whether adopting such a perspective could help to bridge the tensions between local and universal interests in cultural heritage protection. In this sense, it both summarises the preceding chapters and provides an answer to the overarching research question of the dissertation, which asked how the interests of individuals and local communities should be safeguarded within the state-centric universalist legal structures and norms of cultural heritage law.

7.1 TENSIONS BETWEEN THE 'FORM' AND 'FUNCTION' OF UNIVERSALIST INTERNATIONAL LAW

The first three chapters of the dissertation focused on the phenomenon of universality and the role it has played in the development of public international law, and more specifically cultural heritage law. The chief goal was to place cultural heritage law within broader trends which have driven the development of international law – as well as the anxieties of international lawyers about the operation of universality within the workings of contemporary international law.

Chapter 2 examined how international law regulates the protection of common interests through universalist legal concepts, asking to what extent the role granted to the state in the protection of these common interests is being challenged by new doctrinal and legal developments. It defined universality as the process through which international legal instruments designate certain regulatory issues as being subject to the common interests of the international community, thereby (theoretically) transforming them from issues within the sphere of a state's sovereign interests into the subject of inter-state cooperation in the interests of the international community. These treaties do so by calling upon concepts such as the 'common interest', the 'international community', the 'common heritage of mankind', or the 'common concern'.²

International lawyers have traditionally analysed these developments as signifying a broader shift from 'coexistence' to 'cooperation' in public international law – and with it, a reconceptualization of the role of state sovereignty within the international legal order. And indeed, it seems difficult to deny that the growth of common interest norms, such as those found in regimes such as human rights law and the law of the global commons, has resulted in a number of fundamental changes within this order.³

For one, common interest regimes frequently establish obligations of means and conduct rather than result, and contain a relative paucity of absolute obligations; this is in part because the goal of many common interest regimes

2 Section 2.1.

3 Section 2.2.

is to promote and facilitate state compliance rather than punish non-compliance. Furthermore, many common interest norms are inward-looking obligations which are not dependent on a mutual exchange and performance of rights and obligations between states (so called 'non-synallagmatic norms').⁴ In addition to this, the emergence of concepts such as *jus cogens* norms and obligations *erga omnes* have led to a number of critical developments in the laws of state responsibility and treaty interpretation, which similarly recognise the existence of certain common interests of the international community. Finally, at the level of monitoring and enforcement states increasingly invoke the notion of obligations which are owed to the international community as a whole in order to justify their appearance before international courts as non-injured states; conversely, they are required to answer for their actions safeguarding the common interest before a panoply of political and legal monitoring bodies.

In any event, international law certainly appears to have moved beyond bilateralism, in light of the fact that a wide variety of legal regimes seek to achieve certain goals which have been deemed to be of such importance that they should not (or cannot) be tackled in isolation by individual states. Despite these developments, many international legal scholars argue that state sovereignty and state consent remain central cogs in the machinations of public international law. As such, although certain common interests of the international community are now firmly removed from the scope of a state's 'internal affairs' – with the very idea of a *domaine réservé* seeming almost quaint – individual states continue to play an important role in not only the creation, but also the monitoring and enforcement of common interest norms. In this reading, the idea of an 'international community' and its associated interests should be interpreted as a legal fiction at the heart of the contemporary international legal system,⁵ with states being conceptualised as trustees or custodians of the common interest identified in international law.⁶

Simultaneously, these observations have provoked certain anxieties amongst international legal scholars, who have identified a fundamental tension between the goals which international law purportedly sets out to realise and the tools

4 Catherine Brölmann, 'Typologies and the "Essential Juridical Character" of Treaties' in Dino Kritsiotis and Michael J. Bowman (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018) 94. See further Section 2.2.1.

5 Pierre-Marie Dupuy, 'From a Community of States Towards a Universal Community?' in Riccardo Pisillo Mazzeschi and Pasquale De Sena (eds), *Global Justice, Human Rights and the Modernization of International Law* (Springer 2018) 55-6.

6 Christian J Tams, 'Individual States as Guardians of Community Interests' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011) 403; Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 AJIL 295; Wolfgang Benedek and others, 'Conclusions: The Common Interest in International Law - Perspectives for an Undervalued Concept' in Wolfgang Benedek and others (eds), *The Common Interest in International Law* (Intersentia 2014) 224.

with which it is equipped to achieve them. This has been described as a 'tension between [the] form and function' of treaties concluded in the pursuit of common interests, given that the central organising principles of the international legal order nonetheless remain bilateralist in nature.⁷ As such, these consensualist models of public international law struggle to account for the enforcement of the underlying goals of common interest regimes.⁸ Moreover, decision-making processes concerning common interests frequently take place within international organisations which are largely inaccessible to those on whose behalf they purport to speak, and who are often most affected by the decisions they take in the name of the common interest, leading to calls for the diversification of the stakeholders represented within international governance.

More broadly, critical legal scholars have questioned whether the language of common interest and universality in international law is as emancipatory as it seems at first glance – precisely because the reins still remain firmly in the hands of states and the language of common interest is often used as a trump card over other, competing, interests which struggle to formulate themselves in a universalist register. Moreover, common interest regimes often fail to deliver on their promises when viewed from the perspective of concrete communities of individuals, rather than an inchoate international community.⁹ Whilst the emergence of these regimes and the rise of universalist rhetoric in international law thus appears to present a challenge to the central position of state sovereignty in the international legal order, in many situations these regimes in fact solidify the position of the state within that order.

The result of the current condition of the international legal order is thus that states become not only the arbiter of what is considered to be in the 'common interest', but also the actor deciding what methods of protection are most appropriate, and subsequently judge, jury and executioner of whether these methods of protection are indeed being adequately implemented. States are only rarely subjected to independent assessments of their implementation of common interest norms, thereby creating a situation ripe for abuse. The negative consequences of this state of affairs are often shrouded by inter-

7 Catherine Brölmann, 'Law-Making Treaties: Form and Function in International Law' (2005) 74 *Nordic Journal of International Law* 383 386; Catherine Brölmann, 'Typologies and the "Essential Juridical Character" of Treaties' in Dino Kritsiotis and Michael J. Bowman (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018) 386. See also Sarah Thin, 'Community Interest and the International Public Legal Order' (2021) 68 *Netherlands International Law Review* 35, 54-5.

8 Section 2.3.2.

9 Such as in the case of the regime established under the law of the sea for the management of the Area: Isabel Feichtner, 'Mining for Humanity in the Deep Sea and Outer Space: The Role of Small States and International Law in the Extraterritorial Expansion of Extraction' (2019) 32 *LJIL* 255; Surabhi Ranganathan, 'Seasteads, Land-grabs and International law' (2019) 32 *LJIL* 205; Surabhi Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary' (2019) 30 *EJIL* 573.

national law's utilisation of universalist legal concepts, which 'at once obscures and legitimizes the particular interests that drive the operation of international law'.¹⁰ As such, certain legal scholars are inherently suspicious of the universalising aspirations of public international law, and seek to uncover who has the authority to speak on behalf of the universal in public international law (and why), and conversely who is silenced by these claims, thereby questioning the neutrality implied by the act of speaking on behalf of the 'universal'.¹¹

How to protect common interests in an international legal order which remains centred around state sovereignty has also formed the focus of scholars working on the 'humanisation' of international law.¹² Scholars in this tradition seek to answer the question 'how a community interest of all individuals can be articulated through, and against, a structure of international law designed to accommodate the interests of States as such'.¹³ In doing so, they acknowledge that while concepts such as state sovereignty and state consent remain central structuring principles of the contemporary international legal order, the growing centrality of human rights norms across a broad range of international legal regimes, coupled with the emergence of the individual as a central actor, represent an important leitmotif for the future development of the law.¹⁴ As was outlined in the introduction to the dissertation, this should arguably also be the case for cultural heritage law, in light of the position of notions of living heritage value at the heart of the field – with the proviso that such developments should also recognise the position of the individual within the communities of which they form a part.

7.2 CULTURAL HERITAGE LAW AS A UNIVERSALIST LEGAL REGIME

Chapters 3 and 4 subsequently enquired whether cultural heritage law should be seen as a common interest regime similarly to the regimes discussed in Chapter 2, both from the perspective of the justifications put forward from

10 Geoff Gordon, 'Universalism' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law* (Elgar 2019) 865.

11 Martti Koskeniemi, 'Projects of World Community' in Antonio Cassese (ed), *Realizing Utopia* (Oxford University Press 2012) 9-10; Benedek and others 225-6; Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary' 597.

12 See e.g. Bruno Simma, 'From Bilateralism to Community Interest' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217; Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff Publishers 2006); Antonio Cassese, *Realizing Utopia* (Oxford University Press 2012); Antônio Augusto Cançado Trindade, *International Law for Humankind* (2nd rev. edn, Martinus Nijhoff Publishers 2013).

13 Benedict Kingsbury and Megan Donaldson, 'From Bilateralism to Publicness in International Law' in Ulrich Fastenrath (ed), *From Bilateralism to Community Interest* (Oxford University Press 2011) 81.

14 Section 2.3.3.

within the field in order to defend the necessity of the creation of an international legal regime aimed at the protection of cultural heritage, and at the level of the norms established in order to give shape to this protection in practice. *Chapter 3* thus examined how cultural heritage regimes in public international law have invoked ideas of universality and argued in favour of the idea that cultural heritage protection is a common interest. To this end, the chapter examined the *travaux préparatoires* of UNESCO's five core cultural conventions in order to trace the emergence of this argument in its legal form. These debates demonstrate that the notion of a 'cultural heritage of humankind' is not a timeless principle underlining the common interest of the international community in heritage protection, but merely shorthand for the enduring relevance of state sovereignty for the field.

According to orthodox accounts of the history of cultural heritage law, the notion that cultural heritage is a matter of concern to the international community first emerged in the nineteenth century.¹⁵ Simultaneously, the emergence of this idea was accompanied by an extractivist logic,¹⁶ in which the cultural heritage of colonised nations was removed from its place of origin in the name of universal heritage protection to museums or private collections located in colonial centres of power. The connection between cultural heritage preservation as being intrinsically tied to the interests of humanity at large which emerged in the nineteenth century gained further weight within international legal discourse during the time of the League of Nations, but did not find concrete expression in positive law until the adoption of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

The Hague Convention famously invokes the notion of a 'heritage of all mankind', and explicitly sets out to protect cultural property 'of great im-

15 Section 3.1.

16 Defined here as 'a complex of self-reinforcing practices, materialities, and power differentials underwriting and rationalizing socio-ecologically destructive modes of organizing life through subjugation, depletion, and non-reciprocity': Christopher W Chagnon and others, 'From Extractivism to Global Extractivism: the Evolution of an Organizing Concept' (2022) 49 *Journal of Peasant Studies* 760, 763. While the concept has in the past mainly been applied to natural resources, scholars have increasingly drawn parallels between natural and cultural forms of extractivism, including in the colonial era: see e.g. Linda Martín Alcoff, 'Extractivist Epistemologies' (2022) 5 *Tapuya: Latin American Science, Technology and Society* 1, 11-15. See also the phenomenon of 'colonial instructions', which directed ethnographic and natural history collecting practices in the colonies of European nations: Linda Andersson Burnett, 'Collecting Humanity in the Age of Enlightenment: The Hudson's Bay Company and Edinburgh University's Natural History Museum' (2022) 8 *Global Intellectual History* 387; Danielle L Gilbert, 'Possessing Natural Worlds: Life and Death in Biocultural Collections' (2022) 25 *Locus – Tijdschrift voor Cultuurwetenschappen*; Yann LeGall and Gwinyai Machona, 'Possessions, Spoils of War, Belongings: What Museum Archives Tell us About the (Il)legality of the Plunder of African Property' (*Verfassungsblog*, 2 December 2022) <<https://verfassungsblog.de/possessions-spoils-of-war-belongings/>>.

portance to the cultural heritage of every people'.¹⁷ The idea that damage to certain forms of outstanding cultural property caused harm to the international community thus formed the impetus for the adoption of an international convention on this issue. Nonetheless, the *travaux* and subsequent implementation of the Hague Convention also demonstrate that despite its invocation of universalist language, the commitments of the Hague Convention remain overwhelmingly national, with the precise scope of the cultural property protected pursuant to the convention remaining largely within the scope of individual state discretion – rather than necessarily being an expression of the views of the international community.

While the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property adopts a radically different approach to the rationalisation of international protection, it also grants states a great deal of freedom to determine what constitutes 'their' heritage for the purposes of the convention in recognition of the principle of sovereign equality.¹⁸ However, unlike many of UNESCO's other cultural conventions, the 1970 Convention does not rely upon an invocation of the position of looted cultural property within a broader heritage of humankind. Instead, the ability for the state to define what forms part of its 'national culture' – and to subsequently retain or demand the return of that cultural property – becomes an expression of the state's sovereignty. The 1970 Convention is thus an outlier within cultural heritage law, at least at the level of the rhetoric it employs to justify international protection.

By contrast, the 1972 World Heritage Convention reverses this trend, returning to the universalist language which characterised the earlier Hague Convention, seeking to protect cultural heritage of 'outstanding universal value'.¹⁹ However, a closer examination of the drafting history of the World Heritage Convention and its subsequent implementation once again reveals that the emergence of the privileged category of cultural heritage of outstanding universal value within the World Heritage Convention was not intended to indicate its removal beyond the realm of individual state sovereignty. Instead, it becomes a shorthand for the view that the state is to be seen as a trustee of the common interest of the international community – indicating the need for the state to enter into international cooperation for the purpose of safeguarding this common interest, but nonetheless retaining ultimate decision-making power.

The 2001 Underwater Cultural Heritage Convention articulates a similar universalist position to that of the Hague Convention and World Heritage Convention, positing this underwater cultural heritage within the 'heritage of humanity' and stating that its preservation is similarly 'for the benefit of

17 Section 3.2.

18 Section 3.3.

19 Section 3.4.

humanity'.²⁰ Like these conventions, it also departs from the perspective that individual states should act as custodians of the common interest of the international community, by managing and preserving the underwater cultural heritage located within their jurisdiction, and more broadly by engaging in international cooperation with other states. Perhaps most tellingly, it does not establish any international body tasked with the protection of underwater cultural heritage absent any state interest in engaging in such protection; quite to the contrary, it also recognises that certain states will have *particular* interests in protecting certain forms of underwater heritage, for example on the basis of their historical ties.

By contrast, the 2003 Intangible Cultural Heritage Convention is perhaps the most clearly non-universalist of UNESCO's cultural conventions.²¹ It thus explicitly emphasises the importance of protecting intangible cultural heritage from the perspective of its source communities, rather than that of the international community. The Convention nonetheless also acknowledges that the act of safeguarding cultural heritage is of interest to humanity as a whole, thereby still departing from a perspective in which the act of protecting cultural heritage is perceived as a common interest. The role of universality similarly played an important role during the drafting of the convention, with numerous states expressing the need to add some kind external yardstick of cultural heritage value – in order to motivate states to participate in the legal regime and thereby provide funding and support to states requesting it. The subsequent practice of the States Parties to the Convention underlines their continuing ambivalence towards the possibility of a truly non-universalist intangible heritage convention.

Thus, even though contemporary cultural heritage law acknowledges that it is not cultural heritage which is itself universal in nature – in light of the relativisation of the notion of cultural heritage value – but rather that the interest in its protection is universally shared amongst the members of the international community, the language of universality remains remarkably tenacious within heritage law. This becomes particularly evident when one looks beyond the realm of UNESCO to fields such as international criminal law and human rights law; when discussing issues related to the protection of cultural heritage, both areas of law quickly veer back into the comforting language of the 'cultural heritage of humanity' developed and heavily publicised under the aegis of UNESCO. Doing so has concrete consequences for the conceptualisation of cultural heritage protection within these fields; in the case of international criminal law it has the potential to marginalise local communities within the broader narratives of international criminal trials concerning cultural heritage destruction, whereas in human rights law notions

20 Section 3.5.

21 Section 3.6.

of universal heritage value and the public interest are deployed in order to support limitations by the state of other rights, such as the right to property.²²

While notions of common interest are a leitmotif of contemporary cultural heritage law, the debates during the drafting of each of UNESCO's cultural conventions unsettle the delicate balancing act between state sovereignty and the common interest in relation to the act of safeguarding cultural heritage. Many of these debates touch upon the question of who should hold the ultimate power to define what constitutes the heritage to be protected by virtue of international law, what shape this protection should take, and the degree to which other actors (whether on the international stage or elsewhere) should influence these issues. An examination of the positive law established by the conventions clearly indicates that while they repeatedly draw upon universalist language, this power remains firmly in the hands of their respective States Parties. Even though these states can be seen as trustees of the common interest of cultural heritage protection – with the matter of cultural heritage protection being firmly removed from the sole purview of state sovereignty – the law by and large does not seek to establish any limitations on how they choose to exercise this custodianship beyond the bare minimum of engaging in international cooperation.

7.3 UNIVERSALIST CULTURAL HERITAGE LAW AND ITS LIMITATIONS

In light of these conclusions, *Chapter 4* delved deeper into the question whether the protection, monitoring and implementation mechanisms employed within cultural heritage law suffer from the same tension between 'form and function' which can be identified with respect to other common interest regimes in public international law. It did so by first examining the nature of the norms established by the conventions for the protection of cultural heritage.²³ Like many other common interest regimes, cultural heritage treaties rely centrally upon non-reciprocal obligations with an inward-facing character with respect to cultural heritage located within the territory of each State Party, and seek to establish a framework of common cooperation amongst states.²⁴ With the exception of the 1954 and 1970 Conventions, this framework of common cooperation is centred around the establishment of lists of protected heritage and a corresponding system of financial and technical support for listed heritage.²⁵

22 Section 3.7.2 and 3.7.3.

23 Section 4.1.

24 With two notable exceptions: the 1954 and 1970 Conventions.

25 Although over time the 1954 Hague Convention has evolved to incorporate a moderate form of listing processes in the form of its special protection and enhanced protection regimes.

Given that many of the obligations established by UNESCO's cultural conventions mandate performance in the name of the international community, rather than on the basis of a web of bilateral relationships amongst individual States Parties, a number of these obligations could potentially be characterised as obligations *erga omnes partes*. This constitutes an additional indicator of the nature of cultural heritage law as a common interest regime.²⁶ Examples in point are the obligations established by cultural heritage relating to the prohibition of the destruction of cultural heritage during armed conflict, corresponding peacetime obligations to safeguard both tangible and intangible cultural heritage, and the duty to preserve underwater cultural heritage (particularly when located in the Area). However, even if these norms can be identified as *erga omnes partes*, it is questionable whether this provides any additional utility in order to circumvent the state-centric nature of cultural heritage law so as to protect the common interest of safeguarding cultural heritage and thereby overcome the tension between 'form and function' which the field faces.

Furthermore, many of the obligations established by the more recent cultural conventions – such as those of 1972, 2001 and 2003 – are largely obligations of means and conduct rather than of result. As such, these conventions can arguably be seen as prototypical framework conventions similar to those found in fields such as international environmental law, in which the main normative weight of the international legal regime is not merely located in the obligations contained in the conventions themselves but rather in the ongoing development of the law by their governing bodies. The chief motivating aim behind these conventions is thus to become a clearing house for the exchange of information amongst stakeholders, by providing scientific and technical advice, and where necessary also financial support.

The field thus shows many affinities with other common interest regimes in public international law when viewed from the perspective of the types of norms it employs to achieve its goals. Simultaneously, it also faces the same tensions that other common interest regimes face in achieving their goals and ensuring effective implementation and compliance. The cultural conventions thus rest heavily upon the idea that states are entrusted with the protection of cultural heritage within their territory, taking on the mantle of the international community. In doing so, the conventions do not seek to establish explicit limitations on state sovereignty or punish states for non-compliance.

Accordingly, this means that the conventions depart from the view that the territorial state will carry out its duty of protection in good faith and in a manner that is in line with the overall object and purpose of the conventions, and that the primary role of other states is to assist the territorial state in fulfilling this duty. And indeed, a first reading of the conventions' monitoring

26 Section 4.1.6.

and implementation mechanisms suggests that they are largely toothless, as has been frequently lamented by commentators. To this end, the chapter proceeded by examining the evolution of these mechanisms beyond the scope of the direct treaty text on the basis of the continuous revision of their respective operational guidelines and the practice of the governing bodies of the conventions.

In this regard, the conventions have undergone a remarkable degree of institutionalisation, first and foremost as the result of the regularisation of the meetings of the plenary bodies of the conventions and in certain cases the establishment of new subsidiary bodies responsible for monitoring the implementation of the convention on a more regular basis than the convention's plenary body.²⁷ In addition, the States Parties to the conventions have increasingly created operational guidelines which provide additional interpretative guidance with respect to the obligations established by the conventions, and in some cases even developing new obligations which are entirely absent from the original treaty text.²⁸

On the one hand, these developments can be seen as demonstrating a baseline commitment by states to the status of cultural heritage protection as a common interest, by virtue of the fact that the subsequent development of the conventions is no longer wholly reliant upon individual state consent but is instead increasingly outsourced to a body of their peers,²⁹ who have engaged in a process of progressive development by virtue of the conventions' operational guidelines. However, there is an important caveat to those who would construe these developments as necessarily minimising the role of state sovereignty within cultural heritage law: while they indeed represent a slight devolution of the power of the state over cultural heritage located within its territory and a minimising of the role of absolute state consent within cultural heritage regimes, this is a devolution to *other states*.³⁰

Furthermore, while cultural heritage law has indeed witnessed a rather remarkable institutional expansion over the course of the past two decades, contemporary cultural heritage conventions also more clearly delineate the responsibilities of their subsidiary bodies vis-à-vis plenary decision-making organs. In this respect, there is a growing trend towards establishing plenary bodies as the 'sovereign' bodies of the convention to which all other organs

27 Section 4.2.1.

28 Section 4.2.2.

29 For this reason, the World Heritage Committee has been described as an 'autonomy gaining institution': Diana Zacharias, 'The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010).

30 Of course, this does not mean that these developments could not be turned on their head: as argued within the introduction, these developments can also be drawn upon by legal scholars in order to facilitate an evolutionary interpretation of the cultural conventions.

must ultimately answer, as in the case of the Underwater and Intangible Cultural Heritage Convention. These developments indicate that while states are content to establish more regular monitoring of the implementation of the conventions, they are loath to wholly relinquish their sovereignty to consensus-based decision-making by their fellow states – let alone an independent expert body. As the reach of international heritage governance has expanded, the freedom of subsidiary bodies has accordingly decreased.

Similar tensions are at play with respect to the conventions' monitoring procedures. While the conventions have historically relied heavily upon periodic self-reporting by states in order to monitor the implementation of the conventions, these periodic reporting processes have struggled with low submission rates of States Parties' reports and have thus been seen as insufficient to monitor compliance.³¹ As a result, a number of the conventions have also developed a range of alternative monitoring and non-compliance mechanisms, in many cases wholly on the basis of the development of their operational guidelines rather than on the basis of their respective treaty texts: reactive monitoring (World Heritage Convention), ad hoc monitoring (1999 Second Protocol), and the enhanced follow-up procedure (2003 Convention).³² In the case of the 1999 Second Protocol and the 2003 Convention, these are recent developments which have been explicitly modelled on the purported successes of the World Heritage Convention's reactive monitoring procedure.

These conventions have developed procedures through which States Parties can request the sending of an expert advisory mission in order to provide the requesting state with technical advice on the safeguarding of cultural heritage. In addition, each of these conventions have developed monitoring procedures which can be triggered in the absence of strict state consent, and which are usually paired with the sending of expert missions to the state in order to gather information on the state's compliance with the convention. Furthermore, each of these three conventions have developed non-compliance mechanisms which focus on placing heritage listed pursuant to the convention on a list of endangered heritage, or deleting the heritage from the international list entirely.

What is most critical about these procedures is that they remove one of the most significant handicaps of the bodies established by the conventions with regard to monitoring: the fact that, historically, they were almost wholly reliant (formally speaking) on information provided by the territorial State Party with respect to issues of implementation and compliance. By comparison, these new procedures open up the possibility for third parties to provide information which can form the basis of decisions to initiate further State Party monitoring – or, in the case of the 2003 Convention, the ability for these third parties to even trigger monitoring procedures of their own accord. However,

31 Section 4.2.3.

32 Section 4.2.4 and 4.2.5.

it is important to emphasise that the majority of these procedures remain reliant upon consultation with the State Party concerned and are thus unlikely to be used against a state's will. Similarly, in the case of information received from third parties, this has also been limited to very specific circumstances, and the information is usually not subsequently made accessible to the public at large, thereby hampering transparency.

However, while innovations such as reactive monitoring, ad hoc monitoring and the enhanced follow-up procedure have attenuated the central role played by state consent in cultural heritage law, they still struggle to overcome the inherent tension between state sovereignty and compliance which other common interest regimes also face. States thus effectively remain in the driving seat within these monitoring mechanisms; the outcomes of monitoring are moreover often inconsistent, with States Parties failing to follow up on the recommendations of intergovernmental bodies and often not facing any sanctions for doing so. This leads to a highly uncertain regulatory environment for all stakeholders involved in the conventions. As such, even though contemporary cultural heritage law is better placed to 'collect more and better information about the nature and frequency of threats'³³ to cultural heritage, this information is ultimately of little use given that the monitoring and non-compliance procedures it is meant to support are inconsistent and unpredictable.

As such, the argument can certainly be made that cultural heritage law suffers from the same tensions between 'form and function' which are more broadly faced by common interest regimes in public international law. Finally, the chapter turned to the issue of individual and community participation in international heritage governance, and whether developments with respect to the fostering of such participation have helped to remedy some of the worst excesses of the state-centric nature of cultural heritage law.³⁴ In doing so, it argued that while UNESCO's cultural conventions have placed an ever-greater emphasis on the importance of living heritage value and its direct association with the individuals and communities which contribute to its continuous (re)construction, this is not necessarily reflected in the working methods of the conventions.

Thus, on the one hand, some of the strongest guarantees for community participation within cultural heritage law are those provided with respect to participation in the process leading up to international inscription and domestic safeguarding practices. The World Heritage Convention thus encourages states to prepare nominations with the 'widest possible participation' of stakeholders

33 Evan Hamman and Herdis Hølleland (eds), *Implementing the World Heritage Convention: Dimensions of Compliance* (Elgar 2023) 30.

34 Section 4.3.

and to adopt a human rights-based approach;³⁵ if a site concerns the lands, territories, or resources of Indigenous peoples, states 'shall demonstrate, as appropriate, that the free, prior and informed consent of indigenous peoples has been obtained'.³⁶ Similarly, the Intangible Cultural Heritage Convention provides that nominations must be preceded by the 'widest possible participation' of communities and individuals, and with their free, prior and informed consent; this consent is also required for the transfer of elements from one list to another and in the process to remove elements from one of the lists.³⁷ The latter also notably provides for the direct influence of communities, groups and individuals over the processes for the transfer or removal of elements from the lists established by the Intangible Cultural Heritage Convention (although the prerogative for proposing sites to the lists remains with the States Parties).

However, a closer analysis of these guarantees reveals that they do little to increase meaningful participation of communities, groups and individuals. Thus in the case of the World Heritage Convention these guarantees are largely hortatory; even for those guarantees which are phrased in obligatory terms – such as those concerning the FPIC of Indigenous peoples – the practice of the World Heritage Committee in enforcing these requirements has been lacklustre at best. Issues relating to the FPIC of Indigenous peoples have certainly not been considered in relation to all potential sites, and counterindications that FPIC has *not* been granted are sometimes ignored even in high-profile inscriptions, such as those of Kaeng Krachan. As such, inscriptions on the World Heritage List can still succeed even in the absence of proof of community participation.

Similarly, in the case of the Intangible Cultural Heritage Convention, the Convention provides very little guidance to States Parties on when the guarantees it establishes with respect to community participation and free, prior and informed consent will actually be considered as being met. Moreover, the practice of the States Parties thus far indicates that there are many inscriptions which can be considered problematic from the perspective the Convention's requirements with regards to community participation and consent. Notwithstanding this state of affairs, the convention's monitoring bodies by and large take States Parties at their word when they assert that community participation has taken place.

Moreover, comparably little guidance is provided within the conventions with respect to community participation throughout the life of an inscription on an international heritage list, even though such participation remains critical. In the case of the World Heritage Convention, for example, a lack of

35 World Heritage Convention Operational Guidelines, para 123; in relation to the human rights-based approach, see para 12.

36 Ibid para 123.

37 Intangible Cultural Heritage Convention Operational Directives, paras 1.1.U.4, 2.R.4, 17.2, 38.1.

participation of local communities in the management of the site does not seem to be sufficient to trigger the convention's reactive monitoring procedures, in light of the fact that these procedures focus on threats to the outstanding universal value of a site; meaningful community participation is not considered to be an element of OUV.

As such, there are no clear pathways through which affected individuals and communities can contest assertions made by the state with regards to their purported participation in listing and subsequent safeguarding. This is in part due to the fact that there are very limited opportunities for these groups to participate directly in international decision-making procedures. While non-state actors thus have the ability to participate in international meetings as observers, their influence remains limited; observer status is moreover weighted heavily towards encouraging participation by 'expert' actors rather than entities representing affected individuals or communities. The main way that individuals and communities can influence international decision-making processes is thus by submitting information to the relevant international bodies of the conventions – a largely passive function, in which the State Party in question continues to play an important role in filtering the information which is received and how it is brought to the attention of the broader public.

The broader reticence of states towards fostering truly meaningful participation of individuals and local communities within international heritage governance becomes even more apparent when one examines the status of human rights standards within the decisions of the intergovernmental heritage bodies. Whereas the operational guidelines of the World Heritage Convention call upon States Parties to adopt a human rights-based approach, and the World Heritage Committee occasionally calls upon States Parties to ensure that the relocation of individuals from World Heritage sites is in accordance with the 'relevant international standards', neither the Operational Guidelines nor the Committee's decisions provide much guidance to States Parties as to what these standards entail. Such calls are furthermore invoked inconsistently; when the Committee does draw attention to human rights, it receives strong pushback from the States Parties. The Intangible Cultural Heritage Convention, for its part, almost wholly eschews references to human rights, beyond using them as a criterion to exclude certain forms of cultural heritage from the scope of the convention due to an incompatibility with internationally accepted human rights standards – thereby ignoring the role that human rights norms play with respect to standards of public participation.

By and large, states thus remain exceedingly reluctant to relinquish control of the means and modalities of the implementation of cultural heritage treaties to actors such as local communities. This state of affairs is increasingly at odds with developments beyond UNESCO which have emphasised the importance of community participation in heritage governance, such as the 2011 recommendation by the Special Rapporteur in the Field of Cultural Rights that '[c]oncerned communities and relevant individuals should be consulted and

invited to actively participate in the whole process of identification, selection, classification, interpretation, preservation/safeguarding, stewardship and development of cultural heritage'.³⁸ This should arguably also include participation within international decision-making processes, as these have an important effect on decisions made at the local and domestic levels.

As such, even though cultural heritage law has witnessed the emergence of requirements with respect to individual and community participation in international heritage governance over the course of recent years, these developments have done little to remedy the state-centric nature of the field. This is because the modalities of community participation remain strictly limited and do not provide for participation where it counts most: at the international level, within bodies such as the World Heritage Committee and the Intergovernmental Committee. Nor do these guidelines provide sufficient guidance to states as to what is required from them in order to ensure meaningful community participation, particularly in the case of issues which would inherently require a legal assessment, such as in the case of the principle of free, prior and informed consent. Perhaps most problematically, intergovernmental bodies are not equipped with sufficient tools in order to judge whether community participation has truly taken place in the manner asserted by States Parties.

7.4 THE IMPACT OF CULTURAL HERITAGE LAW UPON INDIVIDUALS AND LOCAL COMMUNITIES

In *Chapter 5*, the dissertation subsequently examined the concrete effects of the state-centric nature of UNESCO's cultural conventions by turning towards the impact of the implementation of these conventions on individuals and local communities, with a specific focus on the impact of the 1972 World Heritage Convention and the 2003 Intangible Cultural Heritage Convention. Both of these conventions seek to establish long-term heritage management regimes in which there is a close relationship between local, national and international levels of governance. In doing so, the chapter sought to bring together scholarship in fields such as archaeology and anthropology, which have captured the intricacies of implementing UNESCO's cultural conventions on the ground, and the international legal literature on cultural heritage law.

An analysis of the practice of the World Heritage and Intangible Cultural Heritage Conventions revealed that while international heritage listing can lead to positive effects for individuals and local communities, as well as to the increased protection of inscribed heritage, it also invariably grants the state additional discretionary powers without satisfactory oversight of the exercise

38 Human Rights Council, Report of the Independent Expert in the Field of Cultural Rights (21 March 2011) UN Doc A/HRC/17/38, para 80(c).

of this power by international decision-making bodies. In this sense, the invocation of the purported universal or common interest of cultural heritage protection leads to the marginalisation of the voices of individuals and local communities who are most directly affected by international heritage inscription processes – yet these impacts rarely feature in the decisions of the World Heritage Committee and the Intangible Cultural Heritage Convention's Intergovernmental Committee.

The negative effects of international heritage listing on individuals and local communities can be roughly divided into two categories: those that are a direct consequence of requests formulated by intergovernmental bodies within UNESCO's cultural conventions; and those that are the result of a lack of engagement by these bodies with the ways that states take up their mantle as the custodians of the common interest of cultural heritage protection in ways that ultimately run counter to the object and purpose of cultural heritage law – yet remain beyond the view of intergovernmental bodies due to the state-centric structures of the conventions.

A prime example of the first category concerns the recommendations made by the World Heritage Committee with respect to purported 'encroachments' by local communities upon World Heritage sites. The Committee has thus frequently requested States Parties to address 'illegally constructed dwellings' or 'illegal encroachments' – often the homes of local community members – within the boundaries of World Heritage sites without adequately considering the impact of the recommended measures upon these communities. The end result is often the eviction or forced displacement of residents, with the Committee frequently appearing to take at face value the assertion that such settlements are indeed illegal.

While the Committee has increasingly also recommended States Parties to enter into consultations with residents who are to be displaced, it provides very little guidance to states as to what such consultations should look like in practice, and it does not consistently follow up on its recommendations to carry out consultations. Nor does it provide any indication for the legal basis on which it considers settlements within World Heritage sites as a form of illegal encroachment, making it difficult for local actors to contest such assertions of illegality. As such there is an urgent need for the adoption of guidelines which can ensure that the Committee's approach towards the eviction and forced displacement of residents from World Heritage sites is in line with international human rights standards.³⁹

39 Stefan Disko and Dalee Sambo Dorough, "'We Are Not in Geneva on the Human Rights Council': Indigenous Peoples' Experiences with the World Heritage Convention' (2022) 29 *International Journal of Cultural Property* 487–521. See e.g. UN Commission on Human Rights, Resolution 1993/77 (10 March 1993) UN Doc E/CN.4/RES/1993/77; UN Committee on Economic, Social and Cultural Rights, General Comment No. 7 (20 May 1997) UN Doc E/1998/22; Office of the High Commissioner for Human Rights, *Forced Evictions: Fact Sheet No. 25/Rev. 1* (United Nations 2014). For a consideration of the human rights framework

Ultimately, the Committee is more likely to commend States Parties for taking action to prevent the deterioration of a site's outstanding universal value than taking action to safeguard the interests of the individuals and local communities located within these sites. Moreover, in any event the desired end result of such consultations – the removal of residents – has effectively already been fixed by the Committee, drawing into question whether such consultations can be truly genuine.

A similar dynamic is at play in the World Heritage Committee's treatment of ritual, religious or subsistence uses of heritage sites by local communities, which are also often treated as a form of 'encroachment' rather than as contributing to the living heritage value of a site. In recommending States Parties to respond to such encroachments in order to safeguard the outstanding universal value of a given World Heritage Site, the impact of these recommendations on the economic livelihoods and continuity of cultural practices often remains beyond the scope of the Committee's decision.

In these situations, the Committee has once again also increasingly requested States Parties to engage in consultations when dealing with the issue of community practices considered as encroaching upon heritage sites, but here the outcome of these consultations also often already appears fixed. In any event, the outcome of these consultations is not subject to follow-up by the Committee and thus appears normatively negligible. All in all, the Committee's approach to such encroachments is often inconsistent not only between different World Heritage sites, but also with respect to the same site over time, leading to uncertainties for both States Parties and local communities as to what they can reasonably expect from international decision-making processes under the aegis of the World Heritage Convention.

The World Heritage Committee thus often appears to depart from a perspective in which individuals and local communities form a threat to the safeguarding of a heritage site – requiring their adaptation or removal – rather than the recognition that they are actually an integral element of the heritage value of the site. The result is that the Committee's requests to States Parties to undertake consultations with affected communities are effectively an empty shell: their outcome is fixed by the terms set by the Committee. As such, the Convention's participation and consultation procedures continue to cast individuals and local communities as passive subjects of World Heritage governance rather than participants in their own right; they are not granted the agency to define the 'problem' of heritage safeguarding on their own terms.

The listing practices of the Intangible Cultural Heritage Convention provide an illustration of the other dynamic which is frequently at play with regards to the impacts of international listing on individuals and local communities:

in relation to development-induced displacement, see Roman Girma Teshome, 'The Human Cost of Development: Situating Development-induced Displacement in International Human Rights Law' (PhD thesis, University of Amsterdam 2023).

the absence of effective oversight by international monitoring bodies of the Convention's implementation by States Parties. Listing becomes a way for certain states to exercise symbolic (and sometimes very real) power over members of minority groups, by circumscribing cultural practices in ways that align with broader goals of nation-building and often run counter to the communities' own conceptualisations of themselves and their heritage. Certain communities who are already marginalised at the domestic level are thus also often likely to be insufficiently involved in the preparation of inscriptions of subsequent safeguarding measures by the state.

The main challenge faced by the Intangible Cultural Heritage Convention is thus how the governing bodies of the Convention can assess to what extent assertions by the state of community, group and individual participation in safeguarding and inscription processes are genuine. This is complicated by the fact that the Convention's Intergovernmental Committee maintains a largely deferential position towards States Parties; the fact that repressive state policies are not identified anywhere within the Convention's governance framework as a threat to the safeguarding of intangible cultural heritage is particularly telling. While this means that the negative consequences of inscription do not result directly from decisions of the Intergovernmental Committee in the same way as in the case for the World Heritage Committee, it does leave States Parties with a great deal of discretion in implementing the convention in whatever way they deem fit – including implementation which might run contrary to the convention's object and purpose. This not only results in unsatisfactory safeguarding of intangible cultural heritage, but is also particularly problematic from the perspective of the guarantees the convention seeks to provide with respect to community participation and the principle of free, prior and informed consent.

Above all, international heritage governance operates on the assumption that states will carry out safeguarding activities pursuant to the cultural conventions in good faith. Furthermore, because individuals and local communities are marginalised within international bodies such as the World Heritage Committee and the Intergovernmental Committee, issues arising from the implementation at the local level are effectively made invisible within the conventions' monitoring systems. The net result is that cultural heritage law invariably empowers the state, by extending the nature and extent of its reach over cultural heritage law, and by entrusting the state – above all other actors – with the power to safeguard that heritage on behalf of the world at large.

By comparison, the implementation of cultural heritage treaties often presupposes that the interests of individuals and local communities with regards to cultural heritage will be subsumed in universal interests; conversely, if their interests run counter to these universal interests, then they will be conceived of as automatically in opposition, or lower in the hierarchy than such interests. Moreover, opportunities for members of the local community to speak on behalf of their interest in the heritage – as opposed to the universal

interest of the international community – are few and far between; in the rare circumstances in which local communities are granted the ability to participate, they are expected to speak with one voice.

Simultaneously, the practice of both the World Heritage and Intangible Cultural Heritage conventions also demonstrates that processes of heritagisation contain an inherent emancipatory potential for marginalised groups, whether on the domestic or international stage. This insight aligns with the view put forward within critical heritage studies that heritagisation processes are always political, as well as with the discussions raised within the introduction of the present work about the potential of a counterhegemonic universalist international law. As such, the past two decades have also witnessed the emergence of numerous situations in which Indigenous peoples or minorities have used international heritage status as a bargaining chip with local or national authorities in order to ensure the protection of their customary practices.

More broadly, international listing demonstrates the potential to revitalise cultural practices, bring economic benefits to communities, and strengthen both individual and communal feelings of self-worth and identity. It frequently frees up crucial resources, both financial and technical, for cultural heritage which might have otherwise languished despite still being valued by its communities of origin and others across the globe. As a result, heritagisation is far from a wholly negative process: local communities often appreciate the results of heritage listing, even if it results in changes to their cultural heritage. The main takeaway is that this is not possible without providing guarantees that those affected by international heritage listing are able to have a genuine say in the inscription and subsequent management of this heritage, both at local and at international levels.

In any event, more research is needed on the impact of international heritage law on individuals and local communities in the context of UNESCO's cultural conventions. Whereas the preceding section has focused on the impact of the World Heritage Convention and the Intangible Cultural Heritage Convention, the impact of international heritage protection on these groups in the context of the restitution debate, the protection of cultural property during armed conflict, and the safeguarding of underwater cultural heritage has remained largely unexplored, despite comparable risks of marginalisation. In order to fully capture the intricacies involved with the implementation of cultural heritage law 'on the ground', this future research agenda will require further and deeper interdisciplinary collaboration between legal scholars and researchers in fields such as archaeology, anthropology, and heritage studies.

7.5 FOSTERING THE PARTICIPATION OF AFFECTED INDIVIDUALS AND COMMUNITIES

Finally, *Chapter 6* asked to what extent developments in other areas of international law can shape efforts to foreground the interests of individuals and local communities in cultural heritage law. In the fields of environmental law and human rights law, a range of legal techniques have been proposed as potential mitigating factors in response to similar dynamics of dispossession which have emerged from crises of legitimacy in the context of climate change mitigation and international development projects, where the creation of protected areas regimes has led to the displacement of communities. Three of these are of particular interest: the principle of public participation (containing the tripartite rights of access to information; to public participation in decision-making; and to justice); the duty to consult and the right to free, prior and informed consent (FPIC); and the duty to conduct impact assessments.

There are two main compelling reasons for examining these techniques more closely: firstly, the fact that many of the participating states in cultural heritage regimes are also bound by these norms by virtue of their participation in parallel environmental or human rights regimes; thereby raising the question of their applicability in the cultural heritage context. At a more practical level, cultural heritage law has also increasingly made reference to each of these concepts; as such, their elaboration in neighbouring legal regimes, even if not legally binding within the context of cultural heritage law, could nonetheless help to further flesh out these concepts within the context of international heritage governance.

Broadly speaking, international law has recognised the importance of involving affected groups in decision-making processes with a potential impact upon them.⁴⁰ From the 1990s onwards, public participation has thus emerged as a structuring principle of international environmental law, precipitated by its codification in the 1992 Rio Declaration on Environment and Development and subsequent inclusion in numerous multilateral environmental agreements. The principle of public participation has subsequently also been codified as a tripartite right in instruments such as the Aarhus Convention and Escazú Agreement, which guarantee the right to information, the right to participation, and the right to a judicial remedy in environmental matters. Compliance with the procedural environmental rights of Aarhus and Escazú is ensured by their respective compliance committees, which notably also have the ability to consider individual communications.

The manner in which these conventions have sought to codify the right to public participation provides a useful framework within which to structure public participation in cultural heritage law.⁴¹ First of all, the conventions

⁴⁰ Section 6.2.1.

⁴¹ Section 6.2.2.

recognise that the requisite standards of public participation should differ according to the level at which decision-making takes place: they thus distinguish between participation in specific activities (for which it is accordingly easier – relatively speaking – to identify affected individuals and groups); broader plans, programmes and policies; and generally applicable regulations and normative instruments.⁴² Participatory requirements for activities are more stringent than those required in the case of broadly applicable normative instruments. In relation to the first category – specific activities – participation needs to take place at an early stage when all options are still open, so that the contributions of the affected public can be genuinely considered in the decision-making process. All in all, the state needs to take due account of the outcome of the public participation: participation should not be merely performative.

Finally, of particular interest is the fact that both Aarhus and Escazú emphasise the importance of guaranteeing public participation in international forums for those directly affected by decision-making processes taking place at this level. While obviously modified in their operation, the core principles the conventions formulate for domestic public participation continue to hold true within international organisations: affected publics should be granted access to information and subsequently also the ability to participate at a point in the international decision-making process at a moment when all options are still open, and decision-makers should accordingly take due account of the outcome of participatory processes and provide a reasoned decision in which they take account for this process. However, both Aarhus and Escazú remain notably silent about the scope of a potential right of access to justice in the context of international decision-making processes.

The guidelines formulated in the context of both conventions provide concrete steps which can be taken to facilitate public participation in inter-governmental bodies such as the World Heritage Committee, such as ensuring the availability of documents to the public (and, by extension, ensuring that the documents submitted by the public to international decision-makers are also made available to the public at large); the granting of observer status to affected individuals and groups, not just to expert-driven civil society organisations; allowing members of affected publics to circulate statements and speak at international meetings; and potentially even facilitating their ability to formulate text proposals which can be debated and subsequently adopted by the States Parties to the convention in question.

It is nonetheless important to underline that the development of participatory rights in Aarhus and Escazú does not represent a panacea for the

42 Although the categorisation within the Escazú Agreement differs slightly: the Agreement distinguishes between projects, activities, and processes granting environmental permits, on the one hand, and policies, plans, programmes, rules and regulations, on the other hand.

issues facing cultural heritage law.⁴³ For one, both conventions were explicitly developed within a regional setting; the codification of global principles on public participation in (environmental) decision-making remains a sensitive topic for many states, even more so when it comes to the matter of public participation in international forums. As such, the framework developed under these conventions can only function as a possible path forward for the development of similar principles under the aegis of UNESCO's cultural conventions.

Notwithstanding this state of affairs, a global right to public participation has also been gradually emerged in the course of a number of parallel developments within international human rights law.⁴⁴ These developments have recognised not only the existence of a right to public participation in environmental decision-making (including within international decision-making processes such as those of climate finance mechanisms), but have also more broadly underscored the participatory rights of marginalised groups and individuals in decisions which affect them. The potential existence of such rights has been particularly acknowledged in the context of evictions and in relation to decisions which have a potential impact on land use or the enjoyment of the right to take part in cultural life. These developments carry obvious relevance for the problems described above with respect to the impact of international heritage governance on individuals and local communities, which have resulted in forced displacement and the limiting of communities' access to lands which are tied to the exercise of their cultural rights.

While the precise scope of these broader participatory rights remains somewhat unsettled within human rights law – and human rights bodies have generally held that states retain a large deal of discretion in designing the participatory processes required to give effect to them – the broad contours of the right to public participation align with those established under environmental law. This lends further weight to the argument that cultural heritage law should take these standards into account, if not as a matter of human rights law which is automatically binding upon the States Parties of the cultural conventions, then at minimum as a highly compelling example of good practices to be followed. Much akin to how participation has been construed within environmental law and human rights law as a fundamental guarantee of the right to a healthy environment, the argument could be made that participation is one limb of the right to take part in cultural life and should thus be central to the elaboration of a human rights-based approach to international heritage governance advocated by the World Heritage Convention and Intangible Cultural Heritage Convention.⁴⁵

⁴³ Section 6.2.3.

⁴⁴ Section 6.2.4.

⁴⁵ See also Report of the Special Rapporteur on the Rights of Indigenous Peoples (19 July 2022) UN Doc A/77/238, para 72, which describes participation in cultural heritage decision-making processes as part of a human rights-based approach to World Heritage listing; and

Both environmental law and human rights law furthermore underline the critical importance of ensuring that the information available to the public which forms the basis of public participation needs to be accessible and understandable to a non-expert audience, taking into account the need to ensure that access to information for marginalised groups is effective and that the overall process of participation is non-discriminatory. This has important consequences for the operationalisation of participation in cultural heritage law, which has thus far – if it has been put into practice at all – largely relied upon written consent forms in order to demonstrate the existence of community participation. The latter are patently inadequate as a way of demonstrating that informed public participation has taken place, particularly in the case of marginalised groups which may speak a different language than the majority and face additional barriers to participation such as illiteracy.

Moving on from the principle of public participation, the chapter also examined the emergence of more stringent participatory standards which have been developed in relation to the duty to consult and the right to free, prior and informed consent (FPIC), particularly in the context of regimes such as ILO Convention No. 169 and UNDRIP.⁴⁶ Similarly to the elaboration of the principle of participation in human rights law and environmental law, the elaboration of the duty to consult and the right to FPIC within these regimes also contains a number of elements which could be implemented in the conceptualisation of these norms within cultural heritage law.

ILO Convention No. 169 thus establishes that Indigenous peoples should not be removed from their traditional lands unless they have given their ‘free and informed consent’; if the state cannot obtain their consent, the convention establishes the need for appropriate procedures and compensation for Indigenous peoples if such removal nonetheless takes place. The standards established by the convention with respect to relocation are notably more stringent than the other obligations it establishes with regards to the duty of the state to consult with Indigenous peoples prior to taking other decisions which will affect them, such as in the case of the exploration or exploitation of natural resources.

For its part, UNDRIP provides that the FPIC of Indigenous peoples must be obtained – not merely sought – in the case of their relocation from their lands or territories, similarly establishing a higher standard than that which is applicable for other decisions affecting Indigenous peoples. However, even in such situations, the state must engage in a process seeking to obtain the FPIC of Indigenous peoples, acknowledging and facilitating their ability to genuinely influence the decision at stake. Whereas this is a lower standard which does not automatically grant Indigenous peoples a veto over proposed

more broadly UN Doc A/HRC/17/38 (n 38), which calls for a human rights-based approach to cultural heritage matters.

46 Section 6.3.

projects or measures, their consent becomes critical if the project or measure is likely to have a serious negative impact upon the enjoyment of their rights. When one takes into consideration the fact that UNDRIP also guarantees Indigenous peoples' right to cultural autonomy, this underscores the need for states to ensure the consultation of Indigenous peoples in decision-making processes concerning their cultural heritage.

The approach adopted within UNDRIP has also been echoed by human rights courts such as the IACtHR and by the UN human rights treaty bodies, both of which have underlined that while consent is not the required end result of consultations with Indigenous peoples carried out by the state in the context of FPIC obligations, consent should nonetheless always be the *aim* of such consultations.⁴⁷ That being said, consent *is* required in the case of specific situations, such as the relocation of Indigenous peoples from their traditional lands, akin to the standards established by ILO Convention No. 169 and UNDRIP. Similarly to the elaboration of the right to public participation discussed above, consultations with Indigenous peoples should thus be genuine and not mere window-dressing; if the ultimate outcome of the consultation is already fixed at its inception, this standard would likely not be met.

The conceptualisation of FPIC and consultation standards within the above-mentioned regimes certainly holds promise for their conceptualisation within cultural heritage law, where there is an urgent need for the adoption of guidelines which can assist the panoply of actors involved in the implementation of heritage law at the domestic and international level in assessing whether they can consider standards in relation to FPIC to have been met in relation to specific inscriptions. States should thus be required to demonstrate that they have obtained the consent of affected Indigenous peoples in the case of inscription or management decisions which are likely to have a significant impact upon their enjoyment of their fundamental rights.⁴⁸ In all other situations, there should be a requirement for the state to undertake consultation with Indigenous peoples with the aim of obtaining their free, prior and informed consent.

Moreover, the fact that all of the regimes examined above have established more stringent consent requirements in relation to decisions which will result in the relocation of Indigenous peoples, in addition to decisions concerning their access to and use of traditional lands, should be a cautionary tale for cultural heritage law. Whereas neither the operational guidelines of the World Heritage Convention or the Intangible Cultural Heritage Convention recognise more stringent FPIC standards in these situations, an argument can thus be made that they should be amended in order to draw them in line with relevant human rights standards.

⁴⁷ Section 6.3.3.

⁴⁸ Disko and Sambo Dorough (n 39) 521.

An important caveat to both of these conclusions is that the FPIC and consultation requirements examined above have been developed in the context of Indigenous peoples' rights. An alternative approach thus needs to be developed in the case of cultural heritage law, in light of the fact that decisions concerning the inscription and management of international heritage can have far-reaching impacts on a wide range of non-Indigenous communities, groups and individuals as well. While there have been some calls for the application of FPIC standards to non-Indigenous communities in order to ensure their cultural rights in the context of sustainable development projects,⁴⁹ it remains to be seen whether these will be taken up more broadly in the context of international heritage governance.

That being said, when approaching this issue from the perspective of the internal logic of cultural heritage law – which seeks to safeguard living heritage values – the argument can certainly be made that FPIC and consultation standards would be useful in the context of non-Indigenous communities as well. Doing so would particularly help to prevent situations in which the law runs the risk of preserving tangible cultural heritage at the expense of intangible cultural heritage. Furthermore, the extension of these standards within cultural heritage law to non-Indigenous communities does not necessarily need to undermine the privileged legal status granted to Indigenous peoples pursuant to general international law.

One final tool which has been developed within international law to facilitate public participation in decision-making is the requirement for the state (or occasionally also other actors) to conduct an impact assessment prior to the authorisation of a proposed project, plan or policy.⁵⁰ Although the primary recognition of impact assessments in international law relates to the customary obligation to carry out an environmental impact assessment (EIA) in cases of likely significant transboundary environmental harm, there are also a broad variety of other impact assessment methods which are carried out in practice without necessarily being stipulated as obligatory pursuant to positive international law. These include social impact assessments (SIAs), heritage impact assessments (HIAs), and human rights impact assessments (HRIAs).

Once again, the elaboration of such impact assessments in neighbouring fields does not necessarily represent a panacea for the issues faced by individuals and local communities in the context of international heritage governance. Thus, even in situations where international law obligates states to conduct an impact assessment, they retain a great deal of discretion in how these impact assessments will be designed or carried out; nor does international

49 UN General Assembly, Report of the Special Rapporteur in the Field of Cultural Rights (15 August 2022) UN Doc A/77/290, para 98(b).

50 Section 6.4.

law subsequently mandate what the outcome of an impact assessment procedure should be – simply that it should be carried out.

However, this does not mean that impact assessments cannot nonetheless constitute useful tools in the context of heritage governance when deployed as part of a broader arsenal of participatory techniques: much akin to the principle of public participation and the principle of FPIC, impact assessments can create fixed paths which decision-makers are expected to follow as a matter of good practice. Impact assessment procedures can thus bring together the various stakeholders involved or affected by a project, plan or policy, and force the state to justify any actions taken after the impact assessment has been conducted to the public at large. As such, impact assessments are generally considered to promote open and reasoned decisions.

It is for this reason that while a further emphasis on the role of impact assessments in cultural heritage law is unlikely to resolve the issues currently faced by individuals and communities within international heritage governance, they can nonetheless ensure that the impact of heritage protection decisions upon individuals and local communities remains visible to decision-makers. While there has been a growing reliance within UNESCO's cultural heritage conventions on the use of impact assessments, in particular within the context of the World Heritage Convention, these developments have thus far mainly focused on the importance of environmental impact assessments or heritage impact assessments; as such, there is room to grant greater emphasis to the potential use of human rights impact assessments alongside these existing tools, in order to ensure that human rights concerns are integrated into heritage decision-making processes from the get-go.⁵¹

7.6 FOREGROUNDING THE INTERESTS OF INDIVIDUALS AND LOCAL COMMUNITIES IN CULTURAL HERITAGE LAW

As is evident from the above, cultural heritage law can and should be seen as an example of a common interest regime in public international law – not only in light of its reliance upon universalising legal concepts such as the 'cultural heritage of mankind', but also in light of the fact that it is dogged by the same tension between 'form and function' faced by other common interest regimes. The underlying concern behind this tension is the fact that international law aspires towards the protection of common interests, but seeks to do so through the vehicle of a legal system centred around state sovereignty which continues to struggle to accommodate and effectively protect these common interests.

51 The recently developed *Guidance and Toolkit for Impact Assessments in a World Heritage Context* (UNESCO, ICCROM, ICOMOS and IUCN 2022) is a promising first step in this regard.

Cultural heritage law replicates this pattern; consequently, states continue to play a dominant role in giving shape to notions of common interest and universality within the field. As this dissertation has argued, this results in an imbalance towards the position of individuals and local communities within international heritage governance. It is for this reason that it sought to answer the following research question: how should the interests of individuals and communities be safeguarded within the state-centric universalist legal structures and norms of cultural heritage law?

It is possible to give twin answers to this question, both at the level of positive law and in relation to international legal doctrine. In relation to the former, the above demonstrates that there is a clear need for cultural heritage law to draw more closely upon developments in neighbouring areas of law with respect to the position of individuals and communities in international governance. In this regard, the recent proposal by the ILA Committee on Participation in International Heritage Governance to amend the operational guidelines of UNESCO's cultural conventions to explicitly 'recognise a right to participate in decision-making about heritage governance' certainly has merit,⁵² and would further facilitate comparisons between cultural heritage law and other legal regimes establishing environmental procedural rights, such as the Aarhus Convention and Escazú Agreement.

An important lesson to be drawn from the elaboration of standards for public participation in environmental law and human rights law is that these standards should not only be implemented with regards to decision-making procedures at the local level, but also in terms of access to decision-making processes taking place within international organisations which are likely to have an impact upon local communities.⁵³ Affected individuals and local communities should be granted the ability to participate more actively in decision-making processes within international organisations concerning their cultural heritage, moving beyond the assumption that such representation will automatically flow from the participation of 'their' state within the intergovernmental forum in question.⁵⁴

There are a number of forms such participation could take in the context of international decision-making processes concerned with the safeguarding of cultural heritage, which can be divided according to the tripartite structure of the principle of public participation as conceptualised within human rights and environmental law: access to information; the ability of the public to participate in decision-making processes; and access to justice.

52 International Law Association (2022) Resolution 01/2022.

53 See e.g. Escazú Agreement art 7(12); Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums.

54 Natalie Jones, 'Self-Determination and the Right of Peoples to Participate in International Law-Making' (forthcoming) *British Yearbook of International Law*, doi: 10.1093/bybil/brab004, 21-3. On this point, see also Eyal Benvenisti, *The Law of Global Governance* (Brill 2014) 172.

In relation to access to information, the most fundamental step is ensuring that affected individuals and communities are able to access the nomination documents which states submit to the World Heritage Committee and Intergovernmental Committee at a moment of the nomination process when they can still influence the decision-making process. In the case of the World Heritage Committee, for example, nomination documents are not automatically made available to affected communities prior to the discussion of the nomination unless the State Party concerned decides to share them.⁵⁵ As such, there is at present no way for communities to assess whether claims made in the nomination file concerning the nature of the site and the extent of their participation in its nomination and proposed management are accurate – at least not at a sufficiently early stage of the decision-making process.

Moreover, it is important to consider that the public's access to information also needs to be effective, in line with the development of participatory standards by human rights bodies.⁵⁶ Such information needs to be able to be understood and acted upon by non-experts. In the case of cultural heritage governance, nomination files for international inscriptions are often lengthy documents spanning hundreds if not thousands of pages, and steeped in jargon which may be difficult to understand for members of the general public. Moreover, states may need to take extra steps in order to ensure that marginalised members of the public are able to effectively access information concerning nominations, taking into account language differences, literacy rates, and potentially insufficient access to information technologies such as the internet.

However, ensuring access to information in international heritage governance should arguably go both ways: documents submitted by members of the public or civil society organisations with regards to the nomination or management of international cultural heritage should also be made available to the public at large, and should moreover remain publicly available even after the conclusion of the international meeting at which they were discussed. The secretariats of the World Heritage Convention and the Intangible Cultural Heritage Convention frequently receive communications from members of the public, NGOs and other UN bodies. However, these documents are usually not available to actors other than the State Party concerned; if they are made broadly available, it is often only for the duration of the meeting at which the document will be discussed. It would thus be fruitful for cultural heritage law to draw upon the procedures followed by the UN human rights treaty bodies, in which reports submitted by States Parties concerning their compliance with their human rights obligations are displayed on the treaty body's website alongside shadow reports submitted by NGOs and national human rights institutions. Similarly to the UN human rights system, the submission of

55 Disko and Sambo Dorough (n 39) 521.

56 Section 6.2.4.

shadow reports in the cultural heritage context could ensure that intergovernmental bodies possess accurate information in order to arrive at an informed decision.⁵⁷

A number of modalities can be envisaged with regards to facilitating the ability of the public to participate in international decision-making processes. Intergovernmental bodies such as the World Heritage Committee and Intergovernmental Committee could thus consider the expansion of the category of observer status at international meetings to directly include affected individuals or communities: in the case of most bodies established by the cultural conventions, this status is limited to representatives of civil society, or to actors which can otherwise demonstrate that they have sufficient 'expertise' to contribute to the decision-making of the international body.

While representatives of affected communities have occasionally been granted observer status at international meetings and have thus been allowed to make statements at the meetings of bodies such as the World Heritage Committee, their ability to meaningfully contribute to their decision-making processes remains relatively limited as they are usually only permitted to make interventions *after* States Parties have adopted a decision. Another proposal which could strengthen their ability to participate would be to amend the rules of procedure of the intergovernmental bodies established by the cultural conventions in order to allow for lengthier and more substantive interventions by affected individuals and communities at a moment of the decision-making process when their contributions can still have impact, rather than as an afterthought to such decisions as is currently often the case.⁵⁸

Finally, whereas the applicability of the principle of access to justice in the context of international decision-making processes has remained largely curtailed within both environmental law and human rights law, it is also possible to make several suggestions in this regard which could be drawn upon in the context of cultural heritage law. The Special Rapporteur on the Rights of Indigenous Peoples has thus recently called for the establishment of a grievance mechanism which could respond to human rights complaints of Indigenous peoples arising in the context of the World Heritage Convention.⁵⁹ While the creation of such an independent grievance mechanism is perhaps unlikely, this does not mean that individuals and communities could not seek to obtain access to justice with regards to the negative impact of international heritage inscriptions by drawing upon mechanisms developed outside the context of cultural heritage law, such as the UN human rights treaty bodies

57 See Heidi Nichols Haddad and Isaac Cui, 'Localizing Rights Compliance: The Case for Cities as "Shadow Reporters" at International Human Rights Treaty Bodies' (2021) 43 HRQ 491, 492-8.

58 UN Doc A/77/238 (n 45) para 72; see also Disko and Sambo Dorough (n 39) 521.

59 UN Doc A/77/238 (n 45) para 71.

or regional human rights courts,⁶⁰ or perhaps even UNESCO's Committee on Conventions and Recommendations.

More broadly, the Special Rapporteur has also called for greater inter-connection between international heritage governance and human rights actors, such as the Office of the High Commissioner for Human Rights (OHCHR) and the special procedures of the Human Rights Council, for example by creating procedures through which intergovernmental heritage bodies could invite the latter to conduct country visits in states where suspected human rights violations have taken place in the process of heritage inscription and management.⁶¹ This demand for stronger connections between heritage governance and human rights has been echoed by several legal scholars, who have proposed that human rights experts should be called upon to conduct human rights impact assessments in the course of nomination processes, and that human rights should become an integral element of periodic reporting processes – accordingly allowing for the possibility of delisting in the case of human rights violations by management authorities.⁶² While the adoption of such proposals would not strictly speaking lead to direct access to justice for individuals and local communities affected by heritage governance, it could ensure that their interests are better represented within the international decision-making processes of bodies such as the World Heritage Committee and the Intergovernmental Committee.

However, it is important to underline that the mere application of a human rights logic to the problems faced by individuals and local communities within heritage governance will not automatically mean that their interests will be vindicated in the processes of heritage inscription and management. As the practice of the European Court of Human Rights has shown, the approach of human rights bodies towards the issue of heritage protection has often resulted in the prioritisation of the protection of the 'public interest' above individual rights – thereby replicating the problematic dynamic of cultural heritage law which is the focus of the present analysis.⁶³

The issues concerning individuals and communities within cultural heritage law should thus not simply be 'outsourced' to human rights bodies; a genuine attempt should at least be made to resolve the root cause of the issue from

60 Ana Filipa Vrdoljak, 'UNESCO, World Heritage and Human Rights' (2022) 29 *International Journal of Cultural Property* 459; Disko and Sambo Dorough (n 39) 520.

61 UN Doc A/77/238 (n 45) para 70.

62 Ibid para 72. See also Vrdoljak (n 60); Disko and Sambo Dorough (n 39). See also the proposals made in ILA Committee on Participation in Global Cultural Heritage Governance, 'Final Report' in *International Law Association Report of the Eightieth Conference* (Lisbon 2022) (International Law Association, London 2023).

63 Marie-Catherine Petersmann, *When Environmental Protection and Human Rights Collide* (Cambridge University Press 2022) 107-56.

within cultural heritage law itself.⁶⁴ It is for this reason that this dissertation does not necessarily call for the ‘human-rightization’ of cultural heritage law, but rather a more fundamental reimagination of the role of universalising legal techniques within it, as outlined within the introduction of the dissertation. The following section will return to this line of argument.

The conclusion that incorporating the language of human rights within cultural heritage law will not resolve the problems faced by individuals and local communities in heritage governance also follows from the findings of Chapter 6. This analysis demonstrated that even if cultural heritage law were to draw more closely upon developments in relation to the right to public participation in environmental law and human rights law, this will not necessarily entail that the interests of individuals or local communities will automatically prevail over broader public interests or the interests of the international community in relation to cultural heritage protection.⁶⁵

In this regard, the present work adopts a slightly different approach than that advocated by the ILA Committee on Participation in Cultural Heritage Governance in its recent final report, which noted that heritage decision-making processes should aim at achieving consent; if consent is not possible, ‘then the views of those whose identities are most affected should prevail’.⁶⁶ While this position is laudable from the perspective of the underlying object and purpose of the cultural conventions – namely the safeguarding of living heritage value, as outlined in the introduction – it is somewhat out of step with the law on public participation as it has been developed within environmental law and human rights law.

As seen in Chapter 6, the standards established within these neighbouring legal regimes thus simply provide for a framework within which affected publics can be heard and participate, and in which decision-making authorities are required to be transparent in outlining how the outcome of participation

64 For a critique of the language of ‘root causes’ in human rights law, see Susan Marks, ‘Human Rights and Root Causes’ (2011) 74 *Modern Law Review* 57.

65 It is possible to draw parallels here with resistance to the adoption of participatory standards in environmental contexts, in which participation is often deemed to be ineffective in times of ‘climate emergency’ when immediate results are of existential importance. Cultural heritage practice sees similar resistance to the language of participation, with the argument here being that there is an urgent need to safeguard something unique from being lost forever to the sands of time – combined with the strong emphasis on the idea that people need to be ‘taught’ what their heritage is and how to value it by heritage experts. For a rebuttal against the use of the language of ‘climate emergency’ as an argument against the use of participatory techniques in environmental law, see Chiara Armeni and Maria Lee, ‘Participation in a time of climate crisis’ (2021) 48 *Journal of Law and Society* 549–54.

66 ILA Committee Final Report (n 62) para 132. However, compare the conclusions of the Committee in its subsequent resolution, in which it merely noted that the UNESCO cultural conventions should merely ‘attribute considerable weight to minority and Indigenous views over those of states when minority and Indigenous heritage is under consideration’: Resolution 01/2022 (n 52).

processes have been taken into account in the taking of any given decision.⁶⁷ For communities, 'this indicates if not an assurance, then at least a possibility of constructive dialogue and outcome'.⁶⁸ Further embedding participatory approaches within cultural heritage law will thus ultimately strengthen, not weaken, its legitimacy.⁶⁹ Indigenous peoples of course constitute an important exception to this general rule, given that the state needs to obtain their FPIC in the context of decisions affecting them, particularly in cases concerning potential alienation from their traditional lands.⁷⁰

While the current conceptualisation of participatory principles under international law thus does not grant the public an absolute right to veto certain decisions, it does establish that there should be a real possibility that the public can influence the outcome of a decision-making procedure. As the preceding chapters have shown, this is simply not the case for most individuals and local communities affected by international heritage governance at present.⁷¹ The strength of further embedding these procedural elements in cultural heritage law is that doing so will demonstrate the delicate balancing act of interests which is inherent to the act of cultural heritage protection, simultaneously providing a transparent framework in which this balancing act can take place. Returning to the overall theme of the dissertation – the role of universality in cultural heritage law – one could thus argue that fostering public participation in cultural heritage provides a way to directly bridge the divide between the global and the local with regards to how we interpret and bring into practice 'universal' cultural heritage.

However, it is also important to remember that cultural heritage law does not necessarily need to look towards other disciplines in order to improve the positions of individuals and local communities. As discussed in the dissertation, cultural heritage law already contains a number of guarantees with respect to consultation and free, prior and informed consent, such as in the World Heritage Convention's Sustainable Development Policy, the UNESCO Policy on Engaging with Indigenous Peoples, or the string of recent amendments to the operational guidelines of the World Heritage Convention and the Intangible Cultural Heritage Convention. The main issue is that these guarantees (beyond not always being legally binding and heavily focused on

67 This also aligns with principles identified by GAL scholars on the core elements which decision-making processes should meet: see Benvenisti, *The Law of Global Governance* (n 54) 166.

68 Giedre Jokubauskaite, 'Tied Affectedness? Grassroots Resistance and the World Bank' (2018) 3 *Third World Thematics* 703, 711.

69 Cf. arguments made in the context of environmental law on the importance of public participation: Gerd Winter, 'Theoretical Foundations of Public Participation in Administrative Decision-Making' in Gyula Bándi (ed), *Environmental Democracy and Law* (Europa Law Publishing 2014).

70 See also the assertion by the Special Rapporteur on the Rights of Indigenous Peoples: UN Doc A/77/238 (n 45) para 70.

71 Ibid.

impacts for Indigenous peoples rather than all potentially affected groups) are not taken into account in a consistent manner within international heritage governance, leading to uncertain situations not only for states but also for affected individuals and communities. As such, there remains an urgent need to continue work on improving the implementation and enforcement mechanisms within cultural heritage law and to ensure the consistency of its decision-making bodies.

It is moreover critical that participation in international heritage governance does not become a form of window-dressing in which the participation of individuals and local communities is co-opted by states.⁷² The development of participatory principles within the Intangible Cultural Heritage Convention should thus represent a cautionary tale, demonstrating that half-hearted attempts at participation can lead to greater feelings of exclusion and marginalisation than if a community has not participated at all. Such developments similarly require a closer level of monitoring of state assertions of public participation within the intergovernmental bodies of UNESCO's cultural heritage conventions; for this reason, the abovementioned proposals with regards to access to justice in the context of international heritage governance are of particular importance.

More broadly, it is important to remain attentive to the limitations of fostering public participation in international governance mechanisms. Similar developments in other international organisations have thus led to wariness amongst states from the Global South, who fear that facilitating more participation within international governance will simply mean greater representation of the views of the most powerful within the international community.⁷³ Moreover, even if participatory mechanisms are successfully embedded within international heritage law in future, they will not start with a clean slate but will perforce take place against the background of past interactions between local communities and the state.⁷⁴ Whereas these relationships might be characterised by broader histories of violence against and marginalisation of the community in question – drastically reducing the potential for facilitating genuine participation – participatory frameworks within public international law offer few tools with which to repair these broken relationships. Finally, care needs to be taken that the promotion of participatory frameworks in cultural heritage law does not lead to further marginalisation of particularly vulnerable members of local communities, such as women. These questions

72 Jokubauskaite (n 68) 713; Jan Sändig, Jochen Von Bernstorff and Andreas Hasenclever, 'Affectedness in International Institutions: Promises and Pitfalls of Involving the Most Affected' (2018) 3 *Third World Thematics* 587, 589.

73 Benvenisti, *The Law of Global Governance* (n 54) 166.

74 John Forester, 'Making Participation Work When Interests Conflict: Moving from Facilitating Dialogue and Moderating Debate to Mediating Negotiations' (2006) 72 *Journal of the American Planning Association* 447, 450.

have remained underexplored within the literature on participation in cultural heritage governance, and thus represent a fruitful line of future enquiry.

7.7 READING CULTURAL HERITAGE LAW AGAINST THE GRAIN: THE HUMANISATION OF CULTURAL HERITAGE LAW

As such, calls for more participation of individuals and local communities within cultural heritage law need to remain mindful of the broader legal landscape within which this participation must take place, and the extent to which the universalist legal structures of cultural heritage law obscure the interests of these groups within the operation of the law. This calls for a fundamental reconceptualization of cultural heritage law at two levels: firstly, with regards to the question who should be seen as the legal actor at the heart of cultural heritage law; and secondly, with regards to how the relationship between the universal and the particular within cultural heritage law should be conceptualised.

If one thus looks beyond the developments outlined above with regards to the emergence of the principle of public participation in positive international law, the argument to place greater emphasis on the role of individuals and local communities within international heritage governance can thus also be justified by reference to developments in a wide range of traditions within contemporary legal thought, most prominently the work of ‘humanisation’ scholars.⁷⁵ This dissertation aligns with the view put forward by these humanisation scholars that while international law might still be centred around state sovereignty, the growing centrality of the individual represents an important agenda for the future development of the law. Individuals, and the communities of which they form a part, should thus be seen as the core actors and beneficiaries of cultural heritage law.

In this sense, viewing cultural heritage law through the lens of the ‘humanisation’ of public international law provides momentum to the argument that there is an urgent need to balance the role of states in cultural heritage law with that of individuals (and, by extension, the communities of which they form a part). It allows us to reconceptualise the field as no longer being (solely) about the state, but also about communities and their cultural practices, and to structure the international legal framework for cultural heritage protection accordingly. This perspective recognises that while state sovereignty continues to be an important structuring principle in the contemporary international legal order, individuals and the communities of which they form a part should also be granted the ability to invoke the language of the universal – but on their own terms, rather than those of the state.

75 As discussed in Section 2.3.3.

Simultaneously, many of the examples examined in the present work also pinpoint an important shortcoming of much of the scholarship on the purported humanisation of public international law: a general neglect of the role of the communities, groups and peoples of which individuals form a part. These entities also have a claim to being affected by international governance, but often if they do not merit the status of Indigenous peoples they remain woefully underrepresented within the structures of public international law, which predominantly grants rights to individuals rather than groups. This is regrettable, as individuals' membership within a given community often forms the bedrock of their identity. While this should not lead to the tyranny of the group over the individual, it nonetheless deserves greater consideration within discussions on the humanisation of international law.

Ultimately, as outlined in the introduction, the present dissertation seeks to align itself with broader critical legal thinking on the function of universality in international legal argumentation, which recognises that the 'universal' does not have a fixed form or content in international law, but is instead constantly subject to contestation by competing actors. The claiming of the mantle of universality is thus an important part of international politics. The 'solution' to the problem examined in this dissertation with respect to the position of individuals and local communities in cultural heritage law is thus not to eliminate the role of universality and the invocation of common interests of the international community in cultural heritage law, but to recognise that these problems are at least in part due to an imbalance in the ability of actors other than the state to articulate their claims in a universal register. As such, there is a need to facilitate the ability of communities to reclaim the label of the 'universal' in cultural heritage law and draw upon its counterhegemonic potential – while remaining mindful that certain communities may wish to explicitly refuse to adopt such universalising narratives,⁷⁶ and thereby jump off the 'ladder of participation' in order to pursue alternative political and legal projects.⁷⁷

In this sense, changes to the substantive and procedural law of cultural heritage protection are unlikely to be able to wholly address the difficulties faced by individuals and local communities in international heritage governance if they are not also paired with a reimagination of notions of universality

76 See e.g. Sophia Rabliuskas, 'An Indigenous Perspective: the Case of Pimachiowin Aki World Mixed Cultural and Natural Heritage, Canada' [2020] *Journal of World Heritage Studies* 9. On the limits of the counterhegemonic potential of such a particularistic legal universalism, see Stephen Young, *Indigenous Peoples, Consent and Rights: Troubling Subjects* (Routledge 2020) 27-8; Dehm (n 1) 271. For a perspective from cultural heritage studies, see Laurajane Smith, *The Uses of Heritage* (Routledge 2006) 37.

77 Allison B. Laskey and Walter Nicholls, 'Jumping Off the Ladder: Participation and Insurgency in Detroit's Urban Planning' (2019) 85 *Journal of the American Planning Association* 348, paraphrasing the work of Sherry R. Arnstein, 'A Ladder Of Citizen Participation' (1969) 35 *Journal of the American Institute of Planners* 216.

in cultural heritage law. While the adoption of human rights-based approaches could thus represent one facet of a potential 'humanisation' of cultural heritage law, this is only one aspect of the present call for this humanisation – particularly in light of critiques of such rights-based approaches (let alone broader critiques of the human rights project).⁷⁸ Larsen thus aptly notes that '[h]uman rights may offer grammars of heritage justice, yet if subject to neglect and denial, these can be transformed and neutralized into grammars of injustice'.⁷⁹ To demand the humanisation of cultural heritage law should thus not necessarily be equated with the 'human-rightization' of that law, a distinction which is sometimes lost within debates on humanisation.

That being said, it is also critical for cultural heritage scholars to push back against the narrative put forward by certain states within UNESCO that the organisation's cultural heritage conventions are effectively a rights-free zone.⁸⁰ Quite to the contrary: UNESCO is a member of the UN family; its mandate touches closely upon issues intimately tied to the fulfilment of human rights; and the majority of its Member States have ratified the relevant human rights instruments which are implicated by the problems in cultural heritage governance outlined above, and are thus bound by the obligations set out in these instruments. Future work in the field of cultural heritage law should thus continue to engage with the potentialities of human rights law within the context of UNESCO's cultural heritage conventions and beyond, while remaining mindful of its limitations.

Moving beyond human rights, what is thus at stake is the ability of individuals and local communities 'to enter into the normative space in which they can demand (rather than waiting "to be invited") for their agency to be recognised and respected'.⁸¹ It is thus not about the foreclosure of possibilities within cultural heritage law in favour of a particular point of view (that of the individual and their community), but rather 'about contesting and thus expanding political space'⁸² by calling upon the inherent political potential

78 Andrea Cornwall and Celestine Nyamu-Musembi, 'Putting the "rights-based approach" to development into perspective' (2004) 25 *Third World Quarterly* 1415. See also Peter Uvin, 'From the Right to Development to the Rights-based Approach: How 'Human Rights' Entered Development' (2007) 17 *Development in Practice* 597. In the cultural heritage context, see Stener Ekern and Peter Bille Larsen, 'Introduction: The Complex Relationship Between Human Rights and World Heritage' (2023) 41 *Nordic Journal of Human Rights* 1, 1; Lucas Lixinski and Noam Peleg, 'Paternalism in International Human Rights Law' (2023) 33 *Duke Journal of Comparative and International Law* 1.

79 Peter Bille Larsen, 'The Lightness of Human Rights in World Heritage: A Critical View of Rights-Based Approaches, Vernaculars, and Action Opportunities' (2023) 41 *Nordic Journal of Human Rights* 70, 79.

80 Disko and Sambo Dorrough (n 39)

81 Jokubauskaite (n 68) 714-5.

82 *Ibid.*

of indeterminate concepts such as the ‘cultural heritage of humanity’.⁸³ As such, individuals and local communities should be granted the ability – through the vehicle of cultural heritage law, and in particular through the procedural mechanisms outlined above – to advocate for a form of particularistic legal universalism by articulating their own visions of what the ‘universal’ interest is in protecting certain forms of cultural heritage, as a counterbalance to the ability of the state to invoke ideas of universality and common interest.⁸⁴ Doing so can help to bridge the tensions between the local and the global in cultural heritage protection.

83 Ukri Soirila, *The Law of Humanity Project: A Story of International Law Reform and State-Making* (Hart Publishing 2021) 165; Massimo Iovane and others, ‘The Protection of General Interests in Contemporary International Law’ in Massimo Iovane and others (eds), *The Protection of General Interests in Contemporary International Law* (Oxford University Press 2021) 6.

84 Lucas Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination* (Oxford University Press 2019) 101-5; Lucas Lixinski, ‘A Third Way of Thinking about Cultural Property’ (2019) 44 *Brooklyn Journal of International Law* 563, 565.

Summary

The twentieth and twenty-first centuries have witnessed a radical expansion of the scope of application of international legal rules aimed at the protection of cultural heritage. Cultural heritage treaties adopted under the auspices of UNESCO now protect a wide range of cultural heritage, ranging from individual cultural objects to cultural monuments, sites and landscapes, and even intangible cultural heritage such as social practices. This dissertation takes this field of study – international cultural heritage law – as its object of analysis, seeking to answer how the interests of the individuals and local communities most closely connected to cultural heritage should be safeguarded within this body of law.

As with many forms of international law, UNESCO's cultural heritage treaties obscure the impact of their implementation on individuals and communities at the local level. This dissertation argues that a cornerstone of this process is the use of universalising language in cultural heritage law, most notably the invocation of an alleged 'cultural heritage of mankind'. It contends that actions which are frequently justified by reference to the common interest of protecting cultural heritage paradoxically result in the erasure of living heritage value. This is because they equip state actors with the rhetorical authority to assert that certain 'universal' or 'common' interests should trump the interests of local non-state actors.

The dissertation situates cultural heritage law in the context of broader trends in contemporary international law that rely heavily on the invocation of universalist concepts, such as the 'common interest' of the international community or the 'common heritage of mankind' (Chapter 2). While the emergence of such universalist modes of reasoning is part and parcel of a broader transformation of the international legal order beyond bilateralism, state sovereignty remains an important structuring principle of that order. As a result, common interest regimes within international law must grapple with the constant tension between their goals and the legal tools with which they are equipped to achieve them.

Some of the chief obstacles in this regard are the inability of the actors charged with enforcing common interest regimes – often international organisations – to become more than the sum of their parts, coupled with the fact that many international decision-making processes concerned with the protection of common interests are inaccessible to those on whose behalf they purport to speak. This often paves the way for states to play the 'trump card'

of universalist rhetoric in ways that might be detrimental to specific communities in specific places (as opposed to the inchoate international community). Rather than decentring the role of the state within the international legal order, the invocation of the common interest in fact solidifies its position in new and unexpected ways.

The dissertation demonstrates that cultural heritage law constitutes such a common interest regime, not only in light of its subject-matter and the methods of protection it adopts, but also in terms of the tensions surrounding its implementation (Chapter 3). In this respect, it argues that the continuing invocation of universalist concepts within cultural heritage law such as the 'cultural heritage of mankind' should not be read as establishing limits on state sovereignty, but rather as an affirmation thereof. The state hereby assumes the role of trustee of the common interest of the international community with respect to cultural heritage located within its territory.

The main problem with this approach is that cultural heritage law does not set any meaningful limits to the powers of states or provide for appropriate sanctions for non-compliance with international heritage law (Chapter 4). On the one hand, UNESCO's cultural heritage conventions have undergone a remarkable transformation as the result of the establishment of new monitoring and non-compliance procedures and the progressive development of treaty obligations. On the other hand, as the dissertation demonstrates, this expansion of international heritage governance has been accompanied by states' reassertion of their sovereignty, inconsistent monitoring outcomes, and an excessive reluctance on the part of states to engage with the human rights aspects of heritage governance. Moreover, the majority of heritage conventions have yet to take concrete steps to facilitate the meaningful participation of individuals and local communities within decision-making processes.

However, there are important indications that the implementation of cultural heritage treaties continues to negatively impact individuals and local communities 'on the ground' (Chapter 5). The dissertation illustrates that these groups are frequently marginalised in the management of heritage inscribed on international lists such as those established by the World Heritage Convention and Intangible Cultural Heritage Convention. In the case of tangible heritage, local communities are sometimes perceived as 'encroaching' on heritage sites, resulting in the eviction or forced displacement of residents. Conversely, in the case of intangible heritage, listing is a way for certain states to exercise power over marginalised communities and thereby shape the protection of intangible heritage in a way that is contrary to those communities' self-understanding of their heritage; this status quo goes unchallenged by international bodies.

In this regard, cultural heritage law has much to learn from neighbouring fields of international law, in particular environmental law and human rights law (Chapter 6). Both areas of law emphasise the importance of providing for the participation of individuals and communities in decision-making

processes that affect them. They stress that such participation should be genuine and take place at a point in the decision-making process when it can influence its outcome; heightened obligations moreover exist with respect to Indigenous peoples, particularly in cases concerning their potential relocation. While neither field necessarily gives individuals or communities a 'veto' over decision-making processes, they underline there should be a real possibility for the public to influence the outcome of these processes. Moreover, the consent of the affected group becomes critical the larger the likelihood that the decision will have serious negative impacts upon their enjoyment of fundamental rights.

The dissertation provides concrete guidance on how to facilitate the participation of individuals and local communities in decision-making processes concerning cultural heritage protection in international law (Chapter 7). Although cultural heritage law already contains a number of guarantees of participation, these guarantees are often normatively weak and suffer from a lack of implementation. The first step should therefore be to ensure the consistency of existing decision-making processes and to strengthen enforcement mechanisms within cultural heritage law. Critically, the dissertation emphasises that in many situations affected publics are unable to genuinely influence decisions concerning the protection of cultural heritage that have the potential to have far-reaching consequences for their daily lives. The dissertation underlines that such public participation is not only crucial at the local level, but that local actors should also be able to influence international decisions that are likely to affect them. Moreover, participation cannot be genuine without effective access to information and to justice for affected publics.

Finally, the dissertation calls for a reconceptualisation of the notion of 'universal interest' in heritage law in order to better accommodate the interests of individuals and local communities. This requires a recognition that individuals and local communities should be seen as the core actors at the heart of cultural heritage law. This does not necessarily require the elimination of the notion of universal interests, but rather the creation of pathways through which such languages of the universal can be invoked by other actors than only the state. Doing so would allow for individuals and local communities to draw upon the inherent political potential of these concepts in order to bridge the divide between the local and the global in cultural heritage law.

Samenvatting (Dutch summary)

EEN BALANS TUSSEN LOKALE EN MONDIALE BELANGEN

Gemeenschappen en de bescherming van cultureel erfgoed in het internationaal publiekrecht

In de twintigste en eenentwintigste eeuw is de reikwijdte van het internationaal recht met betrekking tot de bescherming van cultureel erfgoed aanzienlijk verbreed. Daardoor beschermen Unesco-verdragen tegenwoordig een breed scala aan cultureel erfgoed, variërend van individuele objecten tot monumenten en van culturele landschappen tot immaterieel erfgoed. Dit proefschrift neemt het internationaal erfgoedrecht als uitgangspunt en onderzoekt hoe de belangen van de individuen en lokale gemeenschappen die het nauwst verbonden zijn met bepaalde vormen van cultureel erfgoed moeten worden beschermd binnen dit rechtsgebied.

Internationale erfgoedverdragen verhullen vaak wat de gevolgen zijn van hun uitvoering op individuen en lokale gemeenschappen. Dit proefschrift stelt dat dit het gevolg is van het 'universaliserend' taalgebruik van deze verdragen, met name de manier waarop zij bepaalde vormen van erfgoed aanduiden als het 'cultureel erfgoed der gehele mensheid' (*cultural heritage of mankind*). Staten rechtvaardigen hun acties met betrekking tot het erfgoed binnen hun landsgrenzen vaak door te verwijzen naar het belang om dit erfgoed te beschermen voor de internationale gemeenschap. Ironisch genoeg gebeurt deze bescherming vaak op een manier die juist afbreuk doet aan de 'levende' waarde van het erfgoed (*living heritage value*): datgene wat het erfgoed juist zo bijzonder maakt in de ogen van specifieke individuen en lokale gemeenschappen. Dit komt doordat dergelijke universalistische concepten staatsactoren de autoriteit geven om te stellen dat bepaalde 'universele' of 'gemeenschappelijke' belangen de belangen van de lokale gemeenschap overstijgen.

Dit proefschrift plaatst het internationaal erfgoedrecht in de context van een bredere trend binnen het internationaal publiekrecht om zich te beroepen op universalistische concepten zoals het 'gemeenschappelijk belang' van de internationale gemeenschap of het 'gemeenschappelijk erfgoed der mensheid' (Hoofdstuk 2). Hoewel deze concepten een belangrijke rol hebben gespeeld bij het tot stand brengen van de internationale rechtsorde zoals we die nu kennen, blijft staatssoevereiniteit desondanks een belangrijk basisbeginsel, zo niet de ruggengraat, van deze rechtsorde. Dit heeft als gevolg dat deelgebieden

van het internationaal recht die zich beroepen op het gemeenschappelijke belang kampen met de voortdurende spanning tussen hun doelen en de ontoereikendheid van de juridische instrumenten waarmee ze deze doelen dienen te bereiken, aangezien deze instrumenten vaak nog berusten op staatssoevereiniteit.

Zo beschikken internationale organisaties, die een centrale rol vervullen in de handhaving van gemeenschappelijke belangen, vaak niet over de juiste middelen om de individuele belangen van hun lidstaten te overstijgen. Bovendien zijn veel besluitvormingsprocessen binnen deze organisaties ontoegankelijk voor degenen die er direct door worden geraakt. Als gevolg hiervan kunnen staten gretig gebruikmaken van universalistische retoriek zonder dat dit daadwerkelijk voordelen oplevert op lokaal niveau voor specifieke individuen en gemeenschappen. De manier waarop het hedendaags internationaal publiekrecht zich beroept op het gemeenschappelijk belang versterkt dus de kernpositie van de staat in de internationale rechtsorde op nieuwe en onverwachte manieren, in plaats van ruimte te maken voor andere actoren, zoals dikwijls wordt verondersteld.

Dit proefschrift beargumenteert dat het internationaal erfgoedrecht deel uitmaakt van deze trends, niet alleen vanwege de manier waarop het zich beroept op het gemeenschappelijk belang, maar ook juist omdat het wordt omringd door vergelijkbare spanningen met betrekking tot de uitvoering van zijn rechtsregels (Hoofdstuk 3). Hierbij wordt gesteld dat het beroep op universalistische concepten, zoals het 'cultureel erfgoed der gehele mensheid', geen teken is dat het internationaal erfgoedrecht leidt tot een beperking van staatssoevereiniteit, maar dat het deze soevereiniteit juist verder onderstreept. Hierbij veronderstelt het erfgoedrecht dat de staat namens de internationale gemeenschap zal waken over het gemeenschappelijk belang met betrekking tot cultureel erfgoed dat zich binnen zijn grondgebied bevindt.

Het erfgoedrecht stelt echter geen noemenswaardige grenzen aan de bevoegdheden van staten, noch voorziet het in gepaste sancties voor gevallen waarin staten hun verplichtingen verzuimen (Hoofdstuk 4). Enerzijds hebben internationale erfgoedverdragen in de afgelopen twee decennia een opmerkelijke transformatie ondergaan, waarbij nieuwe toezichtprocedures zijn ontstaan en bestaande verdragsverplichtingen zijn herijkt. Anderzijds blijft de mate van toezicht op staten binnen het erfgoedrecht onevenredig verdeeld, zowel tussen staten onderling, maar ook tussen verschillende erfgoederen binnen de grenzen van één staat die op dezelfde internationale erfgoedlijst zijn bijgeschreven, en zelfs met betrekking tot hetzelfde erfgoed door de tijd heen. Bovendien zien veel staten het erfgoedrecht nog grotendeels als een rechtsgebied waarin hun soevereiniteit centraal staat, onder andere door het samenspel tussen erfgoedbescherming en mensenrechten te ontkennen. Tot slot hebben de meeste erfgoedverdragen nog geen concrete stappen genomen om de deelname te vergemakkelijken van individuen en lokale gemeenschappen in besluitvormingsprocessen met betrekking tot erfgoedbescherming.

Dergelijke participatie is dringend nodig. Wanneer men naar de praktijk kijkt, blijkt namelijk dat de uitvoering van internationale erfgoedverdragen vaak leidt tot nadelige gevolgen voor individuen en lokale gemeenschappen, met name in het geval van erfgoederen op de Werelderfgoedlijst en de Representatieve Lijst van Immaterieel Erfgoed van Unesco (Hoofdstuk 5). In het geval van materieel erfgoed worden lokale gemeenschappen bijvoorbeeld dikwijls beschouwd als 'indringers' die afbreuk doen aan de bescherming van het erfgoed; als gevolg hiervan worden bewoners van erfgoedlocaties vaak door overheden uit hun huizen gezet of onderworpen aan gedwongen verplaatsing. Op vergelijkbare wijze gebruiken staten vaak de voordracht van immaterieel erfgoed op internationale lijsten als een kans om macht uit te oefenen over gemarginaliseerde gemeenschappen binnen hun grenzen, onder andere door het desbetreffende erfgoed dusdanig te beschermen dat deze bescherming niet aansluit bij de leefwereld van de lokale gemeenschap. Dit proefschrift benadrukt hierbij dat in veel gevallen de individuen en gemeenschappen die direct geraakt worden door besluiten die voortvloeien uit het internationaal recht en die betrekking hebben op de bescherming van cultureel erfgoed, geen mogelijkheid hebben om invloed uit te oefenen op deze besluitvorming, ondanks de vergaande gevolgen voor hun dagelijks leven.

Dit proefschrift betoogt dat het internationaal erfgoedrecht lering moet trekken uit het internationaal milieurecht en de rechten van de mens (Hoofdstuk 6). Beide rechtsgebieden benadrukken het belang van deelname van individuen en lokale gemeenschappen aan besluitvormingsprocessen die hen aangaan. Hierbij stellen deze rechtsgebieden voorop dat deze groepen door hun deelname aan deze processen ook daadwerkelijk invloed moeten kunnen uitoefenen op de totstandkoming van het uiteindelijke besluit. Hoewel zij niet noodzakelijkerwijs een veto moeten kunnen uitoefenen op het besluit, wordt hun instemming doorslaggevend voor de rechtmatigheid van het besluit naarmate de kans groter wordt dat het serieuze negatieve gevolgen zal hebben voor hun fundamentele rechten. Bovendien gelden er in beide rechtsgebieden striktere verplichtingen met betrekking tot het raadplegen van inheemse volkeren, met name in het geval van besluiten die zouden kunnen leiden tot hun verplaatsing uit hun traditionele gebieden.

Dit proefschrift biedt concrete handvaten voor de verbetering van de deelname van individuen en lokale gemeenschappen aan besluitvorming met betrekking tot internationale erfgoedbescherming (Hoofdstuk 7). Hoewel het internationaal erfgoedrecht al een aantal waarborgen bevat met betrekking tot de participatie van deze groepen, zijn deze vaak niet-bindend en worden ze slechts gebrekkig geïmplementeerd. De belangrijkste aanbeveling van dit proefschrift is dan ook om de samenhang te waarborgen van besluitvormingsprocessen binnen Unesco en bestaande handhavingsmechanismes te versterken. Hierbij wordt benadrukt dat de participatie van deze groepen niet alleen van belang is op lokaal niveau; lokale belanghebbenden zouden bijvoorbeeld ook inspraak moeten kunnen leveren op *internationale* besluiten die hen raken. Dit

proefschrift onderstreept dat dergelijke participatie bovendien niet effectief is indien getroffen individuen en gemeenschappen geen toegang hebben tot informatie omtrent het besluit en er geen recht op beroep bestaat.

Tot slot roept dit proefschrift op tot een herziening van het begrip 'universeel belang', waarbij het internationaal erfgoedrecht beter rekening dient te houden met de belangen van individuen en lokale gemeenschappen. Dit vereist onder andere een herijking van de rol van de staat, waarbij wordt erkend dat individuen en lokale gemeenschappen de kernsubjecten zijn van het internationaal erfgoedrecht. Dit hoeft niet noodzakelijkerwijs te leiden tot het afschaffen van het gebruik van universalistische concepten zoals 'universeel belang' in het erfgoedrecht maar slechts tot het creëren van mogelijkheden waarbij ook andere actoren dan enkel de staat zich kunnen beroepen op deze concepten. Door individuen en lokale gemeenschappen op hun eigen manier als rechtsdeelnemers gebruik te laten maken van dit universalistische gedachtegoed ontstaan er kansen om de kloof tussen lokale en mondiale belangen in het internationaal erfgoedrecht te overbruggen.

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Curriculum vitae

Sophie Starrenburg (Sydney, Australia, 1993) obtained her VWO degree from the Stedelijk College Eindhoven in the Netherlands in 2011. From 2011 to 2014, she attended Leiden University College in The Hague, where she graduated *summa cum laude* with a BA (Hons.) in Liberal Arts and Sciences, specialising in public international law. She continued on to the LL.M. programme in Public International Law at Leiden University, where she graduated *cum laude* in 2015. She subsequently pursued a second LL.M. at the University of Cambridge as a Rotary Scholar, supported by additional grants from the Prins Bernhard Cultuurfonds, the Hendrik Mullerfonds and the Minerva Scholarship Fund. She graduated in 2016 with First Class honours and was awarded the De Hart Prize in Law from Christ's College. During her time in Cambridge, she was also an editor of the Cambridge International Law Journal.

From 2016 to 2018, Sophie worked as a research and teaching assistant at the Grotius Centre for International Legal Studies. In 2018, she was awarded an NWO Research Talent grant to conduct her PhD research at Leiden Law School under the supervision of professors Nico Schrijver and Yvonne Donders. During her doctoral studies Sophie was a visiting researcher at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, for which she was awarded an Institute Grant. In 2023, she was a postdoctoral researcher at the Department for Public Law and Governance of Tilburg Law School, working in the 'Constitutionalising in the Anthropocene' research group. She is currently assistant professor at the Grotius Centre for International Legal Studies at Leiden Law School.

Sophie has advised the Netherlands National Commission for UNESCO on the implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict in the Netherlands and is a member of the ILA Committee on Safeguarding Cultural Heritage in Armed Conflict. She is also a member of the 'Our Common Dignity' Rights-Based Approaches Working Group and the International Scientific Committee on Legal, Administrative and Financial Issues (ICLAFI) of ICOMOS (International Council on Monuments and Sites). Prior to commencing her PhD, she was a researcher for the Dutch Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War from 2013 to 2015.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2021-2024

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This dissertation explores the impact of international cultural heritage law on individuals and local communities, particularly through the lens of cultural heritage law's use of universalising language such as the 'cultural heritage of mankind'. It argues that this rhetoric empowers states to prioritise purportedly common interests over local ones, potentially erasing living heritage value in the process.

The dissertation places cultural heritage law in the context of broader international legal trends, in particular the tension between the pursuit of common interests through international law and the enduring influence of state sovereignty as a structuring principle of that law. It argues that contemporary cultural heritage law often fails to effectively limit state powers or protect the interests of individuals and local communities. It thus calls for stronger guarantees of participation within cultural heritage law, drawing upon legal standards developed within environmental law and human rights law.

The dissertation suggests a rethinking the concept of 'universal interest' in heritage law to qualify the operation of state sovereignty and to better accommodate the interests of individuals and local communities, emphasizing their role as central actors and the need to bridge the gap between local and global interests in cultural heritage protection.

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