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

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3 Defining cultural heritage value
The development of 'universal importance' over time*

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

The present chapter charts the – successful and unsuccessful – invocation of universal interests in law-making related to cultural heritage protection over the course of the past century, focusing firstly on interwar efforts within the context of the League of Nations, and subsequently successful codification in the context of UNESCO leading to the adoption of the 1954 Hague Convention, the 1970 Convention for the Fight Against the Illicit Trafficking of Cultural Property, the 1972 World Heritage Convention, the 2001 Underwater Cultural Heritage Convention, and the 2003 Intangible Cultural Heritage Convention.[2] The section concludes by providing a brief overview of parallel developments, including the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions, international criminal law, international human rights law.

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

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

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

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

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

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

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

3 See Section 1.3.2 of the introduction.

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

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

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

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

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

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

8 On these tensions, see Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?' (2007) 18 EJIL 379; Armin von Bogdandy and Sergio 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).

3.1 Early attempts at codification

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

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

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

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

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

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

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

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

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

13 O'Keefe (n 10) 5-13. Along similar lines, a number of peace treaties from the Treaty of Westphalia onwards provided for the restitution of archives and works of art to their country of origin, although many objects were not returned in practice: Nahlik (n 10) 77; Toman (n 10) 5. On 19th and 20th century practice in this regard, see *inter alia* Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge University Press 2006). More generally, see also Gillespie 211-84.

14 Blake (n 10) 2. Betts and Ross draw attention to the role of iconoclasm in the wake of the Reformation in leading to the adoption of domestic legislation protecting cultural property: Paul Betts and Corey Ross, 'Modern Historical Preservation – Towards a Global Perspective' (2015) 226 Past & Present 7, 9.

15 See, for example, the concept of 'waqf' in Islamic law: Eman Assi, 'Islamic Waqf and Management of Cultural Heritage in Palestine' (2008) 14 International Journal of Heritage Studies 380; Khalfan Amour Khalfan and Nobuyuki Ogura, 'Sustainable architectural conservation according to traditions of Islamic waqf: the World Heritage–listed Stone Town of Zanzibar' (2012) 18 International Journal of Heritage Studies 588; Reyhan Sabri, *The Imperial Politics of Architectual Conservation: The Case of Waqf in Cyprus* (Springer 2019). However, compare Fatimah Alshehaby, 'Cultural Heritage Protection in Islamic Tradition' (2020) 27 International Journal of Cultural Property 291. Cf. Indigenous customary management systems in Australia and Tanzania: Johari Hussein and Lynne Armitage, 'Traditional heritage management: The case of Australia and Tanzania' [2014] Proceedings of the 19th Asian Real Estate Society (AsRES) International Conference, Gold Coast, July 2014.

16 See Astrid Swenson, 'The Law's Delay? Preservation Legislation in France, Germany and England, 1870-1914' in Melanie Hall (ed), *Towards World Heritage: International Origins of the Preservation Movement, 1870-1930* (Ashgate 2011) and Astrid Swenson, *The Rise of Heritage: Preserving the Past in France, Germany and England, 1789-1914* (Cambridge University Press 2013) for a comparative historico-legal analysis of cultural property legislation. See also Henry Cleere, *Archaeological Heritage Management in the Modern World* (Routledge 1990); Forrest 133-4, 225-6; Jean-Pierre Bady and others (eds), *1913: Genèse d'une loi sur les monuments historiques* (La documentation Française 2013); Miles Glendinning, *The Conservation Movement: A History of Architectural Preservation, Antiquity to Modernity* (Routledge 2013); Betts and Ross (n 14); Jukka Jokilehto, *A History of Architectural Conservation* (2nd edn, Routledge 2017).

nineteenth century.[17] The French Revolution and Napoleonic Wars marked increasing concern with the status of cultural property during wartime, evidenced in the writings of Quatremère de Quincy[18] and Abbé Grégoire.[19] These statements called upon the shared value of the heritage in question as one belonging to civilisation as a whole.[20] The nineteenth and early twentieth centuries subsequently emerge as a 'formative period', during which 'the protection of specific places, or sites, moved from a cause of national and imperial concern to one of international concern'.[21] This period also saw the emergence of civil society organisations who not only took issue with the protection of cultural property within national boundaries, but also beyond them.[22]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

32 Ibid art 27.

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

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

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

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

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

35 O'Keefe (n 10) 40.

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

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

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

Whilst the ICIC can boast of a moderate claim of being able to engage in global law-making during this period,[39] it was nonetheless founded on particularly Western humanist ideals of achieving peace through mutual intellectual understanding and 'the idea of unilinear progress of civilisation and development'.[40] Thus the Swiss vice-president of the ICIC, Gonzague de Reynold, was able to note in 1938 without irony that it was imperative that the ICIC 'save the essentials of civilisation', placing this mission within a broader historical trend in which '[n]o centre of culture has ever been able to exist in isolation: either it has disappeared, or else it has been kept alive by other and often far distant centres'.[41] One of the guiding principles of the ICIC's work, according to de Reynold, was the principle of universality, defined as 'a superior mental quality, a supreme form of culture'.[42] While the intermediate goal of the organisation was the preservation of a range of 'national' cultures, its ultimate aim appeared to be to arrive at a superior form of civilisation.[43]

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

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

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

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

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

42 Ibid 923.

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

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

3.1.2.1 Regulating the illicit trade in cultural property

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

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

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

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

46 Ibid 7.

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

48 Ibid 126.

49 1933 Draft (n 44) art 1.

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

3.1.2.2 Preventing the destruction of cultural property during armed conflict

The League was spurred into action with regards to the matter of wartime destruction by the start of the Spanish Civil War in 1936,[54] with proposals to safeguard the cultural property in Spain being characterised as a 'matter of importance to civilisation as a whole'.[55] Similarly, discussions within the League on the Second Sino-Japanese War recalled that 'artistic monuments and cultural institutions representing the high-water mark of civilisations should be spared' during times of armed conflict.[56] These thoughts reverberated within the final version of the League's Draft International Convention for the Protection of Historic Buildings and Works of Art in Time of War: the Directors' Committee of the OIM, tasked with the preparation of the draft, noted that the protection of these forms of heritage was a 'problem which is

50 UNESCO/CUA/115 (n 44) para 6.
51 1936 Draft (n 44) art 1(1).
52 Vrdoljak, 'International Exchange and Trade in Cultural Objects' (n 7) 128-30. However, the 1939 draft did remove the former reference to 'objects of *remarkable* palaeontological, archaeological, historic or artistic interest', merely specifying that the convention would apply in relation to objects of 'palaeontological, archaeological, historic or artistic interest'.
53 UNESCO/CUA/115 (n 44) para 6.
54 Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict* (UNESCO Publishing 1996) 18-19.
55 O'Keefe (n 10) 53.
56 'Report of the Sixth Committee to the Assembly' (A.51.1937.XII) (1937) 175 League of Nations Official Journal, Special Supplement 81, 83.

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

The preamble of the Draft Convention notes that artistic preservation is a 'concern of the community of States', and 'that the destruction of a masterpiece, whatever nation may have produced it, is a spiritual impoverishment for the entire international community',[58] phrasing which very closely mirrors the wording of the post-war 1954 Hague Convention. In its explanatory report, the Directors' Committee noted that the obligation contained in article 1 of the Draft Convention to guarantee the material protection of monuments and works of art 'implies recognition of the principle that the preservation of artistic and historical treasures is a matter that *concerns the world as a whole*. The countries possessing artistic treasures are merely their *custodians* and remain *accountable* for them *to the international community*'.[59] Although it was envisaged that Contracting Parties should recognize a general duty to respect and protect monuments during wartime,[60] enhanced protection was granted by special agreement between the Contracting Parties 'to certain monuments or groups of monuments the preservation of which … is of *fundamental importance to the international community*'.[61] Interestingly, article 7(6) notes that '[m]onuments and museums shall be brought to the notice of the civil population, who shall be requested to protect them, and of the occupying troops, who shall be informed that they are dealing with buildings the preservation of which is the *concern of the entire international community*'.[62] In contrast to the ICIC's projects seeking to regulate the illicit trade in cultural property, the proposed convention seeking to prevent the destruction of cultural property during armed conflict thus draws upon universalising language very similar to that found in post-war conventions such as the 1954 and 1972 Conventions.

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

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

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

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

61 Ibid (emphasis added) arts 5, 6.

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

63 Pernet (n 37) 342.

(more popularly known as the Roerich Pact)[64] and the Treaty on the Protection of Movable Property of Historic Value[65] were adopted in 1935. The latter stands out through its explicit regional focus, being the only instrument of the period to *not* refer to the universal nature of cultural heritage in some shape or form.[66] By contrast, the aim of the Roerich Pact (which had in fact first developed in the context of the ICIC) was the preservation 'in any time of danger [of] all nationally and privately owned immovable monuments which form the *cultural treasure of all peoples*'.[67] In doing so, it echoed what was apparently taken as a given at the time: that the protection of cultural heritage was a matter for common concern, and that there was a neutral standard by which to judge which heritage was universally valued.

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

It was these drafts which invoked universality in ways that can still be seen in contemporary law-making; appeals to the interest of the international community provided the necessary impetus and legitimisation for international regulation in an area where such cooperation was far from self-explanatory. In this sense, they can be compared to the role of many universalising legal concepts from the post-war era, which effectively function as legal fictions seeking to call the 'international community' into being.[68] The ICIC's conventions can be seen to be doing the same thing, albeit at a time when the concept of an international community bound by international law stood on shaky ground. Simultaneously, these instruments sought to transform cultural prop-

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

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

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

67 Roerich Pact, preamble.

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

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

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

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

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

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

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

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

73 O'Keefe (n 10) 27.

The first concrete legal expression of these universalist principles emerged upon the adoption of the 1954 Hague Convention,[74] in which a link is explicitly made between damage to cultural heritage and damage to the 'heritage of all mankind'.[75] The convention was also the first convention in which the subject of international regulation was grouped under the heading of 'cultural property' as a unified concept, as opposed to merely enumerating various forms of cultural property to be protected.[76] The manner in which this link was initially expressed within the text of the Convention led to some concerns from a range of states. Thus the United Kingdom objected to the inclusion in the draft preamble of a statement to the effect that 'the preservation of the cultural heritage is the concern of the community of States'.[77] By contrast, the USSR argued that cultural heritage was not the concern of the international community, but was instead 'of great importance for all peoples of the world'.[78] This idea was incorporated in the redrafting of the text. O'Keefe notes that the choice for the term 'peoples', as opposed to 'states' can be traced back to the realisation that the object of protection – cultural property – derives its value from a given society, rather than the 'state' as a legal construct.[79] The idea that damage to cultural property caused damage to the cultural heritage of mankind, derived from similar ideals, was also introduced by the USSR and included in the preamble during the redrafting of the text.[80] Universal ideals thus formed the impetus for international protection of cultural heritage.

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

74 Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 215 (1954 Hague Convention). See John Henry Merryman, 'Two Ways of Thinking About Cultural Property' (1986) 80 AJIL 831, 837; Forrest, 'Cultural Heritage as the Common Heritage' (n 72) 129.

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

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

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

78 Ibid CBC/DR/37, 372.

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

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

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

Nonetheless, the majority of states preferred a definition which emphasised the universal value of the heritage protected.[87] The issue was put to a select drafting group,[88] which altered the notion of 'high cultural value or importance' in the initial draft to cultural property 'of great importance to the cultural heritage of all different peoples'.[89] This was once again adjusted in the final text, to 'movable or immovable property of great importance to the cultural heritage of every people'. O'Keefe argues that the phrase 'of every people' does not imply that the heritage is part of a shared heritage of mankind as a whole: instead, it implies that the Convention protects the cultural heritage 'of each respective people'.[90] This indicates that the cultural property protected by the Convention is constructed and valued at the national level, yet that its destruction diminishes the cultural heritage of all humankind.

This interpretation is confirmed by implementation reports submitted by states pursuant to article 26(2) of the Convention, in which states frequently equate their heritage with the cultural heritage of humanity.[91] In practice, the selection of cultural heritage protected by the Convention is left to the discretion of each party to the Convention; states consider the property protected by the Convention to at least be comprised by those items protected

81 Ibid CBC/DR/31, 373.
82 Ibid CBC/DR/22, 373.
83 Ibid para 173.
84 Ibid para 151.
85 Ibid CBC/DR/36, 373.
86 Ibid para 164.
87 Ibid para 165, paras 199-200.
88 Chaired by the Netherlands, with France as rapporteur and Czechoslovakia, Denmark, Greece, Hungary, Israel, Italy, Japan, Norway, Poland, Romania, Spain, Sweden, Switzerland, Turkey, USSR, United Kingdom, United States, Yugoslavia as other members.
89 Records of the Hague Conference (n 77) CBC/DR/100, 373.
90 O'Keefe (n 10) 103-104.
91 Ibid 103-4.

under their domestic cultural heritage legislation.[92] As such, it can be concluded that even though the goal of the Hague Convention professes universality, its commitments remain national. While the Convention's scope is established by recourse to universality, and universality gave the impetus for international protection, this does not ultimately appear to have shaped the conceptualisation of cultural value in the Convention.[93]

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

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

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

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

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

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

the Intentional Destruction of Cultural Heritage underlined the effect of cultural destruction 'on the international community as a whole', recalling the statement in the 1954 Convention's preamble that 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind', and sought to establish state responsibility for any 'State that intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish any intentional destruction of cultural heritage of great importance for humanity'.[97] These developments prove that the lure of universalist rhetoric remains remarkably stubborn, despite the developments that the concept of cultural heritage has undergone within the international legal context since 1954.[98]

3.3 The Convention for the Fight against the Illicit Trafficking of Cultural Property (1970)

The 1970 Convention[99] came into being during an era of increased concern with the illegal art trade, particularly amongst newly independent states seeking the return of objects lost during the colonial era.[100] The issue of illicit trafficking of cultural property was one that was clearly cut out for international regulation: so-called 'source states' cannot control the export of all cultural property at the border, particularly in situations where the property in question has been illicitly excavated without the knowledge of local authorities. As such, measures limiting the import and sale of cultural property abroad become necessary in order to limit the trade in looted or stolen cultural property;[101] the transnational nature of the problem thus makes it an ideal

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

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

99 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231 (1970 Convention).

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

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

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

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

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

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

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

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

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

105 A distinction developed by Merryman (n 74).

106 Kono and Wrbka (n 101) 35.

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

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

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

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

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

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

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

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

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

113 Ibid.

114 Ibid 9

115 Ibid 10.

116 Ibid.

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

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

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

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

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

120 Ibid 6.

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

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

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

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

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

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

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

126 Ibid art I(2).

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

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

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

130 Williams (n 104) 179.

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

132 14 C/27 (n 131) 15.

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

Nonetheless, whereas the Secretary-General's 1962 report had expressed itself in less than unequivocal terms about the feasibility of a new convention, by 1968 the tone had changed. The Secretary-General's new report called attention to the numerous states, such as Italy and Japan, which had provided support to a future convention, the results of an Expert Meeting on the Exchange of Original Objects between Museums and the Reconstitution of Dismembered Works of Art in 1966,[135] which spoke in similarly positive terms about an international convention, and the draft of a European Convention on the Protection of the Archaeological Heritage, which had been presented to the Council of Europe in February 1968.[136] It was furthermore noted that imposing obligations at the international level was the only way forward: 'only States can exert an influence over their cultural exchange services ... only States can influence the policy of their museums, whose curators naturally try to expand their collections rather than to part with any objects belonging to them'.[137] The report underlined the importance of limiting the proposed convention to cultural property of 'great importance' to the cultural heritage of the state in order to prevent the creation of boundaries to cultural exchange.[138] The project for a new convention was subsequently approved by the 1968 General Conference.[139]

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

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

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

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

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

137 Ibid para 28.

138 Ibid paras 33-4.

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

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

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

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

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

140 Preliminary Report, Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (8 August 1969) SHC/MD/3, para 28.
141 Ibid para 16.
142 Ibid paras 10-11.
143 Ibid paras 90-91.
144 Replies to Circular Letter CL/2041 and to document SHC/MD/3 (27 February 1970) SHC/MD/5, Annex I, 5 (Brazil).
145 Ibid, Annex I, 7 (France)
146 Ibid, Add. 1, 1 (Austria).
147 Ibid, Annex I, 11 (Italy).
148 Ibid 21 (emphasis added).

illegal trade in cultural property.[149] One of the key areas of focus for the special committee was the definition of cultural property.[150] The chapeau of article 1 was modified to include that 'the term "cultural property" means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science', belonging to the predetermined categories provided in article 1.[151] As such, the definition sought to find a middle ground between those states which sought to protect effectively all cultural property situated on their territory, and those which considered it to be an unwarranted limitation of their sovereignty to have to enforce the export prohibitions of other states.[152]

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

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

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

150 Ibid para 17.

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

152 O'Keefe (n 10) 116-117.

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

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

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

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

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

for archaeology, prehistory, history, literature, art or science', belonging to a predefined set of categories.[158] The phrase 'specifically designated by each State' has been interpreted as an indicator that the determination of which cultural property is of importance and thus within the material scope of the Convention, ultimately falls to the discretion of the sovereign state.[159] It does not mean that every object needs to be specifically *listed* (e.g. on an official inventory of cultural property) as such by the state, an assertion that would be particularly problematic for objects that are yet to be excavated. As such, states are granted the freedom to recognise what constitutes 'their' cultural heritage, in recognition of the principle of sovereign equality, yet within the boundaries of the general criterion that protected cultural property nonetheless has to be of importance and must fall within one of the exhaustive categories of article 1.[160]

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

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

158 1970 Convention, art 1.

159 Kono and Wrbka (n 101) 36-8.

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

161 Williams (n 104) 2.

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

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

3.4 The World Heritage Convention (1972)

In the 1970s, the World Heritage Convention[163] was seen as a step on the path to creating a Global Village, with general optimism on the possibility of 'progressive unification of human interests'.[164] Attempts to create an international convention to support the protection of 'world heritage' dotted the work of UNESCO throughout the 1950s and 1960s. These proposals employed a range of terms throughout the years, such as 'monuments of world interest', 'artistic value', 'universal interest' or 'universal value'.[165] It was not until a very late stage of the drafting process that the terminology adopted changed from 'cultural property' to 'cultural heritage' of 'outstanding universal value'.[166] Nonetheless, despite the change in wording, one overriding element

163 Convention for the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151 (World Heritage Convention).

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

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

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

remained present throughout each of these proposals: the idea that cultural heritage is not merely local, but is often part of a cultural heritage of humankind.[167] The elements which made up this cultural heritage of humankind tended to be 'monuments of grand scale, dating from the great and/or ancient civilisations':[168] immediately recognizable sites such as Abu Simbel, Venice and Borobodur, which had been the subject of successful UNESCO funding campaigns prior to the adoption of the World Heritage Convention. The conventions regulating these campaigns also explicitly labelled these sites as the 'cultural heritage of mankind', outside the context of – and some being adopted in fact prior to – the World Heritage Convention.[169]

There are several references to the concept of cultural heritage being the heritage of humankind within the preamble of the final text of the World Heritage Convention; thus the second recital states 'that deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the *heritage of all the nations of the world*'; further on, the preamble considers 'that the existing international conventions, recommendations and resolutions concerning cultural and natural property demonstrate the *importance, for all the peoples of the world*, of safeguarding this unique and irreplaceable property, *to whatever people it may belong*'. As such it is incumbent upon the international community to participate in the protection of this heritage. More importantly, the preamble states 'that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the *world heritage of mankind as a whole*'. To this end, cultural heritage is defined in article 1 as monuments, groups of buildings or sites 'which are of outstanding universal value'. This positioning of cultural

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

168 Labadi (n 165) 26-8.

169 See Agreement Concerning the Voluntary Contributions to be Given for the Execution of the Project to Save the Abu Simbel Temples (adopted 9 November 1963, entered into force 9 November 1963) 489 UNTS 209; Agreement Concerning the Voluntary Contributions to be Given for the Execution of the Project to Save the Temples of Philae (adopted 19 December 1970, entered into force 19 December 1970) 798 UNTS 3; Agreement Concerning the Voluntary Contributions to be Given for the Execution of the Project to Preserve Borobodur (adopted 29 January 1973, entered into force 29 January 1973) 865 UNTS 273; Agreement Concerning the Voluntary Contributions to be Given for the Execution of the Project to Preserve and Develop the Monumental Site of Moenjodaro (adopted 27 May 1980, entered into force 27 May 1980) 1256 UNTS 59.

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

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

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

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

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

172 Ibid.

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

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

175 Ibid art 1.

176 Ibid art 2(6).

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

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

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

In the initial studies on the feasibility of the convention, the experts took care to emphasise that the creation of an international convention did not in any way 'imply the internationalization of such property or any form of extra-territorial status'.[182] International protection was a moral question with chiefly technical consequences, 'carried out by the international community for the benefit of all countries'.[183] Nonetheless, they did also emphasise that '[i]nternational protection implies the existence of something more than the sum of all that is nationally important, i.e. the existence of certain items of universal importance' for which mankind was 'collectively responsible'.[184] In this vein, the delimitation of national and international protection appears to have been adopted for reasons of feasibility: international protection, even in the most optimistic of circumstances, was unlikely to be able to cover items other than those 'of universal importance and interest'.[185]

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

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

180 Final Report, Meeting of experts to co-ordinate, with a view to their international adoption, principles and scientific, technical and legal criteria applicable to the protection of cultural property, monuments and sites (31 December 1968) SHC/CS/27/8, p 4; Final Report, Meeting of Experts to Establish an International System for the Protection of Monuments, Groups of Buildings and Sites of Universal Interest (10 November 1969) SHC/MD/4, para 3.

181 Final Report, Meeting of Experts to Co-ordinate, with a View to Their International Adoption, Principles and Scientific, Technical and Legal Criteria Applicable to the Protection of Cultural Property, Monuments and Sites (31 December 1968) SHC/CS/27/8, 4; Final Report, Meeting of Experts to Establish an International System for the Protection of Monuments, Groups of Buildings and Sites of Universal Interest (10 November 1969) para 3; UNESCO, Records of the General Conference, 17th Session (vol 1) Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage (1972).

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

183 Ibid.

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

185 Ibid para 82.

186 Ibid para 83.

would be logical for a 'peacetime' convention to be wider in scope than the Hague Convention.[187] Above all, uncertainty remained about the precise scope of 'universal value'.[188] The eventual consensus was that it was up to each individual state to consider which sites within its territory 'should be considered – internationally, nationally and locally – as the most precious and most representative of its genius and its history, thus deserving to be protected',[189] a position in line with the end-result of the Hague Convention negotiations.

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

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

187 Ibid para 86.
188 Ibid para 84.
189 SHC/MD/4 (n 180) para 70.
190 Records of the General Conference, 16th Session (vol 1) Resolution 3.412 (1970) paras 1100-7.
191 Preliminary Draft Convention Concerning the Protection of Monuments, Groups of Buildings and Sites of Universal Value (30 June 1971) SHC/MD/17/Ann. II, preamble.
192 Ibid art 2(2).
193 Ibid art 5(1).
194 Ibid art 5(2).
195 Preliminary Draft Recommendation Concerning the Protection, at National Level, of Monuments, Groups of Buildings (30 June 1971) SHC/MD/17/Ann. I, para 1.
196 Ibid para 3.

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

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

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

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

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

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

200 Ibid art 1.

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

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

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

204 Labadi (n 165) 26-28.

value' in the interest of limiting the scope of the Convention.[205] Notably Nigeria (albeit unsuccessfully) submitted a proposal to *delete* the term 'universal' in article 1.[206] Following these changes, this section of the convention was also adopted without discussion, with a consensus being reached on the convention as a whole on 16 November 1972.[207]

Where do these developments leave the World Heritage Convention in relation to universality? The value of a World Heritage Site, according to the logic of the World Heritage Convention, is universal: in the current understanding of the Convention, sites of outstanding universal value should 'be those which humankind collectively would wish to pass onto the next generation, and which are regarded as part of the world heritage of mankind'.[208] In this sense, universal value is explicitly placed against local or regional value. However, the term 'outstanding universal value' has remained difficult to implement in practice, as has the precise scope of the 'world heritage of mankind'. The operational criteria of the Convention have undergone a number of incarnations since 1978,[209] although these criteria are often self-referential, often using 'equally undefined alternatives ("masterpiece", "important", "unique", "exceptional", "superlative", "significant", etc.)'.[210] Early listing practices were decried for being overly Eurocentric and monumentalist, to a certain extent mirroring the struggle between the universal and national interest in the drafting of the Hague Convention.[211] Subsequent practice of the States Parties to the Convention suggests a certain tempering of the universalism present in the early years of the World Heritage Convention, with attempts by the World Heritage Committee to reach greater degrees of representativity and credibility, as marked by the 1994 Global Strategy.[212] Nonetheless, the practice of the World Heritage Committee in recent years

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

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

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

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

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

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

211 Cameron and Rössler (n 171) 45 ff.

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

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

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

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

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

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

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

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

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

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

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

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

3.5 The Underwater Cultural Heritage Convention (2001)

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

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

219 Brumann (n 210) 260-2.

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

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

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

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

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

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

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

224 Janet Blake, 'The Protection of the Underwater Cultural Heritage' (1996) 45 ICLQ 819, 821. The Third United Nations Conference on the Law of the Sea, or UNCLOS III, presented the second attempt to formulate a regime for all maritime zones, and spanned from 1973 to 1982 following the failure of the Second United Nations Conference on the Law of the Sea (UNCLOS II) in 1960.

225 European Convention on the Protection of the Archaeological Heritage (adopted 16 January 1992, entered into force 25 May 1995) ETS No. 143 (Valletta Convention); see Craig Forrest, 'Defining "Underwater Cultural Heritage"' (2002) 31 The International Journal of Nautical Archaeology 3, 6-7. The Valletta Convention replaced the European Convention on the Protection of the Archaeological Heritage (adopted 6 May 1969, entered into force 20 November 1970) ETS No. 066 (London Convention). There had also been attempts in the 1970s and 1980s to adopt a Draft European Convention on the Protection of the Underwater Cultural Heritage, which was ultimately not adopted due to an objection from Turkey. See Parliamentary Assembly of the Council of Europe, Order 361 (25 January 1977); Parliamentary Assembly of the Council of Europe, 'The Underwater Cultural Heritage: Report of the Committee on Culture and Education (Rapporteur: Mr. John Roper')' (18 September 1978) Doc 4200-E; Parliamentary Assembly of the Council of Europe, Recommendation 848 (4 October 1978); Draft Convention on the Protection of the Underwater Cultural Heritage and draft explanatory report (22 June 1984) DIR/JUR (84) 1.

226 Blake, 'The Protection of the Underwater Cultural Heritage' (n 224) 820. Patrick O'Keefe and Lyndel Prott, involved in the drafting of the ILA Draft Convention, had also been involved as experts in the drafting of the Draft European Convention on the Protection of the Underwater Cultural Heritage; as such, the ILA draft was heavily inspired by the European draft: see Sarah Dromgoole, *Underwater Cultural Heritage and International Law* (Cambridge University Press 2013) 50.

227 The ILA draft boldly sought to create a 'cultural heritage zone', extending the jurisdiction of the coastal state up to 200 nautical miles from the baselines; it also sought to exclude the application of salvage law to underwater cultural heritage. See Craig Forrest, 'A New International Regime for the Protection of Underwater Cultural Heritage' (2002) 51 ICLQ 511, 515; Roberta Garabello, 'The Negotiating History of the Convention on the Protection of the Underwater Cultural Heritage' in Roberta Garabello and Tullio Scovazzi (eds), *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Martinus Nijhoff 2003) 91-3.

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

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

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

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

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

231 Maarleveld (n 228) 51.

232 Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009) 2562 UNTS 3 (Underwater Cultural Heritage Convention).

233 Toshiyuki Kono and Stefan Wrbka, 'Convention on the Protection of the Underwater Cultural Heritage (2001)' in Toshiyuki Kono (ed), *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21st Century* (Brill Nijhoff 2010) 78.

term undefined within UNCLOS.[234] The existence of these provisions was to cause significant difficulties during the drafting of the Underwater Cultural Heritage Convention, as a number of powerful maritime states feared that the convention would upset the delicate jurisdictional balance agreed upon in UNCLOS.[235] A number of maritime states have thus refused to ratify the Convention because they believe that it expands the jurisdiction of the coastal state beyond what is permitted by UNCLOS.[236]

Another central issue during drafting related to the material scope of the convention.[237] The adopted text of the Underwater Cultural Heritage Convention defines underwater cultural heritage for the purposes of the convention

234 Ibid 71-2. Forrest, 'Defining "Underwater Cultural Heritage"' (n 225) notes at 7 that it was not 'certain whether the terms should be read conjunctively, as in the Chinese, English, and French texts, or disjunctively, as in the Spanish, Arabic, and Russian texts. As the English terms refer to disciplines that, though related, are quite distinct in nature, it is submitted that the terms should be read disjunctively'.

235 Vincent P. Cogliati-Bantz and Craig J. S. Forrest, 'Consistent: the Convention on the Protection of the Underwater Cultural Heritage and the United Nations Convention on the Law of the Sea' (2013) 2 Cambridge Journal of International and Comparative Law 536 543-4. See also UNGA Res 53/32 (6 January 1999) UN Doc A/RES/53/32, para 20, which '[n]otes with interest the ongoing work of the United Nations Educational, Scientific and Cultural Organization towards a convention for the implementation of the provisions of the Convention, relating to the protection of the underwater cultural heritage, and stresses the importance of ensuring that the instrument to be elaborated is in full conformity with the relevant provisions of [UNCLOS]'. Other debates revolved around the Convention's regime for sunken warships and governmental vessels: the major maritime states believed that sovereign immunity continued to apply even after a vessel has sunk; such vessels were ultimately included within the scope of the Underwater Cultural Heritage Convention despite the reticence of the maritime states, with obligations and rights of the States Parties differing according to the maritime zone in which a vessel is found: Sarid (n 222); Dromgoole, 'Reflections on the Position of the Major Maritime Powers with Respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001' (n 220) 119.

236 These states included France, Germany, the United States, the United Kingdom, Norway, and the Netherlands: Sarid (n 222) 228; Forrest, 'A New International Regime for the Protection of Underwater Cultural Heritage' (n 227) 518; Dromgoole, 'Reflections on the Position of the Major Maritime Powers with Respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001' (n 220) 116. However, the position of a number of the vocal opponents during the drafting of the Convention appear to have begun to change their mind: thus France ratified the Convention in 2013. It has also been suggested that the Netherlands is likely to ratify the Convention within the near future, in light of its 2011 request to the *Commissie van Advies inzake Volkenrechtelijke Vraagstukken* regarding the extent to which the UCH Convention indeed modifies the jurisdictional framework of the UNCLOS such that the two conventions are incompatible, and whether the adoption of the Underwater Cultural Heritage Convention had led to 'jurisdictional creep', to which the Commission largely responded in the negative: see Commissie van Advies inzake Volkenrechtelijke Vraagstukken, *Advies over het UNESCO-Verdrag inzake Cultureel Erfgoed Onder Water* (December 2011). See further Guido Carducci, 'New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage' (2002) 96 AJIL 419, 420, 422; Cogliati-Bantz and Forrest (n 235) 537, 560-1.

237 Sarid (n 222) 228.

as 'all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years'.[238] A point of contention during drafting was whether the definition of UCH should be limited based on the significance of the cultural heritage in question. Whereas civil law countries have historically granted 'blanket protection', protection in common law countries is usually on the basis of the 'significance' of a site or property.[239] The distinction between blanket protection and protection based on 'significance' is also based upon differing perceptions of the most effective management system for underwater cultural heritage.[240] The definition within the Convention finds its origins in the ILA draft convention, which in turn was heavily inspired by the 1985 Draft European Convention on the Protection of the Underwater Cultural Heritage which was drawn up within the Council of Europe.[241] Both drafts eschewed limitations based upon significance criteria, defining underwater cultural heritage broadly.[242]

By contrast, at the first UNESCO meeting of governmental experts on the project of a new international convention some representatives noted that 'cultural importance' should be adopted as a criterion in the definition of

238 Underwater Cultural Heritage Convention art 1(a).

239 Dromgoole, 'Reflections on the Position of the Major Maritime Powers with Respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001' (n 220) 120; see also Dromgoole, *Underwater Cultural Heritage and International Law* (n 226) 92-3. However, Dromgoole also notes at 92 that 'in the specific context of UCH, systems based on so-called 'blanket' protection have become increasingly favoured internationally and are now used even by some common law states (notably Australia)'.

240 Forrest, 'Defining "Underwater Cultural Heritage"' (n 225) 8-9.

241 The final draft of the Draft European Convention is confidential, but the near-identical 1984 draft is declassified: see Draft Convention on the Protection of the Underwater Cultural Heritage and Draft Explanatory Report (22 June 1984) DIR/JUR (84) 1.

242 The 1985 European Convention thus defines UCH as 'all remains and objects and any other traces of human existence located entirely or in part in the sea, lakes, rivers, canals, artificial reservoirs or other bodies of water, or in tidal or other periodically flooded areas, or recovered from any such environment, or washed ashore', whereas the 1994 ILA Draft defines UCH as 'all underwater traces of human existence' which had been 'submerged underwater for at least 100 years'. However, debates on the notion of significance also surfaced during debates on both drafts. In relation to the 1985 European Convention, see Forrest, 'Defining "Underwater Cultural Heritage"' (n 225) 8-9; Garabello (n 227) 106. See also Parliamentary Assembly of the Council of Europe, Recommendation 848 (4 October 1978) Annex, which provided that the potential European Convention could be limited in scope pursuant to the 'discretionary exclusion of less important objects (or of less important antiquities) once they have been properly studied and recorded'. Similarly, discussions within the ILA also raised the question whether the definition of UCH 'should be limited to "important historic" shipwrecks and related material', or whether it should 'be broader, to cover all aspects of the underwater cultural heritage': Patrick J O'Keefe and James A. R. Nafziger, 'The Draft Convention on the Protection of the Underwater Cultural Heritage' (1994) 25 Ocean Development & International Law 391, 392.

underwater cultural heritage, similarly to archaeological objects on land,[243] arguing that the proposed definition was vague and arbitrary.[244] Others noted that it is often impossible to assess the value of underwater heritage until it has been disturbed, calling for a system of blanket protection. It was noted, perhaps in deference to the sovereignty of the territorial state, that 'all sites are of importance and archaeologists have no right to say what is or is not important'.[245] These doubts continued to circulate at subsequent meetings of the government experts.[246] A compromise solution was proposed to mediate between those states in favour of blanket protection and those in favour of a significance requirement, whereby underwater cultural heritage was defined as 'all traces of human existence having a cultural, archaeological or historical character which have been partially or totally underwater, periodically or continuously, for at least 100 years'.[247] It was ultimately this definition which was included in article 1 of the final text adopted by the fourth meeting of governmental experts and presented to the UNESCO General Conference in 2001.[248]

Whilst the inclusion of a criterion based on the 'cultural, historical, or archaeological character' of the underwater cultural heritage might at first sight appear to favour an interpretation in line with the views of the proponents of a 'significance' criterion, it has been argued that the inclusion of the word 'character' simply supplements the 100-year time-limit, as the ordinary meaning of the term is different from that of 'significance'.[249] As such, the Convention does not provide states with leeway to exclude cultural heritage from the operation of the Convention solely on the basis of a purported lack of significance.[250] In this sense it is comparable to the definition of underwater cultural heritage in UNCLOS, which has been interpreted by some states to apply to a wide range of underwater cultural heritage, not only that considered of

243 Report by the Director-General on the Findings of the Meeting of Experts Concerning the Preparation of an International Instrument for the Protection of the Underwater Cultural Heritage (12 March 1997) 151 EX/10, para 10.

244 Forrest, 'Defining "Underwater Cultural Heritage"' (n 225) 8-9; Garabello (n 227) 106-7.

245 151 EX/10 (n 243) paras 13-14.

246 Report of the Meeting of Governmental Experts on the Draft Convention for the Protection of the Underwater Cultural Heritage (29 June-2 July 1998) Doc CLT-98/CONF.202/7, para 10; Synoptic Report of Comments on the Draft Convention on the Protection of the Underwater Cultural Heritage (April 2000) CLT-2000/CONF.201/3, 4 (comments of Egypt and France). For the draft convention under discussion, see Draft Convention for the Protection of the Underwater Cultural Heritage (April 1998) Doc CLT-96/Conf.202/5.

247 Final Report of the Third Meeting of Governmental Experts on the Draft Convention on the Protection of Underwater Cultural Heritage (21 August 2000) CLT-2000/CONF.201/7, Annex I. Garabello (n 227) 107-8.

248 Draft Convention on the Protection of the Underwater Cultural Heritage (3 August 2001) 31 C/24, 5.

249 Dromgoole, *Underwater Cultural Heritage and International Law* (n 226) 92-3.

250 Strati (n 223) 41; Carducci (n 236) 422-3; see also Forrest, 'Defining "Underwater Cultural Heritage"' (n 225) 10.

great significance.[251] The definition furthermore formed a reason for some maritime states to refrain from adopting the Convention: thus the United Kingdom, in its explanation of vote in 2001, reiterated its preference for a management and protection system based on significance, in order to streamline resources to protect 'the most important and unique examples of underwater cultural heritage', and considered that the definition of UCH did not provide sufficient leeway to do so.[252] In light of its broad character, the definition of cultural heritage in the Convention can thus be contrasted against those established by the 1954 and 1972 Conventions, both of which draw heavily on notions of universal cultural value.

Further consideration of the role that universality plays within the Underwater Cultural Heritage Convention requires a brief excursion into the UNCLOS regime for underwater cultural heritage contained in articles 303 and 149, in light of the intricate connection between UNCLOS and the Underwater Cultural Heritage Convention. Article 303, which applies in all maritime zones,[253] provides that 'States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose'.[254] Although the text of article 303 is relatively broad in nature and thus would appear to be normatively weak, it has nonetheless been considered to establish minimum standards for states: thus '[a] State which knowingly destroyed or allowed the destruction of elements of the underwater cultural heritage would be responsible for a breach of the obligation to protect it', as would persistent refusal to cooperate in order to protect the underwater cultural heritage at the request of another state.[255]

With regards to the Area, article 149 states that '[a]ll objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin'. Even though article 149 references that preservation of underwater cultural heritage is carried out 'for the benefit of mankind as a whole', it is clear that underwater cultural

251 Dromgoole, *Underwater Cultural Heritage and International Law* (n 226) 30-2, 72-5; Strati (n 223) 29-31.

252 Sarid (n 222) 228; Dromgoole, 'Reflections on the Position of the Major Maritime Powers with Respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001' (n 220) 120.

253 On the basis of its location in Part XVI of UNCLOS on 'General Provisions': Dromgoole, *Underwater Cultural Heritage and International Law* (n 226) 32-4; Trpimir M Šošić, 'The Common Heritage of Mankind and the Protection of the Underwater Cultural Heritage' in Trpimir M Šošić, Budislav Vukas and Božidar Bakotić (eds), *International Law: New Actors, New Concepts, Continuing Dilemmas: Liber Amicorum Božidar Bakotić* (Brill Nijhoff 2010) 344.

254 UNCLOS art 303(1).

255 Tullio Scovazzi, 'A Contradictory and Counterproductive Regime' in Roberta Garabello and Tullio Scovazzi (eds), *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Martinus Nijhoff 2003) 4.

heritage in the Area is not to be considered part of the common heritage of mankind: the operation of the latter principle is strictly limited to the mineral resources of the Area.[256] Similarly, the authority of the International Seabed Authority does not extend to underwater cultural heritage in the Area, leaving the matter of the management of underwater cultural heritage in the Area unsettled.[257]

Although article 149 of UNCLOS frames the protection of cultural heritage through the lens of common interests – thereby placing it within the purview of the universalist approaches adopted within cultural heritage law – the UNCLOS regime remains hampered by the fact that it only recognises that this underwater cultural heritage is to be preserved 'for the benefit of mankind' when it is located in the Area.[258] It thereby leaves up in the air what the interest of international community is with respect to underwater cultural heritage located in areas under national jurisdiction (or whether such an interest even exists).[259]

The Underwater Cultural Heritage Convention partly remedies this issue. Article 2(3) thus posits that States Parties to the Convention 'shall preserve underwater cultural heritage for the benefit of humanity in conformity with the provisions of this Convention', indicating that the obligation is no longer limited to the Area.[260] During the drafting process it was considered that doing so would align the Convention with earlier cultural heritage treaties employing the concept of the cultural heritage of mankind,[261] thereby also filling the 'gap' created by article 149 of UNCLOS.[262] Along similar lines, the preamble of the Underwater Cultural Heritage Convention acknowledges that

256 UNCLOS art 136; see Dromgoole, *Underwater Cultural Heritage and International Law* (n 226) 30-2. During UNCLOS III, Greece and Turkey had sought to extend the working of the common heritage of mankind principle to the underwater cultural heritage in the Area; this proposal was rejected, and the drafters deliberately chose a different wording in order to refer to the international interest in archaeological or historical objects located in the Area: Šošić (n 253) 341-2.

257 Dromgoole, *Underwater Cultural Heritage and International Law* (n 226) 30-2, 121-2; Strati (n 223) 33-4.

258 Dromgoole, *Underwater Cultural Heritage and International Law* (n 226) 121-2.

259 Strati (n 223) 33-4.

260 Nicola Ferri, 'The Right to Recovered Underwater Cultural Heritage: The Neglected Importance of Article 149 of the UN Law of the Sea Convention' in Silvia Borelli and Federico Lenzerini (eds), *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Brill Nijhoff 2012) 258. With regards to the draft of this article in the initial ILA Draft Convention, see O'Keefe and Nafziger (n 242) 408 (article 3).

261 Anastasia Strati, Draft Convention on the Protection of Underwater Cultural Heritage: A Commentary (April 1999) CLT-99/WS/8, 24-5; Forrest, 'A New International Regime for the Protection of Underwater Cultural Heritage' (n 236) 519-20, at art 3.

262 CLT-99/WS/8 (n 261) 24-5.

the underwater cultural heritage is 'an integral part of the cultural heritage of humanity', as already noted above.[263]

While some commentators have argued that article 2(3) of the Convention appears to be largely aspirational, as 'the interests of humanity referred to are not given any legal basis',[264] there are nonetheless indications in the text of the Convention which could give weight to the interests of humankind in the protection of underwater cultural heritage.[265] With respect to several of their obligations, States Parties are thus expected to act either 'for the benefit of humanity as a whole, on behalf of all States Parties'[266] or 'for the public benefit',[267] thereby assuming a 'stewardship role' regardless of their individual connection to the heritage in question.[268] Nonetheless, as will be seen in the following chapter, the Convention does not remedy one of the main deficiencies of UNCLOS in relation to the management of the underwater cultural heritage: the absence of an international monitoring body which can 'act on behalf of humanity', fulfilling the same role for underwater cultural heritage as the International Seabed Authority does for the resources of the Area.[269] Instead, this responsibility remains wholly with the States Parties of the Convention, which are expected to cooperate with one another for this purpose. The Convention simultaneously also recognises that certain states have a particular interest in the preservation of certain forms of cultural heritage, acknowledging the already existing rights of flag states and providing extended rights to states which can demonstrate a 'verifiable link' to the heritage in question,[270] thereby somewhat tempering the universalist approach of the Convention.

All in all, this leaves the Underwater Cultural Heritage Convention in a somewhat curious position in relation to the notion of universality. While the Convention on the one hand acknowledges that certain states have a particular interest in the preservation of certain forms of underwater cultural heritage – and the Convention itself was the result of efforts by states particularly affected by unregulated access to 'their' underwater cultural heritage, such as Mediterranean states – a great deal of the heritage which the Convention seeks to preserve has an undeniably shared character. Yet by contrast to

263 Compare this to the initial emphasis in the ILA draft on 'the importance of the underwater cultural heritage as an integral part of the cultural heritage of humanity', and the statement that UCH 'belongs to the common heritage of humanity' and that responsibility for its protection is shared between 'all States and other subjects of international law': O'Keefe and Nafziger (n 242) 404. See also Garabello (n 227) 97-8.

264 Forrest, 'A New International Regime for the Protection of Underwater Cultural Heritage' (n 236) 519-20.

265 Šošić (n 253) 346-8.

266 Underwater Cultural Heritage Convention art 12(6).

267 Ibid art 18(4).

268 Dromgoole, *Underwater Cultural Heritage and International Law* (n 226) 133; Šošić (n 253) 346-8.

269 Dromgoole, *Underwater Cultural Heritage and International Law* (n 226) 126-7.

270 Ibid 133. See e.g. articles 9(5), 11(4), 18(3)-(4).

cultural heritage conventions such as the 1954 Hague Convention and the World Heritage Convention, this 'commonality' of underwater cultural heritage is not expressed directly in the definition of UCH in the Convention. The Convention's scope of protection is thus not defined by reference to the universal value or significance of the heritage to be protected; instead, it establishes a fairly broad net of protection.

However, as has been demonstrated above, in light of its position beyond the boundaries of state sovereignty, the underwater cultural heritage is simultaneously also placed within the framework of universal interest. UNCLOS establishes a general duty of cooperation and broad duty to protect objects of an archaeological and historical nature; it furthermore provides that these objects shall be preserved or disposed of for the benefit of mankind as a whole. This status has furthermore been underlined in the practice of the UN General Assembly since 2006, which has consistently '[emphasised] that underwater archaeological, cultural and historical heritage, including shipwrecks and watercrafts, holds essential information on the history of humankind and that such heritage is a resource that needs to be protected and preserved'.[271] Similarly, the Underwater Cultural Heritage Convention provides that underwater cultural is part of the cultural heritage of humanity. The responsibility of managing and preserving underwater cultural heritage is carried out by states as custodians of this heritage, and states are expected to cooperate in the interest of humanity. However, as we shall see in the next chapter, the modalities of this cooperation continue to be strictly determined by the maritime zone in which the cultural heritage is situated.

3.6 The Intangible Cultural Heritage Convention (2003)

As noted above in relation to the World Heritage Convention, subsequent practice of the States Parties to the World Heritage Convention has promoted

271 UNGA Res 60/30 (8 March 2006) UN Doc A/RES/60/30, preamble; UNGA Res 61/222 (16 March 2007) UN Doc A/RES/61/222, preamble; UNGA Res 62/215 (14 March 2008) UN Doc A/RES/62/215, preamble; UNGA Res 63/111 (12 February 2009) UN Doc A/RES/53/111, preamble; UNGA Res 64/71 (12 March 2010) UN Doc A/RES/64/71, preamble; UNGA Res 65/37 (17 March 2011) UN Doc A/RES/65/37, preamble; UNGA Res 66/231 (5 April 2012) UN Doc A/RES/66/231, preamble; UNGA Res 67/67 (18 April 2013) UN Doc A/RES/67/78, preamble; UNGA Res 68/70 (27 February 2014) UN Doc A/RES/68/70, preamble; UNGA Res 69/245 (24 February 2015) A/RES/69/245, preamble; UNGA Res 70/235 (15 March 2016) UN Doc A/RES/70/235, preamble; UNGA Res 71257 (20 February 2017) UN Doc A/RES/71/257, preamble; UNGA Res 72/73 (4 January 2018) UN Doc A/RES/72/73, preamble; UNGA Res 73/124 (31 December 2018) UN Doc A/RES/73/124, preamble; UNGA Res 74/19 (20 December 2019) UN Doc A/RES/74/19, preamble; UNGA Res 75/239 (5 January 2021) UN Doc A/RES/75/239, preamble; UNGA Res 76/72 (20 December 2021) UN Doc A/RES/76/72, preamble; UNGA Res 77/248 (9 January 2023) UN Doc A/RES/77/248.

a gradual shift of outright universalism towards greater representativity. The 2003 Intangible Cultural Heritage Convention can be seen as a culmination of these trends and a turning away from the outright universalism employed in projects such as the Hague Convention and the World Heritage Convention.[272] Unlike earlier attempts at international protection, the Intangible Cultural Heritage Convention emphasises the importance of intangible heritage to local communities, rather than to the international community as a whole – although not necessarily implying that these concepts are mutually exclusive.[273] The Convention furthermore explicitly employs the common concern principle which was formulated as an alternative to the common heritage of mankind principle in the context of international environmental treaties adopted during the 1990s; it also establishes that safeguarding intangible heritage is of interest to humanity as a whole, and therefore encourages states to cooperate to achieve this goal. In doing so, it engages once again in the delicate balancing act between universality and particularity surveyed above.

However, the development of the convention uncovers ambivalences amongst experts and state representatives on the role that universality should play in cultural heritage protection at the international level, demonstrating that it is instructive to take a closer look at its drafting history. In the early activities of UNESCO on intangible heritage in the 1970s and 1980s, UNESCO was initially preoccupied with the protection of 'folklore', in tandem with WIPO (the World Intellectual Property Organisation).[274] The concept of 'folklore' was predominantly defined from the perspective of the state, a position necessitated by the fact that the instruments and soft law documents adopted were aimed at providing model laws for national intellectual property protection. Folklore was thus, in reality, 'national folklore', and its value generated within the boundaries of the state.[275] In 1989, UNESCO diverged from its cooperation with WIPO, adopting the Recommendation on the Safeguarding of Traditional Culture and Folklore.[276] This recommendation was of a broader scope: in contrast to earlier documents, the Recommendation noted in its preamble that

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

273 Laurajane Smith and Natsuko Akagawa, 'Introduction' in Laurajane Smith and Natsuko Akagawa (eds), *Intangible Heritage* (Routledge 2009); Labadi (n 165) 8-9.

274 See also Lucas Lixinski, *Intangible Cultural Heritage in International Law* (Oxford University Press 2013) 29-31.

275 See 'Tunis Model Law on Copyright and Commentary' (1976) X Copyright Bulletin 10, section 6; Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (UNESCO/WIPO 1985) preamble, section 2.

276 UNESCO, Records of the General Conference, 25th Session (vol 1) Annex I (1989) Recommendation on the Safeguarding of Traditional Culture and Folklore.

'folklore forms part of the universal heritage of humanity',[277] although the definition of folklore itself was firmly rooted in the idea that it emerged from a given community.[278] This stood in stark contrast to the predominantly state-driven processes of the UNESCO heritage flagship, the World Heritage Convention.

The Recommendation remained largely unimplemented;[279] to this end, in 1993 Korea proposed to UNESCO's Executive Board the creation of a new system of 'living cultural treasures'.[280] Within this new line of thinking, intangible heritage continued to be part of the heritage of mankind,[281] except now in combination with a similar logic to the World Heritage Convention: the establishment of a list of particularly valuable manifestations of heritage. In 1997 UNESCO took the initiative international, instituting the 'Masterpieces of Oral and Intangible Heritage of Humanity' programme.[282] The programme drew upon a similar framework to that of the World Heritage Convention; the initial selection criteria for the programme emphasised the 'outstanding value' of the listed heritage, and its position within the 'oral and intangible heritage of humanity'.[283] This was heavily critiqued by UNESCO Member States,[284] whereupon the definition of 'outstanding value' was tempered, being defined in light of the value to the local community and the particularity

277 A proposal which had been introduced by France: Draft Recommendation to Member States on the Safeguarding of Folklore (5 June 1989) 25 C/33, Ann. II, para 28. See also Report, Special Committee of Technical and Legal Experts on the Safeguarding of Folklore (5 June 1987) UNESCO/PRS/CLT/TPC/SPL/6, para 17.

278 Recommendation on the Safeguarding of Traditional Culture and Folklore (n 276) art A.

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

280 Establishment of a System of 'Living cultural properties' (living human treasures) at UNESCO (10 August 1993) 142 EX/18, 1; Establishment of a system of 'living cultural properties' (living human treasures) at UNESCO (10 December 1993) 142 EX/SR.12.

281 International Consultation on New Perspectives for UNESCO's Programme: The Intangible Cultural Heritage (16-17 June 1993) CLT/ACL/93/IH/01, 20.

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

283 155 EX/Decisions (n 282) Decision 3.5.5, Annex, Regulations relating to the proclamation by UNESCO of masterpieces of the oral and intangible heritage of humanity, paras 1(a), 6(a). See also 155 EX/15 (25 August 1998).

284 Proposal by the Director-General Concerning the Criteria for the Selection of Spaces or Forms of Popular and Traditional Cultural Expression that Deserve to be Proclaimed by UNESCO to be Masterpieces of the Oral Heritage of Humanity (24 March 1998) 154 EX/13, Annex III, para 6; 154 EX/Decisions (n 282) Decision 3.5.1; Summary Records of the 157th Session of the Executive Board of UNESCO (1999) 157 EX/SR.1-11, 133-4. See Noriko Aikawa-Faure, 'From the Proclamation of Masterpieces to the Convention for the Safeguarding of Intangible Cultural Heritage' in Laurajane Smith and Natsuko Akagawa (eds), *Intangible Heritage* (Routledge 2009) 19-20, 32.

of the tradition.[285] Similarly, the term 'masterpieces' was stripped of any comparative value, defined as 'defying any formal rules and not measurable by any external yardstick'.[286] In doing so, any element of universality in the implementation of the Masterpieces programme was defined away, yet the programme retained the veneer of universality in order to incentivise financial support.[287]

Simultaneously, progress was underway on the adoption of a new convention on the protection of traditional culture and folklore, where the emphasis on universality that had been present in the Masterpieces programme was notably absent.[288] In an initial expert meeting in March 2001 in Turin on the preparation of a definition of intangible cultural heritage for a future convention, two ideas of intangible heritage circulated. On the one hand, Francesco Francioni proposed that the definition of intangible heritage should include some reference to 'importance' or 'significance', and that the 'loss or destruction of such heritage amounts to loss and impoverishment of the common cultural heritage of humanity', along the lines of the 1954 Hague Convention.[289] However, the suitability of notions of outstanding universal value in the context of intangible heritage led to some doubts amongst the experts.[290] Thus, by contrast, Janet Blake noted that any definition of intangible cultural heritage must not be presented as part of the common heritage of mankind (which would, according to the logic of environmental law, imply that it could not be appropriated), but rather 'as a matter of universal *interest*', an idea that was generally accepted by the other participants.[291] However, the eventual draft definition contained no reference to universal interest, merely defining intangible cultural heritage firstly by virtue of the role it plays in providing a sense of continuity and cultural identity to communities, and secondly by reference to the role it plays in safeguarding cultural diversity.[292] It was agreed by

285 Ibid 32. See also Final Report, International Jury for the Proclamation by UNESCO of Masterpieces of the Oral and Intangible Heritage of Humanity (18 January 2002) RIO/ITH/2002/INF/6.

286 Ibid 33.

287 Ibid 16, 19.

288 30 C/Resolution 25 (1999) para B.2(a)(iii).

289 Francesco Francioni, Intangible Cultural Heritage – Working Definitions (UNESCO 2001) 4.

290 Final Report, International Round Table on 'Intangible Cultural Heritage – Working Definitions', 14-17 March, Turin, Italy (UNESCO 2001) 14; Aikawa-Faure (n 284) 30.

291 Final Report, International Round Table on 'Intangible Cultural Heritage – Working Definitions', 14-17 March, Turin, Italy (UNESCO 2001) 12, 14; see also Janet Blake, *Developing a New Standard-setting Instrument for the Safeguarding of Intangible Cultural Heritage: Elements for Consideration* (UNESCO 2001). Aikawa-Faure (n 284) 28.

292 Report on the Preliminary Study on the Advisability of Regulating Internationally, Through a new Standard-Setting Instrument, the Protection of Traditional Culture and Folklore (16 May 2001) 151 EX/15, Annex, Action Plan for the Safeguarding of the Intangible Cultural Heritage, p 3; Aikawa-Faure (n 284) 31.

the General Conference of UNESCO to use this definition as a starting point for deliberations on the draft convention.[293]

These thoughts on the unsuitability of universalist language in the draft convention were to be echoed in the meetings that followed. It was decided that the text of the World Heritage Convention should be used as a starting point, which immediately produced one problem: should the future convention on intangible heritage also employ the criterion of 'outstanding universal value', so central to the World Heritage Convention? During the first meeting of the select drafting group of the preliminary convention, chair Mohammed Bedjaoui noted that the term 'universal value' should not be applied in the context of the draft convention for intangible cultural heritage, 'because of the very nature and the specificity of this form of heritage'.[294] To do so would merely be 'unjust or arbitrary, or quite simply impossible … since only comparable things should be compared'.[295] It was even noted that intangible heritage does not have any universal elements, in and of itself.[296] As such, it was decided to substitute the phrase 'outstanding universal value' used in the World Heritage Convention for 'outstanding *specific* value',[297] a yet-to-be-defined term. It was furthermore decided that references to phrases such as 'universal' or 'global' were to be avoided in the work of the select drafting group.[298]

Nonetheless, the preamble of the preliminary draft did note that the disappearance of intangible cultural heritage of one country is a loss for the cultural heritage of humanity, in light of the diminishing of cultural diversity that results from it.[299] However, reservations were expressed as to the use of phrases drawn from international environmental law such as 'common concern' in the preamble.[300] Along similar lines, Bedjaoui simultaneously proposed that the preliminary draft convention could include an article which was equivalent to article 6 of the World Heritage Convention, which notes that the heritage protected by the Convention 'constitutes a world heritage for whose protection it is the duty of the international community as a whole

293 UNESCO, Records of the General Conference, 31st Session (vol 1) 31 C/Resolution 30 (2001). See also Oral report of the Chairperson of Commission IV (12 November 2001) 31 C/INF.24; Address by Mr Koïchiro Matsuura at the meeting of experts on the preliminary draft of the International Convention for the Safeguarding of the Intangible Heritage (20 March 2002) DG/2002/26, p 2-3.

294 Outline Work Plan Prepared by Mohammed Bedjaoui for the First Meeting of the Select Drafting Group of a Preliminary International Convention on Intangible Cultural Heritage (2001) 9-10.

295 Ibid 41.

296 Final Report of the First Meeting of the Restricted Drafting Group (10 June 2002) GRR2/CH/2002/WD/6, 5.

297 Outline Work Plan (n 294) 41; GRR2/CH/2002/WD/6 (n 296) 10.

298 GRR2/CH/2002/WD/6 (n 296) 10.

299 Ibid 5.

300 Ibid.

to cooperate'. In doing so, he noted that the concept of 'world heritage' could be reformulated and replaced with the concept of 'common heritage of humanity'.[301] This proposal was once again met with reservation, as it was noted that the use of the phrase 'common heritage of humanity' should be avoided and that the safeguarding of intangible heritage should not be seen as a 'common good' or as 'shared heritage'.[302] The participants noted that 'le qualificatif universel ne doit pas s'appliquer au patrimoine immatériel lui-même, mais à la justification de sa sauvegarde'.[303]

At the second meeting of the select drafting group, a preliminary draft convention was drawn up. During this meeting the experts once again reflected on the impracticalities of applying the logic of 'outstanding value' to intangible cultural heritage.[304] One member noted that a reference to the fact that the safeguarding of intangible heritage is a common concern of humankind should also include a reference to 'the particular importance of [intangible cultural heritage] to the local community that creates it', although this proposal was not taken up.[305] The preliminary draft contains a number of instructive elements from the perspective of examining the role of universality in the drafting debates as a whole; despite earlier misgivings, the preamble noted 'the general interest and common concern for the safeguarding of the intangible cultural heritage of humanity'.[306] Akin to the World Heritage Convention, the draft convention provided for a system of both national safeguarding and international cooperation. With regard to the latter point, the preliminary draft noted that, while respecting state sovereignty, 'the States Parties recognize that such heritage is of general interest to humanity, and undertake to cooperate ... for its safeguarding'.[307] Crucially, the preliminary draft called for the creation of an international list of intangible cultural heritage, the items on which should have 'outstanding specific value', with the drafting committee noting that a definition still needed to be reached on the meaning of this term, in particular the meaning of 'outstanding'.[308]

This preliminary draft was subsequently examined at the intergovernmental level by an Intergovernmental Meeting of Experts, where doubts were immediately expressed about the utility of a list of intangible heritage and the nature of the list: should it contain intangible heritage of 'specific', 'exceptional' value; should it be a list of heritage at risk; should it be a global inventory; or should

301 Outline Work Plan (n 294); GRR2/CH/2002/WD/6 (n 296) para 4.
302 GRR2/CH/2002/WD/6 (n 296) 5, 7-8.
303 Or, in other words, that 'the universal qualifier should not apply to the intangible heritage itself, but to the justification for its safeguarding': ibid 7-8.
304 Meeting Report of the Second Meeting of the Select Drafting Group (13-15 June 2002) 15.
305 Ibid 13.
306 First Preliminary Draft of an International Convention for the Safeguarding of the Intangible Cultural Heritage (26 July 2002) CLT-2002/CONF.203/3.
307 Ibid art 6(1).
308 Ibid art 11(2).

the list only specify 'best practices'?[309] A significant number of states were of the view that there should be no list at all, as this would imply ranking the 'unrankable'. A circular letter was sent to the Member States of UNESCO, inviting comments on the consolidated preliminary text.[310] A number of the responses received touched upon the theme of universality: thus Turkey observed if the criteria of 'outstanding specific value' were to be adopted as the guideline for inclusion on an international register, it would need further definition, 'because qualification or any implication of some kind of ranking among elements could lead to uncertainty'.[311]

By contrast, a small number of other states emphasised the role that 'significance' should play in the convention; thus Australia noted that '[s]ignificance assessment is important because it ensures that scarce resources are directed only at the preservation of heritage of outstanding local, national or international value', once again driving home the point that significance and selection is often also a matter of available budget.[312] Similarly, France noted that a 'convention which claimed to safeguard the whole of the intangible cultural heritage would be bound to fail ... Our conservation efforts should, logically, be applied mainly to those elements of the intangible cultural heritage that are in immediate danger'.[313] A number of other proposals were made to emphasise the universal nature of the intangible heritage,[314] with Indonesia even going so far as to state that:

> It should be made clearer why the intangible cultural heritage is useful for humanity, and worthy of safeguarding … Simply being "of general interest" is not going to be sufficient reason for governments to provide the funds needed to preserve the intangible cultural heritage. Even if such preservation is funded, if people from all over the world do not understand the utility of intangible culture, it will in any case die out, because people tend to give importance to those things which they preserve to be of pragmatic use, whereas things which they do not consider to be of real use, they will neglect or totally forget.[315]

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

310 Second Session of the First Intergovernmental Meeting on the Preliminary Draft Convention for the Safeguarding of the Intangible Cultural Heritage (31 January 2003) CL/3651.

311 Compilation of Amendments from Member States Concerning the Convention for the Safeguarding of the Intangible Cultural Heritage (12 February 2003) CLT-2003/CONF.203/3 Rev., 68.

312 General Comments Received from Member States (January 2003) CLT-2003/CONF.205/5, 7.

313 Ibid 29.

314 See e.g. the proposals by Benin and the Africa Group (at 4); Bolivia (at 9); Benin, Bolivia, Chile and the Africa Group (at 11) in CLT-2003/CONF.203/3 Rev (n 311).

315 Ibid 51.

Nor did the application of the common concern principle seem to attract the same level of concern amongst states as it had amongst the experts of the select drafting group, with no states addressing the utility of the application of the concept to intangible heritage.[316]

At the second session of the Intergovernmental Meeting of Experts, it was ultimately agreed that while the establishment of a national inventory of intangible heritage should be the priority of the convention, there should nonetheless also be an international list, despite the fact that a significant number of countries had submitted amendments on the unsuitability of this approach for intangible heritage; such international listing 'would ensure the visibility of cultural heritage and promote cultural diversity'.[317] A proposal was made to create a 'List of Treasures of the World Intangible Cultural Heritage', with the reference to 'outstanding specific value' being deleted and the criteria for inclusion being deferred to after the approval of the convention.[318] Simultaneously, it was stressed that 'exceptional value' should not form the point of emphasis in the convention and proposed list: instead, the convention was to seek to safeguard intangible heritage of 'cultural significance'.[319] An intangible heritage fund would also be accessible to all forms of intangible heritage, not only that of 'exceptional value'.[320]

At the final Intergovernmental Meeting of Experts in June 2003, the phrasing of the international list was once again altered, from 'List of Treasures of the World Intangible Cultural Heritage' to a 'Representative List of the Intangible Heritage of Humanity', as 'the term "representative list" was preferred to "masterpieces" and "treasures", which had been proposed initially'.[321] These changes were the result of intense debates between those states which favoured a list of exceptional heritage (led by Japan), and those that preferred a list which did not seek to establish a ranking based on criteria of excellence (led by a group of small-island states: Grenada, Saint Lucia, Barbados and Saint-Vincent and the Grenadines).[322] The latter noted that

316 Ibid 4.

317 Second Session of the Intergovernmental Meeting of Experts on the Preliminary Draft Convention for the Safeguarding of the Intangible Cultural Heritage (April 2003) CLT-2003/CONF.205/6, 5.

318 Semi-Consolidated Draft Convention for the Safeguarding of Intangible Cultural Heritage (April 2003) CLT-2003/CONF-206/1, art 11(c)

319 Report of Intersessional Working Group of Government Experts on the Preliminary Draft Convention for the Safeguarding of the Intangible Cultural Heritage (May 2003) CLT-2003/CONF.206/3, para 21.

320 Ibid para 23.

321 Report of Third Session of the Intergovernmental Meeting of Experts on the Preliminary Draft Convention for the Safeguarding of the Intangible Cultural Heritage (31 July 2003) CLT-2003/CONF.206/4, 7. See also Consolidated Preliminary Draft Convention for the Safeguarding of the Intangible Cultural Heritage (May 2003) CLT-2003/CONF.206/2.

322 Valdimar Tr. Hafstein, 'Intangible Heritage as a List: From Masterpieces to Representation' in Anita Smith and Natsuko Akagawa (eds), *Intangible Heritage* (Routledge 2009) 97-8.

'[t]he intangible cultural heritage of any group is valuable and to them, if only to them. The convention, therefore, should not just recognize intangible cultural heritage of "exceptional" value'.[323] By contrast, the members of the former group noted that 'hierarchy is a fact of history', calling for a distinction between an 'anthropological view of heritage and a political view of heritage'.[324] Pragmatism once again reared its head, with the Brazilian delegate noting 'we cannot safeguard everything, and this means that we cannot value everything equally'.[325] A middle ground was ultimately found by creating a list which favoured representativity, rather than excellence, and deferring the issue of selection criteria until after the adoption of the convention. The convention was ultimately approved by consensus and adopted at the 32nd session of the UNESCO General Conference in October 2003.[326]

Unlike earlier UNESCO heritage conventions, intangible cultural heritage is not defined by its 'external' value to the international community, but rather by its importance to a given community.[327] In adopting local value as the criterion for establishing protection, the Intangible Cultural Heritage Convention reverses the trends established in earlier cultural heritage conventions, which sought to define value in light of the international – the Hague Convention and the World Heritage Convention – or the national – the 1970 Convention and the Underwater Cultural Heritage Convention. Rather than focusing on universal value, the only limitation imposed by the Intangible Heritage Convention is compatibility of a given form of intangible heritage with existing human rights and sustainable development.[328]

However, safeguarding of the intangible cultural heritage of *humanity* still remains the goal of the convention, as is evident from the reference thereto in the preamble and the position of Representative List of the Intangible Cultural Heritage of Humanity at the heart of the Convention.[329] Furthermore, the Intangible Cultural Heritage Convention also employs the common concern principle, despite doubts being expressed as to the utility of doing so; this entails that there is in principle some common interest and benefit in undertaking actions to protect intangible cultural heritage at the international level.[330] As noted above, the principle does not entail specific substantive obligations, but does indicate that the sovereignty of states is not unfettered,[331] and that there is indeed a shared international interest in pro-

323 Ibid 101.
324 Ibid 103-4.
325 Ibid 104.
326 32 C/Resolution 32.
327 Intangible Heritage Convention, art 2(1).
328 Ibid.
329 Ibid art 16.
330 Brunnée (n 215) 564-5.
331 Ibid 565-7.

tection.[332] Similarly, the intangible heritage regime also showcases similar elements which are present in other common concern regimes, such as burden-sharing, international cooperation, and a degree of intergenerational equity.[333]

3.7 Parallel developments

Beyond the realm of the cultural heritage instruments surveyed above, a number of other instruments and legal regimes are relevant to the broader protection of culture as a phenomenon, such as international criminal law (which prohibits attacks against cultural heritage, particularly in its tangible forms), human rights law (which protects cultures, and increasingly also cultural identity and cultural heritage, in the form of cultural rights), the 2005 Convention on Cultural Diversity (which preserves states' sovereign discretion to regulate their cultural affairs). Although these regimes will not form the focus of the rest of the dissertation, it is nonetheless important to briefly mention them here in order to both compare and contrast them to the trends of universality outlined above and in the previous chapter. Whilst issues relating to cultural heritage have also been regulated in numerous regional agreements on cultural cooperation and cultural heritage protection, these treaties are beyond the scope of the present discussion;[334] as such, the follow-

332 Thomas Cottier and others, 'The Principle of Common Concern and Climate Change' (2014) 52 Archiv des Völkerrechts 293, 307-308.

333 Brunnée (n 215) 565-7; Nadia Sánchez Castillo-Winckels, 'Why "Common Concern of Humankind" Should Return to the Work of the International Law Commission on the Atmosphere' (2017) 29 Georgetown Environmental Law Review 131, 144.

334 A number of these regional conventions nonetheless mirror the dynamics within cultural heritage law with regards to their engagement (or explicit rejection) of the language of universality. Within Europe, the primary developments have taken place within the context of the Council of Europe: see inter alia the European Convention on the Protection of the Archaeological Heritage (Revised) (adopted 16 January 1992, entered into force 25 May 1995) ETS No. 143 (Valletta Convention); the European Landscape Convention (adopted 20 October 2000, entered into force 1 March 2004) ETS No. 176; the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (adopted 27 October 2005, entered into force 1 June 2011) CETS No. 199 (Faro Convention). However, see also the development of the cultural policies of the European Union, such as the European Heritage Label: Andrzej Jakubowski, Kristin Hausler and Francesca Fiorentini (eds), *Cultural Heritage in the European Union: A Critical Inquiry into Law and Policy* (Brill 2019); Tuuli Lähdesmäki and others (eds), *Creating and Governing Cultural Heritage in the European Union: The European Heritage Label* (Routledge 2020). Within the Middle East, see inter alia the Charter of Arab Cultural Unity (adopted 29 February 1964, entered into force 25 July 1970), reproduced in Amos J. Peaslee and Dorothy Peaslee Xydis, *International Governmental Organizations: Consitutional Documents*, vol III/IV (3rd edn, Martinus Nijhoff 1979) 24. In relation to Latin America, see the Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3 (OAS Charter), art 48. Concerning Africa, see the Cultural Charter for Africa (adopted 5 July 1976, entered into force 19 September 1990) AHG/Res 82, arts 1, 26; Charter for African Cultural Renaissance

ing section focuses on international criminal law, international and regional human rights regimes, and the 2005 Convention on Cultural Diversity.

3.7.1 The 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD) was adopted in 2005; it notes in its preamble that 'cultural diversity is a defining characteristic of humanity', and furthermore that 'cultural diversity forms a common heritage of humanity and should be cherished and preserved for the benefit of all'.[335] It emphasises the importance of cultural diversity for a range of societal issues, such as international peace and security, human rights, and sustainable and economic development. It recognises 'the need to take measures to protect the diversity of cultural expressions, including their contents, especially in situations where cultural expressions may be threatened by the possibility of extinction or serious impairment'. It firmly states that 'cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value', and calls attention to the imbalance between 'rich and poor countries' with regards to the protection of cultural diversity. To this end, the objectives of the Convention are, amongst others, 'to protect and promote the diversity of cultural expressions', 'to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning', and 'to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory'.[336]

As such, the goals of the Convention are different from the other cultural heritage conventions discussed above: the goal is not the protection of culture in and of itself, but the preservation of states' sovereign discretion to regulate their cultural affairs in light of increasing pressures at the global level from international economic organisations such as the World Trade Organisation (WTO); the Convention was intended to serve as a 'cultural counterbalance' in discussions on the linkages between trade and culture. However, it has simultaneously been critiqued as 'disguised protectionism' by seeking to create cultural exceptions to WTO rules, such as national treatment and the most-

(adopted 24 January 2006, not yet entered into force). In relation to Asia, see the ASEAN Declaration on Cultural Heritage (adopted 25 July 2000).

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

336 Ibid art 1(a), (g), (h).

favoured-nation clause.[337] The origins of the Cultural Diversity Convention are thus fundamentally different from the five conventions surveyed above, being rooted in opposition amongst certain states to the expansion of the mandate of the WTO in the area of audio-visual services in particular.[338] This opposition was able to take root within UNESCO, resulting first in the adoption in 2001 of the Universal Declaration on Cultural Diversity,[339] and later the Convention itself, which entered into force in 2007 and has 153 States Parties as of 2023, including the European Union.[340] The Convention seeks to grant states greater discretion to determine their cultural policies than was thought to be possible to achieve within other fora,[341] simultaneously raising questions on the compatibility of the Convention with WTO law.[342] In this sense, it is comparable to the contestation between the WTO and WIPO concerning the regulation of genetic resources, traditional knowledge and folklore.[343] In light of these considerations, this dissertation shall not examine the CCD in further depth.

337 Christoph Beat Graber, 'The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?' (2006) 9 Journal of International Economic Law 553, 553; Sabine von Schorlemer, 'Cultural Diversity' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2009) para 20.

338 Graber (n 337) 554-555.

339 2001 UNESCO Universal Declaration on Cultural Diversity, UNESCO, Records of the General Conference, 31st Session (vol 1) 31 C/Resolution 25 (2001).

340 On the implementation of the Cultural Diversity Convention, see Mira Burri, 'The UNESCO Convention on Cultural Diversity: An Appraisal Five Years after Its Entry into Force' (2013) 20 International Journal of Cultural Property 357; Lilian Richieri Hanania (ed) *Cultural Diversity in International Law: The Effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Routledge 2014).

341 See e.g. arts 5, 6 of the Cultural Diversity Convention. For the background to the debate on the linkages between trade and culture, see Mary E. Footer and Christoph Beat Graber, 'Trade Liberalisation and Cultural Policy' (2000) 3 Journal of International Economic Law 115; Yvonne Donders, 'The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions' in Hildegard Schneider and Peter Van den Bossche (eds), *Protection of Cultural Diversity from a European and International Perspective* (Intersentia 2008).

342 See e.g. Michael Hahn, 'A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law' (2006) 9 Journal of International Economic Law 515; Tania Voon, 'UNESCO and the WTO: a Clash of Cultures?' (2006) 55 ICLQ 635; Jan Wouters and Bart de Meester, 'The UNESCO Convention on Cultural Diversity and WTO Law: A Case Study in Fragmentation of International Law' (2008) 42 Journal of World Trade 205; Hélène Ruiz Fabri Fabri, 'Games within Fragmentation: the Convention on the Protection and Promotion of the Diversity of Cultural Expressions' in Sarah Joseph and David H. Kinley (eds), *The World Trade Organization and Human Rights: Interdisciplinary Perspectives* (Elgar 2009).

343 See e.g. Ruth L. Okediji, 'WIPO-WTO Relations And The Future Of Global Intellectual Property Norms' (2008) 39 Netherlands Yearbook of International Law 69; Sun Thathong, 'Lost in Fragmentation: The Traditional Knowledge Debate Revisited' (2014) 4 Asian JIL 359.

3.7.2 International criminal law

As noted in Chapter 2, cultural heritage has also increasingly featured in the work of international criminal courts and tribunals such as the ICC and ICTY.[344] Thus the ICTY Statute prohibits violations of the laws or customs of war, including the 'seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science'.[345] The Rome Statute, for its part, prohibits the war crime of '[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives'.[346] The Rome Statute furthermore prohibits persecution against groups or collectivities on cultural grounds,[347] defined as 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity',[348] thereby not necessarily protecting tangible manifestations of cultural heritage in and of themselves, but instead the cultural identities that underlie the existence of a given group.

While the cultural heritage jurisprudence of the ICTY and the ICC is not the focus of the present dissertation, these developments nonetheless indicate how pervasive ideas of cultural heritage universalism are even outside the realm of cultural heritage law. Both the ICC and ICTY have thus at times relied upon the logic that not only individual communities are affected by the destruction of cultural heritage, but also the international community – or indeed humanity – as a whole.[349] In doing so, they frequently draw upon ideas of

344 For an overview of this jurisprudence, see inter alia Federico Lenzerini, 'The Role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage' in Francesco Francioni and James Gordley (eds), *Enforcing International Cultural Heritage Law* (Oxford University Press 2013); Serge Brammertz and others, 'Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY' (2016) 14 Journal of International Criminal Justice 1143; Micaela Frulli, 'International Criminal Law and the Protection of Cultural Heritage' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020).

345 UNSC Res 827 (25 May 1993) UN Doc S/RES/827, art 3(d).

346 1998 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 8(2)(b)(ix), 8(2)(e)(iv).

347 Ibid art 7(1)(h).

348 Ibid art 7(2)(h).

349 See e.g. Brammertz and others (n 344) 1161 (recalling the statement by the *Kordić and Čerkez* Trial Chamber that attacks against cultural property '[amount] to an attack on the very … identity of a people. As such, it manifests a nearly pure expression of the notion of "crimes against humanity", for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural obejcts'). See also Drazewska (n 19) 212-6; Yaron Gottlieb, 'Attacks Against Cultural Heritage as a Crime Against Humanity' (2020) 52 Case Western Reserve Journal of International Law 287, 302-8.

universality which were originally put forward within the realm of cultural heritage law, such as in the 1954 Hague Convention. Simultaneously, both institutions have (to varying degrees of success) also underlined the impact of cultural heritage destruction upon *local* communities alongside the international community,[350] mirroring the same shift towards community-centric heritage within the UNESCO instruments outlined in the introduction.

The most recent example of the approach within international criminal law to cultural heritage is the *Al Mahdi* case at the ICC. In its judgment, the Trial Chamber relied upon the World Heritage status of the mausoleums and mosques which had been targeted by the *Hesbah* in order to indicate their status as protected buildings, recalling that 'UNESCO's designation of these buildings reflects their special importance to international cultural heritage';[351] more broadly, the Trial Chamber relied not only on the impact of the destruction of the buildings for the community of Timbuktu, but also upon the international community as a whole.[352] Furthermore, at the reparations phase, the Chamber noted as a preliminary observation that '[t]he international community has recognised in various legal instruments the importance of the human rights to cultural life and its physical embodiments', including in the 1954 Hague Convention.[353] It further noted that '[w]orld cultural heritage is a most important category. Greater interest vested in an object by the international community reflects a higher cultural significance and a higher degree of international attention and concern'.[354] It also drew attention to the fact that '[i]nscription on the World Heritage List requires a very strict procedure whereby it must be shown, *inter alia*, that the object or site at stake has an exceptional quality that transcends national borders'.[355] In its Reparations Order, the Trial Chamber explicitly indicated that the international community was a victim of Al Mahdi's crimes, granting it a symbolic $1 in reparations; this amount was presented to UNESCO as a representative of the international

350 Janine Natalya Clark, 'The Destruction of Cultural Heritage in Armed Conflict: The "Human Element" and the Jurisprudence of the ICTY' (2018) 18 International Criminal Law Review 36; Ciara Laverty, 'Making Crimes Mean: A Normative Analysis of the Acts that Constitute International Crimes' (PhD dissertation, Leiden University 2022) 53-114.

351 *Prosecutor v. Ahmad Al Faqi Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15 (27 September 2016) para 46.

352 Ibid para 46, 80. See also Paige Casaly, 'Al Mahdi before the ICC' (2016) 14 Journal of International Criminal Justice 1199, 1213-14, 1216.

353 *Prosecutor v. Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15 (17 August 2017) para 14. The Chamber further referred to article 53 of Additional Protocol I to the Geneva Conventions and article 16 of Additional Protocol II to the Geneva Conventions, article 4 of the 1954 Hague Convention and article 15 of the Second Protocol to the 1954 Hague Convention.

354 Ibid para 17.

355 Ibid para 20.

community.[356] This was because the destruction of heritage at Timbuktu was seen to 'harm all', in light of the attack it represented on cultural diversity.[357]

3.7.3 Human rights law

International law also touches upon issues relating to the protection of cultural heritage with respect to the cultural rights enshrined in a range of international and regional human rights treaties, in particular through the right to take part in cultural life.[358] At the international level, the right to take part in cultural life is protected by a range of instruments: most prominently in article 27(1) of the Universal Declaration of Human Rights and article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and in comparable articles in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[359] the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[360] the Convention on the Rights of the Child (CRC),[361] the Convention on the Rights of Persons with Disabilities (CRPD),[362] and the Migrant Workers Convention,[363] as well as provisions on minority and Indigenous rights in instruments such

356 Ibid para 53, 106-7.

357 Oumar Ba, 'Who are the Victims of Crimes Against Cultural Heritage?' (2019) 41 HRQ 578, 582.

358 For a comprehensive overview of cultural rights, see Elsa Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (Brill 2007); Pok Yin S. Chow, *Cultural Rights in International Law and Discourse: Contemporary Challenges and Interdisciplinary Perspectives* (Brill Nijhoff 2018). Other cultural rights include the right of each individual '[t]o enjoy the benefits of scientific progress and its applications' and the right '[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author': International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 15(1)(b)-(c). The following section will however focus on the right to take part in cultural life. In addition it is increasingly common to also group the right to education, freedom of expression and association, and the rights of minorities and Indigenous peoples under the heading of cultural rights: Julie Ringelheim, 'Cultural Rights' in Daniel Moeckli and others (eds), *International Human Rights Law* (4th edn, Oxford University Press 2022) 286-7, 290-1.

359 1966 International Covenant on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (ICERD) art 5(e)(iv).

360 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 13(c).

361 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 31.

362 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) art 30.

363 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (Migrant Workers Convention) art 43(1)(g), 45(1)(d).

as the International Covenant on Civil and Political Rights (ICCPR), ILO Convention No. 169, and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[364] The right is furthermore explicitly protected at the regional level in the Arab Charter on Human Rights,[365] the African Charter on Human and Peoples Rights,[366] the 1948 American Declaration on the Rights and Duties of Man and the San Salvador Protocol to the American Convention on Human Rights.[367] Of these regional rights, only those enshrined in the African Charter have given rise to judicial practice,[368] as the statute of the Arab Court of Human Rights has yet to enter into force and neither the American Declaration nor the San Salvador Protocol can give rise to individual petitions before the Inter-American Court.

However, cultural rights have nonetheless been implicitly protected by both the European Court of Human Rights (ECtHR) and the Inter-American Court on Human Rights (IACtHR), indicating the cross-cutting nature of cultural

364 E.g. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 1(1), 27; 1989 ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 26 June 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO Convention No. 169) arts 2(2)(b), 5(a), 7; UNGA Res 61/295, United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007) UN Doc A/RES/61/295, arts 3, 5, 8, 11, 12, 31

365 Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) art 42(1).

366 1981 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (African Charter) art 17(2). The individual right to take part in the cultural life of the community (grouped in the same article as the right to education and the promotion of morals and traditional values) is paired with the concomitant duty '[t]o preserve and strengthen positive African values' (art 29(7)), although it remains unclear what these 'African values' are. Such duties can potentially be owed not only 'towards his family and society', but also to 'the State and other legally recognized communities and the international community' (art 27): see Blake, *International Cultural Heritage Law* (n 10) 315.

367 The 1948 Declaration provides in its preamble that 'culture is the highest social and historical expression of … spiritual development', and that 'it is the duty of man to preserve, practice and foster culture by every means within his power': American Declaration of the Rights and Duties of Man (adopted 2 May 1948) OEA/Ser.L/VI/1.4. In addition, Article XIII of the 1948 Declaration provides that '[e]very person has the right to take part in the cultural life of the community'. Finally, article 14 of the San Salvador Protocol provides for the right to take part in the 'cultural and artistic life of the community': Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 17 November 1988, entered into force 16 November 1999) 28 ILM 156 (San Salvador Protocol) art 14.

368 ACmHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (4 February 2010) Application No. 276/2003; ACtHPR, *African Commission on Human and Peoples' Rights v. Republic of Kenya* (Judgment of 26 May 2017) Application No. 006/2012. On the interpretation of article 17(2), see Folarin Shyllon, 'Collective Cultural Rights as Human Rights Simpliciter: The African and African Charter Example' in Andrzej Jakubowksi (ed), *Cultural Rights as Collective Rights: An International Law Perspective* (Brill 2016); Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford University Press 2019) 452-6.

issues across all human rights.[369] In the case of the ECtHR, cultural rights have thus been discussed by the Court in the context of the right to private and family life, the freedom of thought, conscience and religion, and the freedom of expression.[370] In the case of the Inter-American system, cultural rights have been brought before the IACtHR under the scope of the right to property of Indigenous peoples,[371] and under the heading of article 26 of the American Convention on Human Rights, which provides for the progressive development of economic, social and cultural rights.[372]

While, as Donders argues, it is important to distinguish between regimes aimed at the safeguarding of cultural heritage and cultural rights under human rights law – in light of the fact that 'the international legal underpinning these concepts is different and the international legal instruments protecting one

369 Kristin Hausler, 'Collective Cultural Rights in the Inter-American Human Rights System' in Andrzej Jakubowksi (ed), *Cultural Rights as Collective Rights: An International Law Perspective* (Brill 2016) 237. However, as Donders points out, it remains important to distinguish between '[r]ights that explicitly refer to culture', '[r]ights that have a direct link with culture', and rights which merely have a 'cultural dimension': Yvonne Donders, 'Foundations of Collective Cultural Rights in International Human Rights Law' in Andrzej Jakubowksi (ed), *Cultural Rights as Collective Rights: An International Law Perspective* (Brill 2015) 90-2. The elusive nature of cultural rights has similarly formed a ground of critique for certain authors, who argue that the all-encompassing definition of 'culture' means that it is arguably possible to view *all* human rights as cultural rights: see e.g. Céline Romainville, 'Defining the Right to Participate in Cultural Life as a Human Right' (2015) 33 Netherlands Quarterly of Human Rights 405, who proposes a more stringent definition.

370 Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (Oxford University Press 2014) 1178; European Court of Human Rights, Research Division, *Cultural Rights in the Case-law of the European Court of Human Rights* (Council of Europe 2017); Andrzej Jakubowski, 'Cultural Heritage and the Collective Dimension of Cultural Rights in the Jurisprudence of the European Court of Human Rights' in Andrzej Jakubowski (ed), *Cultural Rights as Collective Rights: An International Law Perspective* (Brill 2016). See e.g. *Khurshid Mustafa and Tarzibachi v. Sweden,* App. No. 23883/06 (2008); *Sargsyan v. Azerbaijan,* App. No. 40167/06 (2017).

371 Hausler (n 369); Ludovic Hennebel and Hélène Tigroudja, *The American Convention on Human Rights: A Commentary* (Oxford University Press 2022) 795. See IACtHR, *Moiwana Community v. Suriname* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 124 (15 June 2005); IACtHR, *Yakye Axa Indigenous Community v. Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 125 (17 June 2005); IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 79 (31 August 2005); IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador* (Merits and Reparations) Inter-American Court of Human Rights Series C No. 245 (27 June 2012).

372 IACtHR, *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 400 (6 February 2020) paras 231-6, 241-2. As Hennebel and Tigroudja (n 371) note, this approach has not gone without criticism: 762-4.

or the other are of a different character'[373] – a number of important similarities nonetheless remain between the two regimes. Thus the origin of the recognition of the right to take part in cultural life was originally aimed at the enjoyment of certain forms of 'high culture' belonging to the elite,[374] and ensuring universal access to these 'manifestations of national and international cultural life',[375] the '*oeuvres capitales de l'Humanité*',[376] with a notable emphasis in the Universal Declaration on Human Rights on the community of the 'Nation State'.[377] In this sense, the early approach to the definition of 'culture' in human rights law mirrors the early universalist impulses of cultural heritage law, as reflected in the development of the 1954 Hague Convention and the World Heritage Convention.

The current approach to culture within human rights instruments diverges from this initial universalist approach. Thus in later years, the initial focus on 'elite' culture was expanded to incorporate a broader understanding of the concept, as not only including the various external manifestations of popular culture but also more broadly culture as a 'way of life'.[378] No further qualification is given with regards to the 'type' of culture to be protected by cultural rights – in terms of prominence – beyond that the exercise of the right to take part in cultural life must be compliant with other human rights.[379] In this sense, this development can simultaneously be mirrored against a similar shift within cultural heritage law towards a relativisation of the notion of cultural value and the recognition of the intrinsic value of cultural diversity, as well as the shift towards community-centric approaches to cultural heritage. In addition, the right to take part in cultural life has also been interpreted in such a manner as to extend protection to cultural heritage, with states being called upon to safeguard cultural heritage from intentional destruction or to

373 Yvonne Donders, 'Protection and Promotion of Cultural Heritage and Human Rights through International Treaties: Two Worlds of Difference?' in Charlotte Waelde and others (eds), *Research Handbook on Contemporary Intangible Cultural Heritage: Law and Heritage* (Elgar 2018) 54, 56.

374 Roger O'Keefe, 'The "Right to Take Part in Cultural Life" Under Article 15 of the ICESCR' (1998) 47 ICLQ 904.

375 Saul, Kinley and Mowbray (n 370) 1180, referring to the *travaux préparatoires* of article 15(1)(a) of the ICESCR.

376 Romainville (n 369) 420.

377 Ibid 420.

378 Ringelheim (n 358) 288-9; Saul, Kinley and Mowbray (n 370) 1180-2; Roger O'Keefe, 'Cultural Life, Right to Participate in, International Protection' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2020) para 7. See also CESCR, General Comment No. 21 (21 December 2009) UN Doc E/C.12/GC/21, para 13; CESCR, Report on the Seventh Session (1993) UN Doc E/1993/22. For a recent illustration of this approach in the context of climate change by the Human Rights Committee, see e.g. *Daniel Billy et al. v. Australia* (22 September 2022) UN Doc CCPR/C/135/D/3624/2019, paras 8.12-14.

379 CESCR General Comment 21 (n 378) para 19. See also Saul, Kinley and Mowbray (n 370) 1210-2.

ensure access to cultural heritage within the context of their human rights obligations.[380] As such, the approaches between human rights law and cultural heritage law could arguably also be seen as converging.[381]

Nonetheless, despite the broadening of the concept of culture within the scope of the right to take part in cultural life, universalist considerations (in the sense of the term as it is employed within the context of cultural heritage instruments) remain, particularly with respect to the application of cultural rights to cultural heritage. Thus the Committee on Economic, Social and Cultural Rights (CESCR) occasionally draws upon the language of the 'heritage of mankind' with respect to states' obligations under the Covenant, emphasising the need for states to protect this heritage on behalf of the international community,[382] as has the Special Rapporteur in the field of cultural rights in her reports, particularly those relating to intentional destruction.[383] The current reporting guidelines under the CESCR furthermore ask states to indicate whether any measures have been taken '[t]o enhance access to the cultural heritage of mankind'.[384] At the regional level, the ECtHR has notably also

380 Yvonne Donders, 'Cultural Heritage and Human Rights' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020) 380; O'Keefe, 'The "Right to Take Part in Cultural Life" Under Article 15 of the ICESCR' (n 374) 909. See also Human Rights Council, Report of the Independent Expert in the Field of Cultural Rights (21 March 2011) UN Doc A/HRC/17/38 (on the right of access to and enjoyment of cultural heritage); UN General Assembly, Report of the Special Rapporteur in the Field of Cultural Rights (9 August 2016) UN Doc A/71/317 (on the intentional destruction of cultural heritage). See also CESCR General Comment No. 21 (n 378) para 50.

381 See e.g. Donders, 'Cultural Heritage and Human Rights' (n 380) 382-3. As Murray notes, the obligation in the African Charter on the duty to preserve and strengthen African values has frequently been interpreted by states 'as imposing duties on themselves … through ratifying relevant international treaties protecting cultural heritage' and promoting programmes aimed at the safeguarding of cultural heritage: Murray (n 368) 595, on the basis of periodic reports submitted to the African Commission on Human and Peoples' Rights.

382 O'Keefe, 'The "Right to Take Part in Cultural Life" Under Article 15 of the ICESCR' (n 374) 909, fn 35. Compare also the approach taken by the CESCR, which considers that an element of states' obligations under article 15(1)(a) of the Covenant also includes the obligation to '[r]espect and protect cultural heritage in all its forms, in times of war and peace, and natural disasters', for the reason that '[c]ultural heritage must be preserved, developed, enriched and transmitted to future generations as a record of human experience and aspirations': CESCR General Comment No. 21 (n 378) para 50(a).

383 'While in the Special Rapporteur's view, specific aspects of heritage may have particular resonance for and connections to particular human groups, all of humanity has a link to such objects, which represent the "cultural heritage all [hu]mankind"': Human Rights Council, Report of the Special Rapporteur in the Field of Cultural Rights (3 February 2016) UN Doc A/HRC/31/59, para 48, see also para 89; UN Doc A/71/317 (n 380) para 5, 8.

384 CESCR, Guidelines on Treaty-specific Documents to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights (24 March 2009) UN Doc E/C.12/2008/2, para 67. These guidelines replaced the earlier Revised Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and

called upon notions of (universal) cultural heritage value and the general or public interest in order to underscore the legitimacy of limitations of certain human rights by the state, such as the right to property, mirroring the similar dynamics which are at play in cultural heritage regimes.[385] While it is not possible to provide an exhaustive account of these developments in the present work, the above indicates that some of the more problematic deployments of universality in relation to cultural heritage law have thus also travelled to certain human rights regimes.

3.8 Conclusion

The previous chapter defined the notion of universality in international law as 'the process whereby international legal instruments designate certain regulatory issues as being subject to the common interest of the community', thereby transforming them from issues within the sphere of a state's sovereignty into issues subject to cooperation in the interest of the international community. It surveyed the development of common interest regimes in international law across time, pinpointing the increasing recourse within public international law to notions such as 'common concern', the 'common heritage of mankind', and 'common', 'community' or 'universal' interests. The present chapter has sought to place cultural heritage law within the context of these developments, focusing on the invocation of concepts such as universal importance, universal value and the cultural heritage of (hu)mankind or humanity.

The chapter began by examining the emergence of initial considerations of universality in popular discourse surrounding cultural property in the 19th century, mirrored by the increasing adoption of domestic cultural property legislation around the globe. Simultaneously, these developments were accompanied by the imperial extraction of cultural property, also in the interests of a purported universal culture. While the emergence of the first international conventions aimed at the protection of cultural property – the 1899 and 1907 Hague Conventions – evinced a shared international concern, these conventions did not explicitly draw upon notions of universality or common interest. The

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Cultural rights (17 June 1991) E/C.12/1991/1, which asked states to describe measures relating to the '[p]reservation and presentation of mankind's cultural heritage' (at 20).

385 European Court of Human Rights, Research Division, *Cultural Rights in the Case-law of the European Court of Human Rights* (Council of Europe 2017) 31-2; see also Jakubowski (n 370); Jan Malir, 'Public Interest before the ECtHR: Protection of Cultural Heritage and the Right to Property' in Luboš Tichyì and Michael Potacs (eds), *Public Interest in Law* (Intersentia 2021). See e.g. *Beyeler v. Italy*, App. No. 33202/96 (2000); *Chapman v. United Kingdom*, App. No. 27238/95 (2001); *SCEA Ferme de Fresnoy v. France*, App. No. 61093/00 (2005); *Debelianovi v. Bulgaria*, App. No. 61951/00 (2007); *Kozacioğlu v. Turkey*, App. No. 2334/03 (2009); *Fürst von Thurn und Taxis v. Germany*, App. No. 26367/10 (2013). Cases of individuals or groups calling upon that same cultural value have been less successful, however: compare *Ahunbay and Others v. Turkey*, App No. 6080/06 (2019).

interbellum period subsequently saw several unsuccessful attempts to further codify international legal rules with respect to cultural property within the context of the ICIC, including a draft convention on the protection of cultural property during armed conflict. In this context, it seems to have been widely accepted that the protection of cultural property from destruction was a matter of international concern, providing the necessary momentum for international cooperation and regulation.

This idea found its first expression in positive law upon the adoption of the 1954 Hague Convention, where the potential impact on a nebulous 'cultural heritage of mankind' as the result of the destruction of cultural property formed the impetus for the adoption of the Convention. The notion of universal value was also explicitly incorporated within the Hague Convention's definition of protected cultural property, although the construction of this universal value mainly occurs at the national level. The 1972 World Heritage Convention further codified the idea of a 'cultural heritage of mankind', giving weight to the argument that the protection of certain forms of cultural heritage is a matter of common interest, not only for states but for the international community at large, calling upon ideas of universal interest and value. The use of the phrase 'cultural heritage of mankind' hereby becomes shorthand for states' position as a trustee of the common interest of the international community, and the need to cooperate at the international level to protect this interest – yet still clearly doing so within the boundaries of state sovereignty, as the territorial state remains in many ways the ultimate arbiter of 'outstanding universal value'.

The 1970 Convention adopts a different approach to the 1954 and 1972 Conventions, as the justification for its adoption is more clearly rooted in the transboundary nature of the problem of illicit cultural property trafficking, which required the adoption of an international convention in order to facilitate international coordination amongst a web of conflicting domestic legislation. Simultaneously, the controversiality of the adoption of an international convention on the issue is demonstrated by the relative paucity of references to ideas of common interest in the convention – it almost wholly eschews references to the cultural heritage of mankind and ideas of universal importance – and the fact that it mainly establishes reciprocal obligations. As such, the 1970 Convention bucked the prevailing trends of the time; however, it also presaged later treaties which sought to emphasise other forms of value than the international or which rejected the relevance of significance criteria in determining their scope of protection.

Thus the 2001 Underwater Cultural Heritage Convention defines underwater cultural heritage broadly, without any references to notions of universal value or significance. While the Convention nonetheless affirms that the underwater cultural heritage is part of the cultural heritage of humanity and that responsibility for its protection therefore rests with all states, requiring international cooperation, it also acknowledges that certain states will have

a particular interest in the protection of certain forms of underwater cultural heritage, for example on the basis of historical links. However, given that states' obligations with respect to underwater cultural heritage are determined by the maritime zone in which it is located, states remain the chief actors tasked with its preservation – acting as stewards of the common interest embodied within the underwater cultural heritage, along similar lines to other cultural heritage conventions.

Finally, the 2003 Intangible Cultural Heritage Convention also eschews a significance-based definition of the intangible cultural heritage to be safeguarded under the aegis of the Convention, emphasising the value of the intangible cultural heritage from the perspective of the communities, groups and individuals who practice it. Yet the Intangible Cultural Heritage Convention continues to draw upon universalist language, emphasising that the safeguarding of the intangible cultural heritage is of interest to humanity as a whole, and more broadly drawing upon the principle of common concern. Discussions during drafting showed the remarkably stubborn nature of universalist language, and the difficulty of wholly avoiding it when setting out to adopt an international convention on cultural heritage.

Phrases drawing upon the universal nature of heritage thus form a common thread in cultural heritage law-making, yet the question remains whether they form anything more than a rhetorical device.[386] As the above illustrates, similarly to other common interest regimes in international law, we see within cultural heritage treaties that there is a transformation of an area considered to fall within the purview of national sovereignty into a common interest – albeit a common interest in which the sovereignty of the territorial state remains a decisive factor. A certain sense of pragmatism thus lies at 'the heart of heritage practices, which are always and inevitably selective ... [heritage] lists are ultimately designed to channel funds and attention to the task of safeguarding',[387] and will involve choices that are made in the interests of the sovereign state upon whose territory the heritage is located rather than necessarily a shared interest of the international community, or a local interest of individuals or local communities.[388]

This pragmatism has expressed itself in the limitations imposed upon the types of heritage which the international can and should seek to protect. As the discussions have shown across each of the instruments surveyed above, negotiations repeatedly show a gradual narrowing of the ambition and goals of the convention in question, towards a recognition that all cultural heritage

386 Compare, with respect to environment law, Duncan French, 'Common Concern, Common Heritage and Other Global(-ising) Concepts: Rhetorical Devices, Legal Principles or a Fundamental Challenge?' in Michael Bowman, Peter Davies and Edward Goodwin (eds), *Research Handbook on Biodiversity and Law* (Elgar 2016).

387 Hafstein (n 322) 93.

388 Lucas Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination* (Oxford University Press 2019) 67, 71.

is valuable, but that only a specific segment of this heritage can be protected by virtue of international law.[389] A great degree of discretion is often granted to the territorial state in this regard to determine which heritage will ultimately be selected for preservation pursuant to the international legal regime.

Nonetheless, the starting point in cultural heritage law-making has remained a 'recognition of the cultural heritage as the common concern of humankind'.[390] Over the course of the past century, the idea that cultural heritage is a common interest of humankind has prevailed, with a gradual recognition that shared protection of cultural heritage is often unavoidable – and in many cases will produce more desirable results than unilateral efforts.[391] Similarly, it seems to have become almost commonplace to state that destruction or damage to cultural heritage causes concomitant damage to an undefined entity known as the 'cultural heritage of humankind' – a concept with unclear legal implications, but which has thus far avoided from impinging upon the sovereignty of the territorial state.[392] In this sense, it could be argued that the idea of the cultural heritage of humankind functions as an important legal fiction at the heart of cultural heritage law, similarly to the role played by the concept of the 'international community' in general international law. It remains to be seen whether in future there will be a solidification of the category of 'cultural heritage of humankind' beyond a purely contractual context, as well as the elaboration of customary norms for the protection thereof.

Some scholars have argued that the invocation of the concept of the cultural heritage of mankind indicates agreement amongst the members of the international community that the matter is not solely the purview of an individual

389 Forrest, *International Law and the Protection of Cultural Heritage* (n 10) 389-90. However, this trend has been partially bucked by the 1970 Convention and the 2001 Convention, both of which eschew a significance-based definition of cultural heritage, an in fact seek to draw the net wider in terms of their proposed scope of protection.

390 Ibid 405.

391 Konstantin Parkhomenko, 'Taking Transnational Cultural Heritage Seriously: Towards a Global System for Resolving Disputes over Stolen and Illegally Exported Art' (2011) 16 Art, Antiquity and Law 145, 147-8, 152. See also Lyndel V Prott, 'International Control of Illicit Movement on the Cultural Heritage: The 1970 UNESCO Convention and Some Possible Alternatives' (1983) 10 Syracuse Journal of International Law & Commerce 333, 333; Prott suggests that '[t]his movement has created some difficult issues for governments where cultural matters have traditionally not been a subject for government regulation. Most common law countries are in this group. Nevertheless, the use of legislative controls in new areas is an inevitable phenomenon: it is not so long, after all, since governments have been active in the field of public health. Indeed, there are many other areas, traditionally considered as matters for the internal policy-making processes of a state, that have now become matters of international law and have created obligations for states to act within their borders, in ways which may or may not be in conformity with their historic methods of resolving problems in the area'.

392 Forrest, *International Law and the Protection of Cultural Heritage* (n 10) 410.

state, but that it is a shared heritage of humanity as a whole.[393] However, as we shall see in the next chapter, while the intentions of the treaties surveyed above are certainly universal in design, their implementation is often overwhelmingly national and state-focused in nature.[394] At the core of these conventions is a *delimitation* of state sovereignty, rather than a limitation thereof:[395] within these boundaries, states are expected to cooperate, not only to represent their own interests, but the interests of the international community as a whole, and those of future generations.[396] In this sense, the territorial state becomes a trustee of the cultural heritage situated within its territory.[397] In particular, in the context of the Intangible Cultural Heritage Convention and the World Heritage Convention, this cooperation is paired with the provision of financial and technical support, albeit strictly within the context of a treaty-based regime.

The following chapter will focus on the development of protection, monitoring and implementation mechanisms in cultural heritage law, as the counterpart of this chapter's focus on the position of cultural heritage law as a common interest regime. It will thus seek to place these mechanisms within the context of the broader discussion in the previous chapter on the tools adopted by other common interest regimes in public international law, such as the principle of the common heritage and mankind and the principle of common concern, as well as discussions on the role of reciprocity in international legal obligations relating to the protection of cultural heritage. In doing so, it seeks to examine cultural heritage law through the lens of doctrinal discussions identified in Chapter 2 on the tension between 'form and function' in common interest regimes in international law.

393 Parkhomenko (n 391) 152.

394 Forrest, *International Law and the Protection of Cultural Heritage* (n 10) 410.

395 Lixinski (n 388) notes that the cultural conventions 'rather than creating rights in international law (and thus eroding sovereignty), seem to create cooperation mechanisms that reinforce sovereign prerogatives' (at 244).

396 Forrest (n 10) 412-3.

397 Ibid 410-2.