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

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1 Introduction

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]

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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 Oluborode Jegede in Sébastien Duyck, Sebastien Jodoin and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018).

safeguard biodiversity,[12] and facilitate international development[13] 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 provisions[26] 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 Tichyì 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 Dorough (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 A 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]

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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 so[66] (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 Intranational 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

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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 Rieks 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, Sebastien 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; Mattias 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.

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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 El¿bieta 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 multiscalar 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 Poulios, '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 Poulios (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

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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 counterbalance 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.