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

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4 Protecting heritage of 'universal importance'

The previous chapter examined the invocation of notions of universal importance and interest within cultural heritage law over time. In doing so, it asked whether it was possible to identify a common approach towards the definition of cultural heritage as it is protected by virtue of public international law. The chapter concluded that the idea that cultural heritage is a common interest is a leitmotif of contemporary cultural heritage law. Simultaneously, while the intentions of these treaties are certainly universal in design, the power to decide what constitutes 'universal' heritage is often overwhelmingly granted to states.

The present chapter examines the implementation of these conventions, by focusing on the mechanisms of protection which they employ in order to protect this heritage of 'universal importance'. It does so against the background of the broader discussion of common interest regimes established in Chapter 2. It enquires whether there is a common approach within international law towards the protection of cultural heritage, in terms of the types of obligations as well as the monitoring and implementation mechanisms employed to achieve this goal. In doing so it seeks to answer the following overarching question: is it possible to identify the same tension between 'form and function' in cultural heritage law which was outlined in Chapter 2 with respect to common interest regimes in public international law?

As noted in Chapter 2, scholars have generally argued that contemporary international law has undergone a radical shift, transforming from a body of rules focused on international coexistence to one centred around the facilitation of international cooperation in the common interest. In terms of their substance, the obligations established by common interest regimes thus frequently invoke the importance of international cooperation, or draw upon concepts such as the principle of common concern or the principle of the common heritage of humankind. In the case of treaty regimes established for the protection of common interests, the goal of such regimes is often to facilitate state compliance rather than punishing non-compliance; as such, they frequently do not establish absolute obligations.

These regimes are furthermore often associated with a range of legal characteristics, including the modified role of notions of reciprocity, whereby states' obligations are frequently inward-looking and are not dependent on the mutual exchange (and performance) of rights and obligations between states; the different operation of certain types of secondary rules, such as those

on reservations and denunciation, treaty interpretation, or the invocation of state responsibility; and the presence of *jus cogens* norms or obligations *erga omnes*.

Finally, common interest regimes frequently establish institutions in which states are expected to answer to the international community with respect to their management of the common interest under their protection, ranging from an assembly of fellow States Parties; independent expert bodies; judicial bodies with the jurisdiction to examine individual complaints against the State Party; and sometimes even an independent international body tasked with the management of the common interest instead of States Parties. These institutions are also frequently tasked with the adoption of guidelines which further specify the content of the obligations contained in a given convention, allowing the management of the common interest to evolve in line with changing insights.

Against this background, the present chapter begins by outlining the methods adopted for the protection of cultural heritage, the nature of the legal norms through which this is achieved, and the extent to which notions of common interest are reflected in the types of substantive and procedural obligations employed within cultural heritage treaties. It subsequently outlines the main monitoring and implementation mechanisms employed in each of the conventions. In the final section, the chapter focuses on the mechanisms currently employed within the conventions which seek to foster individual and community participation in processes related to the international protection of cultural heritage, in order to lead up to a discussion in the next chapter on the shortcomings of cultural heritage law from the perspectives of these two key stakeholders.

The chapter concludes that whilst cultural heritage law unmistakeably acknowledges that the protection of cultural heritage is a common interest, it also showcases many of the same limitations faced more broadly by common interest regimes in public international law. This is because the positive obligations which cultural heritage treaties establish are often fairly weak and remain centred around states, rather than the common interest in and of itself. This illustrates that international law-making is limited when it comes to the protection of common interests – developed, as it is, around ideas of reciprocity and self-help.

4.1 Common protection mechanisms

As noted in the introduction to the dissertation, since the 2000s numerous scholars have approached the cultural heritage conventions of UNESCO as representing a common set of international obligations, as is evident in the

growth of handbooks treating these conventions as a group,[1] and which speak of 'cultural heritage law' or 'international heritage law'.[2] In this body of work, there appears to be a general consensus that international law acknowledges the special position of cultural heritage, as distinct from ordinary property (or, in the case of intangible cultural heritage, practices) and that the development of the law is guided by a principle of cooperation.[3] The findings of the previous chapter also support this conclusion. As is often the case, the identification of a treaty regime is coupled with the identification of not only a set of common principles but also common methods of protection and enforcement. Lixinski thus identifies three core safeguarding mechanisms across the cultural heritage conventions: 'listing, heritage funds, and international cooperation'.[4] As demonstrated in the following sections, these international governance mechanisms have indeed assumed an increasingly central role in the shaping of international legal norms for the protection of cultural heritage. However, they have not been universally applied in all treaty regimes, with certain regimes, such as the 1954 Hague Convention and the 1970 Convention, representing exceptions to this trend. The following section discusses each of the conventions in turn, concluding with a brief analysis of the role of *jus cogens* norms and obligations *erga omnes* within cultural heritage law.

1 See e.g. Abdulqawi A Yusuf (ed) *Standard-setting at UNESCO: Essays in Commemoration of the Sixtieth Anniversary of UNESCO* (Martinus Nijhoff 2007); Toshiyuki Kono, *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21st Century* (Martinus Nijhoff Publishers 2010); Craig Forrest, *International Law and the Protection of Cultural Heritage* (Routledge 2012); Janet Blake, *International Cultural Heritage Law* (Oxford University Press 2015).

2 See e.g. Francesco Francioni and James Gordley (eds), *Enforcing International Cultural Heritage Law* (Oxford University Press 2013); Blake (n 1); Marina Lostal, *International Cultural Heritage Law in Armed Conflict* (Cambridge University Press 2017); Lucas Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination* (Oxford University Press 2019); Anne-Marie Carstens and Elizabeth Varner (eds), *Intersections in International Cultural Heritage Law* (Oxford University Press 2020); Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020). See also, for example, the creation of a committee within the International Law Association on 'Cultural Heritage Law' (1988-2016).

3 See e.g. Francesco Francioni, 'A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage' in Abdulqawi A Yusuf (ed), *Standard-setting at UNESCO: Essays in Commemoration of the Sixtieth Anniversary of UNESCO* (Martinus Nijhoff 2007) 222; Forrest (n 1) 388; Lostal (n 2) 50-1, 62-3.

4 Lixinski (n 2) 196. See also Francesco Francioni, 'Custom and General Principles of International Cultural Heritage Law' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020) 548, who similarly identifies international cooperation as a core principle of cultural heritage law.

4.1.1 1954 Hague Convention

Unlike other subsequent cultural heritage conventions, listing, funding or international cooperation is not the primary *modus operandi* of the 1954 Convention. In this sense, the Hague Convention reflects the nature of the Convention as embedded simultaneously within cultural heritage law and a separate international legal regime – international humanitarian law – where the main method of protection is the establishment of rules of conduct during armed conflict. The provisions of the Hague Convention are supplemented by those of the 1954 First Protocol, which contains provisions on the protected of movable cultural property during times of occupation, and the 1999 Second Protocol, which sought to update the provisions of the 1954 Convention in light of the changing nature of armed conflict.

While the Hague Convention is chiefly aimed at the protection of cultural property during times of armed conflict, the Convention also acknowledges that this protection can only be achieved effectively if measures are taken during peacetime.[5] To this end, for the purposes of the Convention, 'protection' entails 'the safeguarding of and respect' for cultural property.[6] Safeguarding is primarily intended as a peacetime measure, and entails several inward aimed obligations of due diligence for States Parties. In order to meet their obligation to safeguard cultural property, States Parties are expected to undertake measures as they consider appropriate to prepare for the effects of armed conflict on cultural property situated in their territory.[7] The 1999 Second Protocol further elaborates upon possible safeguarding measures which can be taken by the parties.[8]

Other measures, primarily intended to be implemented during peacetime, but whose operation is of crucial importance to respect for cultural property during armed conflicts, include the marking of cultural property with the Blue Shield emblem,[9] the introduction of provisions in a state's military regulations

5 Emma Cunliffe and Paul Fox, 'All Possible Steps? Revisiting Safeguarding in the 1954 Hague Convention' in Emma Cunliffe and Paul Fox (eds), *Safeguarding Cultural Property and the 1954 Hague Convention* (Boydell & Brewer 2022) 31.

6 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 215 (1954 Hague Convention) art 2. On the implementation of such safeguarding measures in practice, see the contributions in Emma Cunliffe and Paul Fox (eds), *Safeguarding Cultural Property: All Possible Steps* (Boydell & Brewer 2022).

7 1954 Hague Convention, art 3.

8 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 172 (1999 Second Protocol) art 5.

9 1954 Hague Convention, arts 6, 10. Practice has however showed that many of the parties to the 1954 Convention neglect this obligation, with the Blue Shield emblem falling into increasing desuetude. See, for example, the statement of the Dutch Minister of Culture that the Netherlands will no longer make use of the emblem: 'Kamerbrief met beleidsreactie op advies Nederlandse Unesco Commissie over cultureel erfgoed' (*Rijksoverheid*, 13 Septem-

ensuring respect for the Convention, and broadly the fostering of a 'spirit of respect for the culture and cultural property of all peoples' in their armed forces.[10] The parties must further undertake to establish specialist personnel within their armed forces, whose task is the securing of respect for cultural property.[11]

These peacetime obligations are non-reciprocal, in the sense that the obligations are inward-looking and do not hinge on a mutual exchange of rights and obligations between the States Parties to the convention; states are expected to fulfil these obligations regardless of whether other States Parties do so. In other words, if a state does not adequately establish peacetime measures for the protection of cultural property, this does not lessen the scope of obligations that another State Party will have with regards to cultural property situated on its territory during peacetime. They are also solely applicable for each State Party in relation to its territory. Nor do the provisions established in the 1954 Convention and the 1999 Second Protocol establish absolute obligations: instead of establishing obligations of result, these provisions provide guidelines for appropriate action by states.[12] In this sense they are comparable to many of the provisions established by other common interest regimes in international law.

The parallel to states' obligations to safeguard cultural property is that of respect for cultural property, which primarily operates in the context of armed conflicts. By contrast to peacetime measures, the majority of norms established by the convention with regards to protection of cultural property during armed conflict constitute absolute obligations which prohibit certain actions, rather than providing guidance for the actions to be undertaken by states. Unlike obligations relating to safeguarding, these obligations of respect operate both within the territory of the parties as well as with respect to the cultural property located in the territory of other parties to the Convention, if the State Party is engaged in an armed conflict on that territory.[13]

In order to ensure respect for cultural property, States Parties must undertake to refrain from using the property and its 'immediate surroundings' in a manner 'likely to expose it to destruction or damage'.[14] They must further

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ber 2021) <https://www.rijksoverheid.nl/documenten/kamerstukken/2021/09/13/beleidsreactie-advies-nederlandse-unesco-commissie-een-wapen-in-vredestijd-de-uitvoering-van-het-unesco-haags-verdrag-en-het-gebruik-van-het-blauw-witte-schildje>.

10 1954 Hague Convention, art 7(1).

11 Ibid art 7(2).

12 Articles 3 and 7 of the 1954 Hague Convention thus merely state that the High Contracting Parties are expected to 'undertake' safeguarding measures; article 6 establishes that cultural property 'may' bear the Blue Shield emblem (however, compare article 10). Article 5 of the 1999 Second Protocol is phrased in similarly hortatory language, which provides that '[p]reparatory measures … shall include, *as appropriate*'.

13 1954 Hague Convention, art 4(1). See also Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge University Press 2006) 121.

14 1954 Hague Convention, art 4(1).

refrain from directing acts of hostility against it.[15] These obligations can only be waived 'in cases where military necessity imperatively requires such a waiver'.[16] The Second Protocol establishes a stricter regime regarding the permissibility of attacks against cultural property.[17] Further obligations also operate within the Convention with respect to illicit trafficking of cultural property and the protection of cultural property during times of occupation,[18] which are supplemented by the provisions in the First Protocol.[19]

Pursuant to the Convention, states are expected to accord respect to the designation of certain property as cultural property for the purposes of the Convention by another State Party. Practically speaking, respect for cultural property during an armed conflict is enhanced if a state has taken adequate peacetime measures. Nonetheless, the obligations flowing from the Convention concerning respect for cultural property remain non-reciprocal, like most norms of international humanitarian law.[20] The guaranteeing of respect for cultural property by a belligerent is thus not dependent upon such property having been marked or otherwise designated as such by the state during peacetime.[21] Furthermore, if a state breaches the actions prohibited under the heading of respect for cultural property – for example by occupying a heritage site – then this does not permit the other state to disregard its obligations, clearly indicating their non-reciprocal character.[22] Another indication of the non-reciprocal nature of the norms on respect for cultural property contained in the Hague Convention and the Second Protocol is the fact that they have been interpreted as also applying to actors who have not ratified either instrument but who are nonetheless parties to a given armed conflict, such as armed non-state actors.[23]

15 Ibid art 4(1).
16 Ibid art 4(2).
17 1999 Second Protocol, arts 6(a)-(b), 7.
18 1954 Hague Convention, arts 4(3), 5.
19 Protocol for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240 (1954 First Protocol) arts 1-2.
20 On the Hague Convention, see O'Keefe (n 13) 126. On international humanitarian law in general, see, for example, Rule 140 of the ICRC's Customary International Humanitarian Law database: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule140. But compare e.g. Bryan Peeler, *The Persistence of Reciprocity in International Humanitarian Law* (Cambridge University Press 2019).
21 Article 6 determines that cultural property 'may' bear the distinctive emblem; use of the emblem is not obligatory. Furthermore, article 4(5) states that '[n]o High Contracting Party may evade the obligations imcumbent upon it under the present Article, in respect of another High Contracting Party, by reason of the fact that the latter has not applied the [peacetime] measures of safeguard'. See also O'Keefe (n 13) 110-11.
22 Ibid 125-6.
23 1954 Hague Convention, art 19(1). See e.g. Jean-Marie Henckaerts, 'New Rules for the Protection of Cultural Property in Armed Conflict: the Significance of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed

In addition to the designation of certain forms of cultural property by individual States Parties, both the 1954 Convention and the 1999 Second Protocol establish additional protective obligations with regards to a privileged category of cultural property which is called into being as the result of an internationalised process rather than on the basis of self-judgment by the State Party; in this sense, the Hague Convention thus mirrors later cultural heritage conventions by providing for a rudimentary form of international listing.

The 1954 Convention thus provides for a regime of 'special protection', through which property can be entered into an International Register of Cultural Property under Special Protection upon the request of a State Party in relation to cultural property situated on its territory;[24] property entered into the International Register enjoys a higher standard of protection.[25] If no other State Party objects to this registration, the property is entered onto the Register.[26] This regime can be applied to refuges of movable cultural property; centres containing monuments; and 'immovable cultural property of very great importance'.[27] Designation hinges on two criteria: the location of the refuge, centre, or property ('at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point'),[28] and the prohibition of its use for 'military purposes'.[29]

The Second Protocol establishes an additional system of 'enhanced protection', akin to the 1954 Convention's system of special protection. Cultural property under such enhanced protection enjoys a more stringent level of immunity from attack during armed conflict.[30] Three criteria must be met for inscription: the property must constitute 'cultural heritage of the greatest importance for humanity'; it must be subject to adequate protection measures at the domestic level; and it must not be 'used for military purposes or to shield military sites'.[31] While inscription can be recommended by actors other than the territorial state, including other States Parties or relevant NGOs,

Conflict' (1999) 12 Humanitäres Völkerrecht 147. However, compare on this point Andrew Clapham, 'Focusing on Armed Non-State Actors' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 776-7.

24 Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, art 13(1).

25 1954 Hague Convention, art 9. However, this status can be withdrawn: see arts 11(1)-(2).

26 Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, arts 14-15.

27 1954 Hague Convention, art 8(1).

28 1954 Hague Convention, art 8(1)(a). An exception is made for refuges, which can be designated regardless of location, 'if it is so constructed that, in all probability, it will not be damaged by bombs': art 8(2).

29 Ibid art 8(3) – although the article technically only defines use for military purposes in relation to centers containing monuments.

30 1999 Second Protocol, arts 12-14.

31 Ibid art 10.

inscription can only take place with the consent of the territorial state.[32] Inscription is granted by the Committee for the Protection of Cultural Property in the Event of Armed Conflict, a body comprised of twelve States Parties to the Second Protocol, elected by the Meeting of the Parties of the Second Protocol.[33] As such, this procedure is clearly modelled on the listing practices of the World Heritage Convention.

The Guidelines for the implementation of the Protocol adopted by the Meeting of Parties expand further upon the criteria for inscription; of particular interest for the present discussion is the elaboration of the criterion of 'greatest importance for humanity'. This criterion can be assessed according to three possible values: the exceptional cultural significance of the property; its uniqueness; and whether its destruction 'would lead to irretrievable loss for humanity'.[34] The latter is presumed to be fulfilled if the immovable cultural property is inscribed on the World Heritage List, or, in the case of documentary heritage, on the Memory of the World Register.[35] The question whether the loss of the property 'would lead to irretrievable loss for humanity' is assessed according to an analysis whether damage or destruction 'would result in the impoverishment of the cultural diversity or cultural heritage of mankind',[36] thereby appearing to give greater credence and materiality to the concept of the 'cultural heritage of mankind'. Perhaps most critically, the criteria relating to the 'exceptional cultural significance' of the property are modelled very closely on the criteria for outstanding universal value of cultural heritage under the World Heritage Convention. All but one of the current inscriptions (as of August 2023) on the Enhanced Protection List are also included on the World Heritage List.[37]

As noted in the previous chapter, the universality of heritage is thus primarily expressed in relation to the definition of heritage itself, in particular for the definition of cultural property that falls within the scope of the special and enhanced protection regimes. Otherwise, the common interest which the Hague Convention seeks to protect generally does not find any direct expression in the positive law of the Convention, neither in the type of protection adopted nor in the methods through which this protection is achieved. However, what can be seen is development in this direction over time, largely due

32 Ibid art 11.
33 Ibid art 24.
34 1999 Second Protocol: Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (16 December 2021) C54/21/9.SP/Resolutions, Resolution 9.SP 9 (Second Protocol Guidelines) para 32.
35 Ibid paras 36-37.
36 Ibid para 35.
37 The exception is the inscription of the National Central Library in Florence by Italy, which, whilst located in the World Heritage Site of Florence, was inscribed on the Enhanced Protection List pursuant to paragraph 33 of the Guidelines to the Second Protocol.

to the adoption of the Second Protocol in 1999: whereas inscriptions on the list of special protection pursuant to the Convention can only occur with the consent of the territorial state, inscription on the list of enhanced protection pursuant to the 1999 Protocol has been shaped in such a way as to give greater expression to the common interests at stake by delegating this decision to the Committee and facilitating recommendations for inscription by actors other than the territorial state, although the latter's consent ultimately remains necessary.

Overall, the Hague Convention nonetheless represents a clear example of a 'law-making' treaty, in the classical sense of the term. It contains a number of non-reciprocal obligations, in which performance is mandated in the interest of the international community and not that of individual States Parties. Its status as an instrument of international humanitarian law is reflected in the fact that both the Hague Convention and its two Protocols contain a number of absolute obligations, prohibiting states from undertaking certain actions. In this sense, they can be distinguished from many of the cultural heritage law treaties examined below, which usually contain hortatory obligations rather than absolute prohibitions of action (comparable to the Hague Convention's provisions on peacetime safeguarding). As such, upon its adoption, the Hague Convention represented the more traditional modes of international law-making of the time: while later cultural heritage conventions could perhaps more appropriately be termed framework conventions, the Hague Convention seeks to establish a comprehensive regime for the protection of cultural property during armed conflicts.[38]

However, this boundary has been blurred over time, in particular since the adoption of the 1999 Second Protocol. The Protocol places greater emphasis on the traditional tools of cultural heritage law: the adoption of lists of protected heritage, such as the abovementioned Enhanced Protection List; the provision of international funding and technical assistance to protect this heritage, through the vehicle of the Fund for the Protection of Cultural Property in the Event of Armed Conflict;[39] and a greater emphasis on the importance of international cooperation to resolve the issues facing cultural heritage protection in this area,[40] *inter alia* through the regularisation of Meetings of States Parties and the creation of permanent bodies tasked with monitoring the implementation of the Second Protocol such as the Committee for the Protection of Cultural Property in the Event of Armed Conflict, as will be seen in section 4.2.[41]

38 Brölmann refers to this as the 'normative completeness' of a convention: Catherine Brölmann, 'Typologies and the "Essential Juridical Character" of Treaties' in Dino Kritsiotis and Michael J. Bowman (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018).

39 1999 Second Protocol, art 29, 31-3.

40 Ibid art 31.

41 Ibid art 24, 27.

4.1.2 1970 Convention

In comparison to many of the other cultural heritage conventions of UNESCO, the issue at the heart of the 1970 Convention is 'by definition transnational in nature', requiring the adoption of an international convention to coordinate action between states and give force to domestic cultural property laws overseas.[42] Pursuant to the 1970 Convention, States Parties are expected to 'undertake to oppose [the illicit import, export and transfer of ownership of cultural property] with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations'.[43] Article 3 of the Convention subsequently declares that '[t]he import, export or transfer of ownership of cultural property effected contrary to the provisions [of the Convention] shall be illicit'.[44]

Member States are expected to adopt predominantly national measures to combat the illicit trade in cultural property. These obligations are, by and large, normatively weak in the sense that they establish mostly hortatory obligations for states. Member States are thus expected to 'undertake, as appropriate for each country, to set up within their territories one or more national services … for the protection of cultural heritage'; these national services are expected to carry out functions such as the drafting of laws to protect a country's cultural heritage, the creation and maintenance of a register of protected property, and the supervision of archaeological excavations.[45] The 1970 Convention also provides for a number of cooperative efforts amongst its States Parties, such as 'concerted international effort[s]' to respond to crises of pillage in a State Party,[46] and the ability of the member states to call upon UNESCO for technical assistance.[47] Similar methods of international cooperation are also called for in later soft-law instruments adopted by UNESCO, such as the 1976 Recommendation on the International Exchange of Cultural Property and the 1978 UNESCO Recommendation for the Protection of Movable Cultural Property.[48]

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42 Internal Oversight Service, Evaluation of UNESCO's Standard-setting work of the Culture Sector. Part II – 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property (April 2014) IOS/EVS/PI/133 REV. 2, 11, 22.

43 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231 (1970 Convention) art 2.

44 Ibid art 3.

45 Ibid art 5.

46 Ibid art 9.

47 Ibid art 17.

48 Records of the General Conference, 19th Session (vol 1) 19 C/Resolutions (1976) Annex I, Recommendation on the International Exchange of Cultural Property; Records of the General Conference, 20th Session (vol 1) 19 C/Resolutions (1978) Annex I, Recommendation for the Protection of Movable Cultural Property.

The core obligations of the Convention are reciprocal, in that it creates corresponding sets of rights and obligations between States Parties.[49] A state's national service must, for example, undertake (insofar as this can be achieved in accordance with its domestic law) 'to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners' and to recognise the right of other States Parties to declare certain forms of property as inalienable, making their presence in another state *ipso facto* illicit, as they cannot be legally exported from the state of origin.[50] States are further expected to (once again, 'undertake to') introduce a certification system for the export of cultural property from their territory; they must also undertake 'to prohibit the exportation of cultural property' in the absence of the requisite certificate.[51] The corresponding obligation to the establishing of export certification systems in the country of origin, is the obligation upon so-called 'market states' to give effect to this designation in their domestic legal system by establishing an absolute import prohibition, provided that the property was 'stolen from a museum or a religious or secular public monument or similar institution in another State Party'.[52] Although return of illicitly exported cultural property must be facilitated by the market state, the state of origin must provide 'just compensation to an innocent purchaser or to a person who has valid title to that property'.[53]

The successful operation of these obligations depends on the indication by the state of origin which property has been illicitly exported; the market state is then expected to give effect to this status in its domestic laws, hence leading to the reciprocal nature of the treaty norms. This point was noted in a 2014 internal oversight report by UNESCO on the implementation of the Convention, which stated that the importance of Convention stems from its role as 'a multilateral instrument, which promoted reciprocity through mutual recognition of domestic laws of other States and international cooperation in their effective implementation by facilitating return, was imperative … By its nature, the 1970 Convention rises or falls on mutual recognition, reciprocity and international cooperation'.[54] However, implementation remains wanting in the adoption and enforcement of many of these domestic laws; such domestic laws are critical to give force to the 1970 Convention, as its provisions are not self-executing.[55]

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49 Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (May 2015) C70/15/3.MSP/Resolutions, Resolution 3.MSP 11 (1970 Convention Operational Guidelines) para 9.

50 1970 Convention, arts 13(c)-(d).

51 Ibid art 6.

52 Ibid art 7(b)(i).

53 Ibid art 7(b)(ii).

54 IOS/EVS/PI/133 REV. 2 (n 42) 22.

55 Ibid.

As is evident from the above, the intended goal of the Convention was the establishing of a framework at the bilateral level between individual source and market states to regulate the illicit trafficking of cultural property through reciprocal measures. It is perhaps the inability of the convention to attract ratification from important market states which has led to a letting go of the more traditional contractual approach of the Convention as drafted, to the development of measures similar to other 'framework' cultural heritage conventions. Similarly to the other cultural heritage treaties surveyed in the present chapter, we see protection achieved through listing – in the broadest sense – of protected objects, the indication of the importance of international cooperation, and the provision of (limited) funding, provided by the international community to individual states in need of assistance to protect their cultural heritage from the effects of illicit trafficking.[56]

Ultimately, the Convention does not give a great deal of expression to the principle that the cultural property under protection is part of a potential cultural heritage of humankind: as we shall see further on in the chapter, its mechanisms of international cooperation have remained wanting for a long period of time, and have remained relatively weak compared to other institutional mechanisms of cultural heritage cooperation. This is perhaps only logical, as the 1970 Convention is widely perceived as seeking to counter these universalist trends within cultural heritage laws, by placing the national value of cultural property at its centre.[57] In many ways, the 1970 Convention thus represents the most far-reaching inroad into domestic state sovereignty, as it does not allow the state to designate which heritage is to be protected within its own territory (under the guise of the 'heritage of humankind'), but instead requires it to be willing to recognise the designation of an object as cultural property and to subsequently enforce this in their own domestic laws – indicating why many states have been reticent to effectively implement the 1970 Convention.

4.1.3 1972 World Heritage Convention

By contrast to the 1970 Convention, the World Heritage Convention predominantly establishes international, rather than national protection mechanisms.[58] Nonetheless, the Convention does establish a number of obligations aimed solely at establishing national measures of protection; these obligations

56 Ibid ii.

57 John Henry Merryman, 'Two Ways of Thinking About Cultural Property' (1986) 80 AJIL 831.

58 At the time of adoption, a Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage was simultaneously adopted; this recommendation was intended to supplement the international measures of the World Heritage Convention.

are chiefly obligations of due diligence or of effort, according to the resources available to the state. The exception to this would seem to be the obligation contained in article 6(3) of the Convention, which notes that each State Party should '[undertake] not to take any deliberate measures which might damage directly or indirectly' cultural and natural heritage as defined for the purposes of the Convention 'situated on the territory of other States Parties' to the convention, regardless of the inscription of this heritage on the World Heritage List. This obligation thus operates between states; however, it has also been interpreted as applying within the territory of the state in respect of its 'own' heritage.[59]

The core domestic duty of States Parties is outlined in article 4, which provides that each State Party 'recognizes that the duty of ensuring the identification, protection, conservation, presentation, and transmission to future generations' of cultural heritage, regardless of international recognition by virtue of the World Heritage List, 'belongs primarily to that State'. However, as the article continues, it notes that the state will do so, 'where appropriate, with any international assistance and co-operation … which it may be able to obtain'. In doing so, the article neatly encapsulates the ambition of the World Heritage Convention: to assist states in performing the act of heritage protection by providing a framework of international cooperation which can provide the necessary financial support and technical expertise in situations where states do not possess these resources themselves. The Convention furthermore establishes, in article 5, that 'each State Party … shall endeavour, in so far as possible, and as appropriate for each country' to take a number of national measures, such as the creation of a service for the protection of cultural and natural heritage within its territory, 'to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community',[60] and to stimulate scientific expertise in relation to heritage protection.

By contrast to these inward-looking obligations, the Convention defines 'international protection' as 'the establishment of a system of international cooperation and assistance designed to support States Parties to the Convention in their efforts to conserve and identify that heritage'.[61] This system of international cooperation takes the shape of the establishment of the World Heritage List, and its counterpart, the List of Heritage in Danger; both lists are administered by the governing body of the Convention, the World Heritage Commit-

59 On the basis of a reading of article 6(3) in tandem with article 4 in light of the object and purpose of the World Heritage Convention. See e.g. Lostal (n 2) 159.

60 1972 Convention for the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151 (World Heritage Convention) art 5(a).

61 Ibid art 7.

tee. Since 1992, the World Heritage Committee is assisted in the discharge of its duties by the World Heritage Centre, the secretariat of the Convention.

States Parties are expected to 'undertake … to give their help in the identification, protection, conservation and presentation' of heritage included in the World Heritage List and the List of World Heritage in Danger.[62] Sites included on the list can receive international assistance, which is distributed by the World Heritage Committee. Such requests for assistance must be made by 'States Parties … with respect to property forming part of the cultural or natural heritage, situated in their territories', either already included in the World Heritage List, amenable to inclusion on the list, or in order to provide assistance in the identification of potential sites on the List.[63] Such assistance is provided by virtue of the World Heritage Fund, to which States Parties must make regular contributions.[64] Assistance can furthermore take a range of forms.[65]

In short, the World Heritage Convention perhaps typifies the model of a cultural heritage convention and the common set of heritage obligations in international law: the creation of a list of protected heritage, to be protected through internationally sourced and administered funding, achieved under the banner of international cooperation, as brought to life in the governing institutions of the Convention: the World Heritage Committee and the World Heritage Centre. The World Heritage Convention is moreover not a static legal instrument; it has undergone a great deal of development since its adoption in 1972, primarily through the successive adoption of operational guidelines.[66] The fact that the Convention has been developed over time through the elaboration of additional policy guidelines, for example by the World Heritage Centre, the General Assembly of States Parties, or the World Heritage Committee, as well as the periodic revision of the Operational Guidelines by the World Heritage Committee, further indicates that the Convention should perhaps not necessarily be indicated as a 'law-making' treaty as such, but rather as a framework convention, a clearing house for cooperation.

The obligations elaborated upon in the Convention are furthermore non-reciprocal,[67] as is often the case for obligations taken to represent a common interest rather than a bilateral interest between individual states. The focus

62 Ibid art 6(2).
63 Ibid art 13(1)-(2).
64 Ibid arts 15-16.
65 Ibid arts 22-3.
66 The Operational Guidelines of the Convention have been extensively revised throughout the course of the fifty years of the Convention's existence, from 28 paragraphs in 1977 to 290 paragraphs in 2021.
67 UNESCO, Internal Oversight Services, 'Evaluation of UNESCO's Standard-setting Work of the Culture Sector – Part III – 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage' (April 2014) IOS/EVS/PI/132 REV.3, 46. The report was prepared by the Internal Oversight Service and written by Francesco Francioni, amongst others.

of the World Heritage Convention is thus on the state in respect of its own territory, rather than on regulating the relations between states. However, these obligations are also 'largely voluntary';[68] they are generally also not seen to be self-executing;[69] and they do not create enforceable rights for individuals, but establish a system of international governance to facilitate national action. While there is a *prima facie* commitment to the ultimate beneficiaries of heritage protection – local communities – through an increasing emphasis on their participation in World Heritage governance, as we shall see in section 4.3, these commitments remain similarly unenforceable. While the World Heritage Convention limits the scope of permissible state action, it ultimately does not 'usurp the authority of State Parties in their own domestic decision-making'.[70]

4.1.4 2001 Underwater Cultural Heritage Convention

Similarly to many of the cultural heritage conventions discussed in this chapter, the Underwater Cultural Heritage Convention has a dual function. The Convention firstly establishes international cooperation as a general principle.[71] To this end, the parties to the Convention are encouraged to engage in the drafting of bilateral, regional and multilateral agreements to further the purposes of the Convention.[72] The Convention also has an Annex, providing technical rules for activities directed at underwater cultural heritage; the Rules privilege *in situ* conservation of underwater cultural heritage and consider commercial exploitation of UCH as fundamentally incompatible with its proper protection and management. The Rules are an 'integral part' of the Convention.[73]

In light of the cooperative character of the Convention, a number of subsidiary bodies are created by the Convention, including a regular Meeting of States Parties (MSP) and a Scientific and Technical Advisory Body (STAB), tasked with assisting the MSP 'in questions of a scientific or technical nature

68 Ibid.

69 Ibid 2.

70 Evan Hamman, 'The Role of NGOs in Monitoring Compliance under the World Heritage Convention: Options for an Improved Tripartite Regime' in Christina Voigt (ed), *International Judicial Practice on the Environment: Questions of Legitimacy* (Cambridge University Press 2019) 426.

71 2001 Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009) 2562 UNTS 3 (Underwater Cultural Heritage Convention) art 2(2).

72 Ibid art 6.

73 The trade-off for the privileged position of the Rules in the legal framework of the Convention is that they are subject to the same amendment procedures as provisions of the Convention itself; as such, they cannot be easily amended to adjust to technological or scientific developments: Sarah Dromgoole, *Underwater Cultural Heritage and International Law* (Cambridge University Press 2013) 58-9.

regarding the implementation of the Rules';[74] section 4.2 will return to a discussion of these bodies. The Operational Guidelines of the Convention also contain a number of pointers aimed at increasing awareness of and support for underwater cultural heritage protection, such as the publication of information of activities relating to underwater heritage, and capacity-building efforts such as training related to conservation of underwater cultural heritage or in underwater archaeology.[75]

However, the second – and primary – function of the Convention is the establishing of jurisdictional competence for states over underwater cultural heritage according to the maritime zone in which the heritage is located. As a general principle, a state is expected to 'use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage'.[76] More generally, states are expected to take a number of measures in relation to persons or places under their jurisdiction,[77] such as measures aimed at the prevention of the trade of illicitly excavated underwater cultural heritage on their territory, and the '[imposing] of sanctions for violations of measures it has taken to implement' the Convention.[78] They must also establish a competent authority charged with the implementation of the Convention.[79]

Of particular interest is the following 'general remark' in the Operational Guidelines to the Convention, not included in so many words in the Convention itself, that '[w]hile fully respecting the sovereignty or jurisdiction of the States or territories where the underwater cultural heritage is situated, States Parties to the Convention recognize the collective interest of the international community to cooperate in the protection of this heritage'.[80] From this recognition flow the duties of protection of the underwater heritage and cooperation to this end, as well as the prevention of activities which seek to commercially exploit underwater cultural heritage.[81]

Akin to the regulation of maritime zones in UNCLOS, the nature of the coastal state's exercise of sovereignty under the Convention changes the further one gets from the coast, with the most dramatic shift occurring at the boundary between the contiguous zone and the continental shelf and the EEZ. As a general principle, a state is expected to 'use the best practicable means at its

74 Underwater Cultural Heritage Convention, art 23(5).
75 2001 Underwater Cultural Heritage Convention: Operational Guidelines for the Convention on the Protection of the Underwater Cultural Heritage (August 2015) CLT/HER/CHP/OG 1/REV (Underwater Cultural Heritage Operational Guidelines) paras 50-56.
76 Underwater Cultural Heritage Convention, art 5.
77 Ibid arts 14-18.
78 Ibid art 17(1).
79 Ibid art 22.
80 Underwater Cultural Heritage Convention Operational Guidelines, para 10.
81 Ibid para 10(i)-(iii).

disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage'.[82] In relation to the protection of underwater cultural heritage located in a state's internal waters and territorial sea, States Parties have the 'exclusive right to regulate and authorize activities', but 'shall require' the application of the Rules located in the Annex of the Convention to activities taking place in these zones and which are directed at underwater heritage.[83] In relation to heritage located in their archipelagic waters and territorial sea, they are furthermore expected to inform Flag States Parties and other states with a 'verifiable link' of the discovery of 'State vessels and aircraft'.[84] States Parties can further regulate underwater cultural heritage in the contiguous zone, but must require the application of the Rules to such activities.[85]

A shift occurs between on the one hand the territorial sea and contiguous zone, where the coastal state has the right to regulate underwater cultural heritage, and on the other hand the continental shelf and Exclusive Economic Zone (EEZ), where '[a]ll States Parties have a responsibility to protect underwater cultural heritage'.[86] The obligations of states in this regard are divided into obligations related to reporting and notification, and obligations relating to protection of underwater heritage. With regards to the former, states must ensure that when 'its national, or a vessel flying its flag, discovers or intends to engage in activities directed at underwater cultural heritage' located in either its own EEZ or continental shelf, or that of another State Party, that they will report this to the relevant State Party. However, if it concerns discoveries or activities in the EEZ or continental shelf of another State Party, states may choose to opt for direct reporting by nationals or flagged vessels to that State Party, or for reporting to their own State Party which shall subsequently be relayed to the second State Party.[87] The Convention further provides that no authorisation is permitted of activities directed at underwater cultural heritage in the EEZ or continental shelf unless the activity is in conformity with the Convention;[88] to this end the coastal state has the right to prohibit or authorise activities directed against underwater heritage in these zones.[89] If activity is indeed undertaken, then the coastal state must consult with other States Parties that have declared an interest in its protection, and are granted the responsibility of coordinating these activities as the Coordinating State.[90] As Coordinating State, the state must 'implement measures of protection', 'issue

82 Underwater Cultural Heritage Convention, art 5.
83 Ibid art 7(1)-(2).
84 Ibid art 7(3).
85 Ibid art 8.
86 Ibid art 9(1).
87 Ibid art 9(1).
88 Ibid art 10(1).
89 Ibid art 10(2).
90 Ibid art 10(3)-(5).

all necessary authorizations for such agreed measures', and 'may conduct any necessary preliminary research'.[91] In taking these actions, the Coordinating State is presumed to 'act on behalf of the States Parties as a whole and not in its own interest'.[92]

A similar but separate regime exists for the Area. As noted in the previous chapter, UNCLOS establishes certain minimum standards for the protection of underwater cultural heritage, guided by the general duty of states 'to protect objects of an archaeological and historical nature found at sea', which is applicable in all maritime zones.[93] This duty is supplemented by the specific obligation in relation to underwater cultural heritage found in the Area to preserve or dispose of such heritage 'for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin'.[94] The obligation to protect archaeological and historical objects located in the Area has been further elaborated by the International Seabed Authority, which has adopted exploration regulations in respect of polymetallic nodules, polymetallic sulphides, and cobalt-rich ferromanganese crusts, as well as a draft regulation on the exploitation of these mineral resources. Each of these regulations establishes obligations for prospectors operating in the Area to notify the Secretary-General of the International Seabed Authority (who in turns informs the Director General of UNESCO) of archaeological and historical objects, after which 'no further prospecting or exploration shall take place' until after a decision by the Council of the ISA.[95]

The UNCLOS regime for underwater cultural heritage located in the Area is thus fairly open-ended and is supplemented by the provisions on the Area in the Underwater Cultural Heritage Convention. According to the latter, States

91 Ibid art 10(5).

92 Ibid art 10(6).

93 1982 UN Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 303.

94 Ibid art 149.

95 Assembly of the International Seabed Authority, Decision of the Assembly of the International Seabed Authority relating to the regulations on prospecting and exploration for polymetallic sulphides in the Area (15 November 2010) ISBA/16/A/12/Rev. 1, Regulation 8 and 37; Assembly of the International Seabed Authority, Decision of the Assembly of the International Seabed Authority relating to the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (22 October 2012) ISBA/18/A/11, Regulation 8 and 37; Council of the International Seabed Authority, Decision of the Council of the International Seabed Authority relating to amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters (22 July 2013) ISBA/19/C/17, Regulation 8 and 35; Council of the International Seabed Authority, Draft regulations on exploitation of mineral resources in the Area (22 March 2019) ISBA/25/C/WP.1, Regulation 35. See also Tullio Scovazzi, 'Underwater Cultural Heritage as an International Common Good' in Federico Lenzerini and Ana Filipa Vrdoljak (eds), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature* (Hart Publishing 2014) 217-8.

Parties are expected to require their nationals or flagged vessels to report discoveries of underwater cultural heritage located in the Area, and also if they plan to undertake any activity in relation to it. The State Party is subsequently expected to notify this information to the Director-General of UNESCO and the Secretary-General of the International Seabed Authority, of which the former must communicate this in turn to all other States Parties to the UCHC. States Parties can subsequently declare to the Director-General that they have an interest in being consulted on the protection of this underwater heritage on the basis of a 'verifiable link … particular regard being paid to the preferential rights of States of cultural, historical or archaeological origin',[96] similarly to the UNCLOS regime. Once again, authorisation of any activities directed at underwater cultural heritage in the Area may only be carried out in conformity with the Rules annexed to the Convention,[97] and States Parties must 'take all practicable measures … to prevent any immediate danger to the underwater cultural heritage'.[98] The States Parties may again appoint a Coordinating State, which is tasked with implementing measures of protection as agreed by the States Parties with a particular interest in the heritage in question;[99] once again, this is carried out 'for the benefit of humanity as a whole, on behalf of all States Parties', rather than for its own benefit.[100]

Measures such as those taken by Coordinating States, are, according to the Operational Guidelines of the Convention, ideally subject to common financing by the States Parties to the Convention.[101] To this end, the Guidelines also establish an Underwater Cultural Heritage Fund, which can be used to support the cooperative mechanisms of the Convention, capacity-building efforts, the financing of the STAB, and more broadly 'the enhancement of the protection of the underwater cultural heritage'.[102]

The Underwater Cultural Heritage Convention is thus, perhaps, the most diverse legal instrument within international cultural heritage law. On the one hand, the Convention establishes a number of jurisdictional competences of States Parties over underwater cultural heritage. These obligations are not reciprocal in character, but are intended to create a common jurisdictional framework. The Convention also establishes, as noted above, a range of co-operative mechanisms and international financing of activities carried out by states in their implementation of the Convention. Perhaps most fundamentally, the 2019 Internal Oversight Service (IOS) report on the 2001 Convention noted that '[t]he 2001 Convention and the Rules in its Annex have become the world

96 Underwater Cultural Heritage Convention, art 11(4).
97 Ibid art 12(1).
98 Ibid art 12(3).
99 Ibid art 12(4).
100 Ibid art 12(6).
101 Underwater Cultural Heritage Convention Operational Guidelines, para 61.
102 Ibid para 65(e).

reference for underwater archaeologists. Indeed, they are implemented by archaeologists around the world, regardless of whether their countries have ratified the Convention or not'.[103] This indicates that the function of the Convention is, once again, not a 'law-making' convention *pur sang* – that is, in the sense of establishing international 'legislation'. Instead it establishes a framework which delegates the competence of adopting this legislation to the body of States Parties. The Convention thus functions as a clearing-house for the exchange of information amongst states and other stakeholders, by establishing rules which are not obligatory in and of themselves (although states must require their application in relation to operations taking place within their jurisdiction when authorising these operations).

Ultimately, universal interests find limited expression in the positive law of the Convention, often remaining at the level of an overall guiding principle.[104] Any potential universalist approach of the Convention is furthermore tempered by the fact that it recognises that certain states have a particular interest in the preservation of certain forms of underwater cultural heritage, acknowledging the existing rights of flag states and providing extended rights to states which can demonstrate a 'verifiable link' to the heritage in question.[105] Nonetheless, this does not mean that the Convention's potential status as a common interest regime is wholly negligible.[106] This status can be demonstrated, for example, by the fact that the Convention prohibits the commercial exploitation of underwater cultural heritage,[107] and the obligation with respect to recovered underwater cultural heritage that this heritage 'shall be deposited, conserved and managed in a manner that ensures its long-term preservation', although the precise modalities of such preservation and the actors responsible is left up in the air.[108] The Convention's notification requirements and protection regimes in the EEZ, continental shelf and the Area – the latter of which grants states the ability to exercise rights of consultation

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

104 Craig Forrest, 'A New International Regime for the Protection of Underwater Cultural Heritage' (2002) 51 ICLQ 511, 519-20.

105 Dromgoole (n 73) 133. See e.g. Underwater Cultural Heritage Convention, arts 9(5), 11(4), 18(3)-(4).

106 Trpimir M Šošić, 'The Common Heritage of Mankind and the Protection of the Underwater Cultural Heritage' in Trpimir M Šošić, Budislav Vukas and Bo_idar Bakotić (eds), *International Law: New Actors, New Concepts, Continuing Dilemmas: Liber Amicorum Božidar Bakotić* (Brill Nijhoff 2010) 346-8.

107 Underwater Cultural Heritage Convention art 2(7). See also, by comparison, Scovazzi (n 95) 217 on UNCLOS.

108 Underwater Cultural Heritage Convention art 2(6). See Nicola Ferri, 'The Right to Recovered Underwater Cultural Heritage: The Neglected Importance of Article 149 of the UN Law of the Sea Convention' in Silvia Borelli and Federico Lenzerini (eds), *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Brill Nijhoff 2012) 254-5.

in the managing of underwater cultural heritage in the Area – furthermore underline the common interest of all states in the effective protection of this heritage. Moreover, on several occasions the Convention explicitly acknowledges that activities are undertaken in the interests of all States Parties (or variably the 'benefit of humanity'), rather than the national (economic) interest.[109] As such, even though the Convention does not explicitly reference the existence of a 'cultural heritage of humanity', its presence can nonetheless be implied.[110]

4.1.5 2003 Intangible Cultural Heritage Convention

The purposes of the Intangible Cultural Heritage Convention are fourfold, as outlined in article 1 of the Convention: the safeguarding of intangible cultural heritage (ICH); the ensuring of respect for ICH; raising awareness of its importance; and the provision of international cooperation and assistance. 'Safeguarding' is hereby defined as 'measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage'.[111] Similarly to the World Heritage Convention, the Intangible Cultural Heritage Convention establishes both a plenary body, the General Assembly, and an Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, which is tasked with the examination of requests for inscription and the granting of international assistance.[112]

Although the Convention recognises that 'the safeguarding of intangible cultural heritage is of general interest to humanity'[113] and requires cooperation at all levels, the obligations of the Convention are primarily aimed at states in relation to their own heritage, rather than that of other states. To this end, each State Party 'shall … take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory', and also 'identify and define the various elements of the intangible cultural heritage present in

109 Šošić (n 106) 346-8. See e.g. Underwater Cultural Heritage Convention arts 12(6), 18(4).
110 Ibid 346-8.
111 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3 (Intangible Cultural Heritage Convention) art 2(3).
112 Ibid art 7.
113 Ibid art 19(2). Principle 12 of the 2015 Ethical Principles furthermore notes that '[t]he safeguarding of intangible cultural heritage is of general interest to humanity and should therefore be undertaken through cooperation among bilateral, subregional, regional and international parties; nevertheless, communities, groups and, where applicable, individuals should never be alienated from their own intangible cultural heritage': Intergovernmental Committee, Decision 10.COM 15.A (2015).

its territory'.[114] This duty of identification and subsequent safeguarding is primarily carried out through the compilation of national inventories of intangible cultural heritage; although doing so is compulsory, states can undertake this activity 'in a manner geared to [each state's] own situation'.[115] Supplementary measures, which states must 'endeavour' to carry out, include the adoption of national policies aimed at safeguarding intangible heritage, the creation of national services for its safeguarding, and the adoption of 'appropriate legal, technical, administrative and financial measures'.[116]

The international measures envisaged by the Convention are limited to the establishment of two international lists – the Representative List of the Intangible Cultural Heritage of Humanity and the List of Intangible Cultural Heritage in Need of Urgent Safeguarding – and the provision of international assistance.[117] The latter can be provided to states in order to safeguard heritage on one of the two lists; to prepare national inventories; or to support activities aimed broadly at safeguarding ICH.[118] The Committee is furthermore granted the discretion to grant assistance for 'any other purpose [it] may deem necessary'.[119] Requests must be submitted by States Parties,[120] but the Committee will take into account in the granting of assistance whether '[t]he community, group and/or individuals concerned participated in the preparation of the request and will be involved in the implementation of the proposed activities, and in their evaluation and follow-up as broadly as possible'.[121] International measures also encompass the establishing of international cooperation amongst States Parties. Article 19 of the Convention establishes a baseline presumption of international cooperation amongst States Parties, defined as including, 'inter alia, the exchange of information and experience, joint initiatives, and the establishment of a mechanism of assistance to States Parties in their efforts to safeguard the intangible cultural heritage'.[122]

Above all, the function of the Intangible Heritage Convention is thus the facilitation of national, rather than international, protection. In this sense, the Convention is intended to be complementary to already existing efforts being undertaken by the state within its territory; it also epitomises the orthodox protection mechanisms employed within cultural heritage law through its focus

114 Intangible Heritage Convention, art 11(a)-(b).
115 Ibid art 12.
116 Ibid art 13(d).
117 Ibid arts 16-17.
118 Ibid art 20(a)-(c).
119 Ibid art 20(d).
120 Ibid art 23.
121 General Assembly, Resolution 9.GA 9 (July 2022) Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage (Intangible Cultural Heritage Convention Operational Directives) para I.4.12.A.1.
122 Intangible Heritage Convention, art 19(1).

on the use of heritage lists, supported by the provision of (international) funds and guided by a principle of international cooperation.[123] The obligations established by the Convention are not reciprocal in character, and are – as is the case for the majority of the cultural heritage obligations surveyed above – aimed inwards, at the territory of the state. They also largely establish normatively weak obligations for the States Parties, indicating that the chief goal of the Convention is not the prohibiting of certain forms of action with regards to intangible heritage.

At the international level, the primary aim of the Convention is thus the facilitating of international cooperation and the provision of funding to those states which are not able to foresee in protection of their intangible heritage on the basis of their own resources. The common interest in the protection of intangible cultural heritage is thus not necessarily reflected clearly within the obligations contained in the Convention itself, beyond the fact that intangible cultural heritage is inscribed on the List pursuant to the decision of the Intergovernmental Committee, which accordingly provides for the possibility of international monitoring of the protection of intangible heritage inscribed on the List; this will be further discussed in section 4.2.

4.1.6 Utilisation of *jus cogens* norms and *erga omnes* obligations

As noted in Chapter 2, a frequent element of common interest regimes in public international law is the characterisation of certain norms contained within these regimes as *jus cogens* or peremptory norms or as obligations *erga omnes* (*partes*). While it is questionable whether any *jus cogens* norms can be identified within cultural heritage law, either on the basis of treaty or customary law,[124] the protection of cultural heritage has in many cases been identified as contributing to the realisation of *jus cogens* norms, such as the 'prevention and punishment of war crimes, crimes against humanity and genocide'.[125]

By contrast, it is arguably possible to identify *erga omnes partes* obligations within each of the cultural heritage conventions examined above (with the perhaps notable exception of the 1970 Convention).[126] Of these, the prohi-

123 Lixinski (n 2) 196.

124 Forrest, *International Law and the Protection of Cultural Heritage* (n 1) 52; Francioni, 'Custom and General Principles of International Cultural Heritage Law' (n 4) 548.

125 Francioni, 'Custom and General Principles of International Cultural Heritage Law' (n 4) 550. See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment of 26 February 2007) [2007] ICJ Rep 43, para 344.

126 On cultural heritage law more broadly, see Annalisa Ciampi, 'Identifying and Effectively Protecting Cultural Heritage' (2014) 97 Rivista di Diritto Internazionale 699, 702-3, 724. As previously noted, the 1970 Convention more closely mirrors a reciprocal exchange of rights

bition of the destruction of cultural heritage during times of armed conflict, as codified in the 1954 Hague Convention, is a prime example; in light of the recent state practice beyond the scope of the Hague Convention, such as that of the UN Security Council, this norm can debatably even be considered as an *erga omnes* norm of customary status.[127] Another norm which can be potentially identified as *erga omnes partes* is the duty established by articles 4 and 6 of the World Heritage Convention to protect cultural heritage of outstanding universal value[128] – and, *a contrario*, the prohibition of damage or destruction to such heritage by parties to the World Heritage Convention with respect to such heritage located within their territory.[129] Similarly, the duty to safeguard and ensure respect for intangible cultural heritage established by article 1 of the 2003 Convention could potentially also be seen as an *erga omnes partes* obligation when read in the context of the overall object and purpose of the convention, as established by the invocation in the preamble

and obligations between the parties to the convention than a common interest of the international community.

127 On the practice of the Security Council, see e.g. Kristin Hausler, 'Cultural heritage and the Security Council: Why Resolution 2347 Matters' (2018) 48 Questions of International Law 5; Andrzej Jakubowski, 'Resolution 2347: Mainstreaming the Protection of Cultural Heritage at the Global Level' (2018) 48 Questions of International Law 21. On the potential *erga omnes* and customary character of this norm, see Francesco Francioni and Federico Lenzerini, 'The Destruction of the Buddhas of Bamiyan and International Law' (2003) 14 EJIL 619, 634; George Rodrigo Bandeira Galindo, 'The UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage' in James A R Nafziger and Tullio Scovazzi (eds), *The Cultural Heritage of Mankind* (Brill 2008) 448; Yaron Gottlieb, 'Attacks Against Cultural Heritage as a Crime Against Humanity' (2020) 52 Case Western Reserve Journal of International Law 287, 311; Federico Lenzerini, 'Intentional Destruction of Cultural Heritage' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford Academic, Oxford University Press 2020); Ana Filipa Vrdoljak, 'Cultural Heritage as "Common Concern": Role of International Organizations and States' in Massimo Iovane and others (eds), *The Protection of General Interests in Contemporary International Law* (Oxford University Press 2021) 316. However, compare Roger O'Keefe, 'World Cultural Heritage: Obligations to the International Community as a Whole?' (2004) 53 ICLQ 189.

128 O'Keefe, 'World Cultural Heritage: Obligations to the International Community as a Whole?' (n 127) 190. See also Gionata P. Buzzini and Luigi Condorelli, 'Art.11, List of World Heritage in Danger and Deletion of a Property from the World Heritage List' in Francesco Francioni and Federico Lenzerini (eds), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press 2008) 178-9; Forrest, *International Law and the Protection of Cultural Heritage* (n 1) 277; Berenika Drazewska, 'The Human Dimension of the Protection of the Cultural Heritage from Destruction during Armed Conflicts' (2015) 22 International Journal of Cultural Property 205, 219. By contrast, Carducci is more doubtful as to the *erga omnes partes* nature of these obligations: Guido Carducci, 'Articles 4-7, National and International Protection of the Cultural and Natural Heritage' in Francesco Francioni and Federico Lenzerini (eds), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press 2008) 143-4.

129 On the basis of a reading of article 6(3) of the World Heritage Convention in tandem with article 4 in light of the object and purpose of the World Heritage Convention. See e.g. Lostal (n 2) 159.

of the 'common concern to safeguard the intangible cultural heritage of humanity', as well as the connection of the convention's obligations to the realisation of human rights (similarly reaffirmed in the first recital of the preamble).[130] The same can be held with respect to states' duty to preserve underwater cultural heritage for the benefit of humanity, as established by article 2(3) of the Underwater Cultural Heritage Convention; the upholding of the jurisdictional framework of the Convention can be considered to be in the interest of all States Parties and therefore, insofar as the Convention establishes obligations in this regard, as *erga omnes partes*.[131] This status would seem to be particularly the case with respect to states' responsibility to protect underwater cultural heritage in the Area.[132]

Beyond the prohibition of the destruction of cultural heritage during times of armed conflict, it seems unlikely that any other *erga omnes* norms have been developed; the main contribution of cultural heritage law has thus been to establish the protection of cultural heritage as a common interest, and emphasise that international concern for issues relating to cultural heritage within the territory of a state does not amount to a violation of the principle of non-intervention.[133] In other words, as aptly put by Roger O'Keefe: '[t]he world's cultural heritage is the proper concern of the international community as a whole but it is not yet, in peacetime, the object of obligations owed to

130 The ICJ noted in *Barcelona Traction* that *erga omnes* obligations include 'the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination': *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Preliminary Objections) [1970] ICJ Rep 3, para 34. Similarly, respect for the right to self-determination has been held to constitute an *erga omnes* norm: *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, para 180. Some scholars argue that human rights should generally be seen as establishing *erga omnes* obligations: see Erika De Wet, 'The International Constitutional Order' (2006) 55 ICLQ 51, 55; Yvonne Donders, 'Protection and Promotion of Cultural Heritage and Human Rights through International Treaties: Two Worlds of Difference?' in Charlotte Waelde and others (eds), *Research Handbook on Contemporary Intangible Cultural Heritage: Law and Heritage* (Elgar 2018) 58. See also Human Rights Council, General Comment No. 31 (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add. 13, para 2. However, as Chow notes, the question arises whether all obligations contained in human rights treaties could indeed be characterised as *erga omnes*: Pok Yin S. Chow, 'On Obligations Erga Omnes Partes' (2021) 52 Georgetown Journal of International Law 469, 492. The question is thus whether the human rights guaranteed by the Intangible Cultural Heritage Convention would meet the standard established by bodies of the ICJ, which has thus far limited itself to ascertaining the *erga omnes* status of certain fundamental human rights, such as the prohibition of torture or the right to self-determination.

131 Ciampi (n 126) 703.

132 UNCLOS, art 149; Underwater Cultural Heritage Convention, arts 11-12.

133 O'Keefe, 'World Cultural Heritage: Obligations to the International Community as a Whole?' (n 127) 205; Francioni, 'A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage' (n 3) 222, 236.

that community'[134] as a matter of customary international law. That being said, peacetime obligations with respect to the protection of the cultural heritage of minorities or Indigenous peoples might represent an exception to this general trend.

Furthermore, even in the case of those obligations in cultural heritage law which can be identified as *erga omnes partes*, there are important reasons to doubt the utility of this designation in practice for the protection of common interests, given that the identification of *erga omnes* obligations is often employed to open up additional routes of establishing state responsibility and subsequently the enforcement of a given obligation at the international level. The first hurdle in this case is the frequently discretionary nature of the obligations contained in cultural heritage treaties, creating obligations of means or conduct rather than of result within a common framework centred around international cooperation and assistance.[135] The normatively soft content of treaty obligations in cultural heritage law thus 'makes it difficult to establish wrongfulness that could be invoked by non-injured states for the breach of concrete standards of conduct'.[136] As such, even if the requirement of establishing the existence of an internationally wrongful act by a given state may be proven, many states will be reluctant to take the step of subsequently invoking the wrongfulness of such an act.

Moreover, even if it is possible to clearly identify *erga omnes* (*partes*) obligations with respect to cultural heritage, enforcing these obligations remains difficult in practice.[137] While the identification of a norm as *erga omnes* facilitates the invocation of state responsibility by non-injured states,[138] entailing the cessation of the internationally wrongful act and the performance of reparation,[139] the law of state responsibility remains a blunt tool for enforcing

134 O'Keefe, 'World Cultural Heritage: Obligations to the International Community as a Whole?' (n 127) 207. See also Alessandro Chechi, 'Cultural Heritage Losses in Peacetime: Challenges and Lingering Questions' in Amy Strecker and Joseph Powderly (eds), *Heritage Destruction, Human Rights and International Law* (Brill Nijhoff 2023).

135 Ibid 190; Lucas Lixinski and Vassilis P Tzevelekos, 'The World Heritage Convention and the Law of State Responsibility: Promises and Pitfalls' in Anne-Marie Carstens and Elizabeth Varner (eds), *Intersections in International Cultural Heritage Law* (Oxford University Press 2020) 252.

136 Lucas Lixinski and Vassilis P Tzevelekos, 'The Strained, Elusive and Wide-Ranging Relationship between International Cultural Heritage Law and the Law of State Responsibility: From Collective Enforcement to Concurrent Responsibility' in Alessandro Chechi and Marc-André Renold (eds), *Cultural Heritage Law and Ethics: Mapping Recent Developments* (Schulthess 2017)

137 Ciampi (n 126) 724.

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

139 Ibid art 48(2). Such reparation is to be performed with respect to 'the interest of the injured State or of the beneficiaries of the obligation breached' (art 48(2)(b)).

obligations for the protection of cultural heritage.[140] While the invocation of state responsibility can occur through diplomatic fora, the main added value of identifying an obligation as *erga omnes* (*partes*) is the ability for non-injured states to file a claim before an international dispute settlement body.[141] However, as will be seen in the following section, most cultural heritage treaties do not contain dispute settlement clauses; even if such a body were to have jurisdiction over a given dispute – such as the International Court of Justice on the basis of declarations recognising the compulsory jurisdiction of the Court[142] – states are notoriously reticent in initiating disputes concerning cultural heritage before such bodies.[143] In addition, it is difficult to assess appropriate forms of reparation in response to acts which have resulted in damage to or destruction of cultural heritage, as *restitutio in integrum* frequently is not possible and other forms of reparation will not do justice to the harm caused.[144] Finally, insofar as international law recognises the right of non-

140 O'Keefe, 'World Cultural Heritage: Obligations to the International Community as a Whole?' (n 127) 207; Lixinski and Tzevelekos, 'The Strained, Elusive and Wide-Ranging Relationship between International Cultural Heritage Law and the Law of State Responsibility: From Collective Enforcement to Concurrent Responsibility' (n 136); Jakubowski (n 127) 26; Patrizia Vigni, 'Cultural Heritage and State Responsibility' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020) 640-1.

141 An emerging trend with respect to the enforcement of common interests: see Section 2.2 in Chapter 2.

142 Statute of the International Court of Justice (entered into force 24 October 1945) XV UNCIO 335 (ICJ Statute) art 36(2).

143 To date, the ICJ has only decided one dispute concerning matters related to cultural heritage: *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Judgment of 15 June 1962) [1962] ICJ Rep 6. However, see the recent twin applications by Armenia and Azerbaijan, both of which seek to bring claims concerning the destruction of cultural heritage under the heading of the CERD: *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)* (Application Instituting Proceedings containing a Request for Provisional Measures) General List No 180 [2021]; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)* (Application Instituting Proceedings) General List No 181 [2021]. The Court notably granted Armenia's request for the indication of provisional measures with respect to the destruction of Armenian cultural heritage by Azerbaijan: *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)* (Request for the Indication of Provisional Measures: Order of 7 December 2021) [2021] ICJ Rep 361, para 98.

144 Lixinski and Tzevelekos, 'The Strained, Elusive and Wide-Ranging Relationship between International Cultural Heritage Law and the Law of State Responsibility: From Collective Enforcement to Concurrent Responsibility' (n 136). More broadly, on the notion of reparation in relation to cultural heritage, see Elisa Novic, 'Remedies' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020). The Articles on State Responsibility establish several modalities of reparation: restitution, compensation, and satisfaction: ARSIWA arts 34-37.

injured states to take countermeasures,[145] identifying proportional countermeasures is complex,[146] making it more likely that states will prefer to resort to diplomatic means of dispute settlement.

4.1.7 Conclusion

The above overview of the five core conventions of the international law of cultural heritage demonstrates that the primary method of law-making is indeed not through the adoption of traditional *traités-contrats* but through the form of *traités-lois*. This is comparable to other areas of international law which seek to safeguard common interests. An important caveat is that these conventions do not necessarily seek to establish 'the' law with regards to cultural heritage protection under international law; instead, they seek to establish methods of international cooperation which can assist states in taking action within the scope of their own jurisdiction. As such, it is perhaps inappropriate to equate them with international 'legislation', as is indeed the driving force behind the distinction between law-making and contract treaties discussed in Chapter 2. Nonetheless, each of the conventions surveyed above consist of largely non-reciprocal obligations, with a largely inward-facing character, focusing upon areas or activities within the jurisdiction of the states in question.[147] This non-reciprocal character of the norms in question has also been acknowledged beyond the field of cultural heritage law.[148] Many of the norms

145 The question of the permissibility of such countermeasures was deliberately left open in the Articles on State Responsibility. See Denis Alland, 'Countermeasures of General Interest' (2002) 13 EJIL 1221 (tentatively arguing in favour of such permissibility); Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005) 250 (arguing in favour of the permissibility of countermeasures 'in response to systematic or large-scale breaches of obligations *erga omnes*); Marco Longobardo, 'Genocide, Obligations Erga Omnes, and the Responsibility to Protect: Remarks on a Complex Convergence' (2015) 19 The International Journal of Human Rights 1199, 1206 (pointing out state practice does not yet support the conclusion that forcible countermeasures in response to *erga omnes* violations are permissible); Martin Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge University Press 2017) (arguing in favour of the existence of a customary norm recognising the permissibility of countermeasures by non-injured states, particularly in the context of breaches of communitarian norms).

146 See O'Keefe, 'World Cultural Heritage: Obligations to the International Community as a Whole?' (n 127) 207, who notes that 'simple reciprocity, in the form of damage by other States to cultural heritage found on their respective territories, would be preposterous and simply impossible.'

147 Exceptions to this are the 1970 Convention and, for certain maritime zones, the 2001 Convention.

148 Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 EJIL 907, 917. See also Brilmayer, who equates the World Heritage Convention to a 'pledge', similar to human rights agreements; the underlying normative value which the Convention seeks to conserve is decisive in granting

contained in cultural heritage law can moreover be characterised as *erga omnes partes* as is often the case for common interest regimes in international law, although it is unlikely that any *erga omnes* norms or *jus cogens* obligations have emerged with respect to cultural heritage protection in customary international law (with the exception of obligations relating to the prohibition of the destruction of cultural heritage during times of armed conflict, as noted above).

Furthermore, many of these conventions clearly have links to other regimes besides cultural heritage law: the 1954 Convention to international humanitarian law; the 2001 Convention to the law of the sea; and the 1972 and 2003 Conventions to regimes for the protection of the environment and human rights. But the baseline which has developed over time and can now be considered a common factor tying these regimes together is the establishing of the importance of international cooperation as a guiding principle in cultural heritage protection. There is a recognition that cultural heritage is important to all, but that not all states have sufficient means or knowledge to safeguard it. As a consequence of this realisation, the conventions facilitate the use of cultural heritage lists. As it is not self-explanatory which heritage the international community values, this is a deliberative process through which the international community can seek to constitute itself through the vehicle of international cultural heritage law. In addition, the majority of the conventions establish (limited) funding to support states in their protection of heritage which has been recognised as internationally valued by virtue of its recognition in the respective conventions.

4.2 Monitoring and implementation mechanisms

Having considered these common methods of protection employed within cultural heritage law, the following section now turns to the monitoring and implementation mechanisms which have been developed in these conventions over time. It will examine in turn the establishment of statutory bodies; the creation of operational guidelines; the establishment of periodic reporting mechanisms; the establishment of monitoring and non-compliance mechanisms; and finally, the role of dispute settlement procedures.

4.2.1 Establishment of statutory bodies

Since the early 2000s, cultural heritage law has undergone an increasing institutionalisation at the international level, predominantly through the regularisation of the meetings of plenary bodies of the respective cultural

it this character: Lea Brilmayer, 'From 'Contract' to 'Pledge': The Structure of International Human Rights Agreements' (2007) 77 British Yearbook of International Law 163, 174.

heritage conventions and the establishment of subsidiary bodies with a rotating membership based on geographical representation. These subsidiary bodies have in turn become largely responsible for the monitoring of the implementation of their respective conventions by the States Parties, for example by examining periodic reports, responding to urgent problems, and formulating recommendations on implementation for their respective plenary bodies.

The High Contracting Parties to the 1954 Hague Convention for example only held one meeting until the 1990s,[149] and the Meeting of States Parties to the 1970 Convention only held its first session in 2003.[150] Since the 2000s, the situation for both conventions has radically changed. Thus in the case of the Hague Convention, the adoption of the 1999 Second Protocol led to the regularisation of the monitoring process of the implementation of the Hague Convention.[151] The Protocol does so through the establishment of a regular Meeting of the Parties, which takes place every two years in tandem with the Meeting of the High Contracting Parties to the Hague Convention, as well as through the establishment of an intergovernmental Subsidiary Committee for the Protection of Cultural Property in the Event of Armed Conflict, which meets every year.[152]

The Subsidiary Committee is responsible for most tasks related to the day-to-day running of the Second Protocol, such as the development of operational guidelines; the management of the enhanced protection system established by the Second Protocol; monitoring the implementation of the protocol, *inter alia* by considering periodic reports; and the granting of international assistance through the Fund established by the Second Protocol.[153] The Meeting of the Parties of the 1999 Second Protocol is in turn responsible for the election of the members of the Subsidiary Committee, adopting the operational guidelines proposed by the Committee, and reflecting more broadly on implementation of the Convention and the Protocol.[154] The Meeting of the High Contracting Parties of the Hague Convention carries out similar tasks, with its main task being 'to study problems concerning the application of the Convention and of the Regulations for its execution, and to formulate recommendations in

149 The 1954 Hague Convention merely provides in art 27(1) that a meeting of the High Contracting Parties may be convened by the Director-General of UNESCO. The first meeting was in 1962; subsequent meetings took place in 1995, 1997, 1999, 2001, and 2005. Since 2005 the meetings are held every two years.

150 Subsequent meetings took place in 2012, 2013, 2015, 2017, and 2019.

151 1999 Second Protocol: Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (16 December 2021) C54/21/9.SP/Resolutions, Resolution 9.SP 9 (Second Protocol Guidelines) para 120.

152 1999 Second Protocol, art 24.

153 Ibid art 27; Second Protocol Guidelines para 19.

154 1999 Second Protocol, art 23; Second Protocol Guidelines para 17.

respect thereof'.[155] The main distinction is that, unlike the Second Protocol, it does not have a subsidiary body.

Similarly, in the case of the 1970 Convention, the Meeting of States Parties has taken place every two years since 2003;[156] a Subsidiary Committee was established in 2012 by the Meeting of Parties, which meets every year. The Meeting of States Parties is the 'sovereign organ' of the 1970 Convention,[157] and 'gives strategic orientations for the implementation of the Convention'.[158] By contrast, the Subsidiary Committee is responsible for a wide range of tasks relating to the implementation of the 1970 Convention, including the review of periodic reports, the exchange of best practices, and more broadly to 'identify problem areas, trends and challenges arising from the implementation of the Convention', and to report on these issues to the Meeting of States Parties.[159] Indirectly linked to the governance of the 1970 Convention is the creation in 1978 of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, a stand-alone intergovernmental body which seeks to facilitate the restitution of illicitly trafficked cultural property through bilateral negotiations and mediation and conciliation between states.[160] However, as the ICPRCP is not strictly speaking a body established by the 1970 Convention, it is beyond the scope of the present discussion.[161]

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155 1954 Hague Convention, art 27(2).

156 IOS/EVS/PI/133 REV. 2 (n 42) 6.

157 Rules of Procedure, Meeting of States Parties to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (2021) C70/21/6.MSP/15.FINAL, para 1.1.

158 Ibid para 1.2. The 1970 Convention does not contain an explicit provision on the Meeting of States Parties.

159 Rules of Procedure, Subsidiary Committee of the Meeting of States Parties to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (2021) C70/21/9.SC/3b.bis, para 1.

160 Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (October-November 1978) 20 C/Resolution/4/7.6/5, art 3(2), 4(1). The Statute was amended in 2005 by the General Conference of UNESCO: see Alessandro Chechi, *The Settlement of Cultural Heritage Disputes* (Oxford University Press 2014) 33, 104-5. The Rules of Procedure for such mediation and conciliation procedures are set out in the Rules of Procedure for Mediation and Conciliation in Accordance with Article 4, Paragraph 1, of the Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (October 2010) CLT-2010/CONF.203/COM.16/7.

161 Moreover, the ICPRCP has been seen as largely ineffective due to the fact that it is limited to inter-state disputes and does not have the ability to issue binding decisions, which requires it to be reliant on the good-will of states: ibid 103. However, as Chechi (n 160) adds: 'the ICPRCP cannot be judged by its docket. On the contrary, it has been rightly pointed out that the tens of thousands of returns that had taken place without its direct involvement since 1978 attest its authority. States and public institutions have been persuaded by the ICPRCP to make restitutions – through bilateral negotiations, voluntary acts by the possessor, or other solutions, such as loans or production of replicas – but also to

The World Heritage Convention is characterised by a similar structure: a plenary body, the General Assembly; and a subsidiary body, the World Heritage Committee. However, the World Heritage Convention does not contain a stand-alone provision on the General Assembly, demonstrating the relative importance of the World Heritage Committee in the governance of the Convention. Nonetheless, this does not mean that the General Assembly is wholly without import, as it elects the members of the World Heritage Committee and determines the percentage of contributions which States Parties must make to the World Heritage Fund.[162] In the past, it has also adopted general policies relating to the implementation of the World Heritage Convention and the governance of the Committee on an *ad hoc* basis, such as the Declaration on the Conservation of Historic Urban Landscapes,[163] the Policy for the Integration of a Sustainable Development Perspective into the Processes of the World Heritage Convention (or the Sustainable Development Policy),[164] and the Declaration of Principles to Promote International Solidarity to Preserve World Heritage.[165]

By contrast, the tasks of the World Heritage Committee are extensively set out in Chapter III of the Convention; the Committee is responsible for the critical task of inscribing sites on the World Heritage List and the maintenance of the List of World Heritage in Danger, as well as for the granting of international assistance to States Parties and the use of the World Heritage Fund.[166] It is also responsible for the monitoring mechanisms of the Convention: reactive monitoring and periodic reporting.[167] In addition to this, the Committee is tasked with the review and evaluation of the implementation of the Convention;[168] thus, similarly to the General Assembly, the Committee has also adopted a wide range of policies which have influenced the development of the Convention, such as the Global Strategy for a Representative, Balanced and Credible World Heritage List[169] and the Budapest Declaration

improve national legislations and produce legal and non-legal tools such as import controls, databases, and codes of ethics' (at 104).

162 World Heritage Committee, Operational Guidelines for the Implementation of the World Heritage Convention (31 July 2021) WHC.21/01 (World Heritage Convention Operational Guidelines) para 18; see also World Heritage Convention, arts 8(1), 16(1), 29.

163 General Assembly of the World Heritage Convention, Adoption of a Declaration on the Conservation of Historic Urban Landscapes (2005) Resolution 15 GA 7.

164 General Assembly of the World Heritage Convention, Policy for the Integration of a Sustainable Development Perspective into the Processes of the World Heritage Convention (2015) Resolution 20 GA 13.

165 General Assembly of the World Heritage Convention, Declaration of Principles to Promote International Solidarity and Cooperation to Preserve World Heritage (2021) Resolution 23 GA 10.

166 World Heritage Convention, arts 11, 13.

167 World Heritage Convention Operational Guidelines, para 24(b).

168 Ibid para 24(i).

169 World Heritage Committee, Decision 18 COM X.10 (1994).

on World Heritage.[170] Finally, the World Heritage Committee is responsible for the revision of the Operational Guidelines.[171]

The World Heritage Committee is assisted in its tasks by the advisory bodies to the Convention: ICOMOS, IUCN, and ICCROM.[172] The primary tasks of the advisory bodies are the evaluation of nominations to the World Heritage List, the monitoring of the state of conservation at World Heritage sites, and the reviewing of requests for international assistance;[173] however they can also more broadly 'advise on the implementation of the World Heritage Convention in their field of expertise'.[174]

By contrast to earlier conventions such as the 1954 Hague Convention and 1970 Convention, the more recent cultural heritage conventions – the 2001 and 2003 Conventions – have had regular meetings of their statutory bodies since their inception. In comparison to the World Heritage Convention, where much of the power for managing the implementation of the Convention rests with the World Heritage Committee, in the case of the 2003 Convention, the General Assembly of the Intangible Cultural Heritage Convention is explicitly described as the 'sovereign' body of the Convention;[175] the Intergovernmental Committee thereby assumes a 'subordinate' role and is 'answerable to the General Assembly' and thus 'shall report to it on all its activities and decisions'.[176] The General Assembly elects members to the Intergovernmental Committee,[177] and determines the contributions to be made by States Parties to the Fund of the Convention.[178] While the Intergovernmental Committee is in turn responsible for the majority of tasks under the Convention, such as the inscription of elements on the Lists and the granting of international assistance,[179] in many situations it merely makes a recommendation to the General Assembly, which is ultimately responsible for the adoption of the decision.[180]

A further distinction between the World Heritage Convention and the 2003 Convention is that the latter does not have official 'advisory bodies' which assess nominations to its lists. Instead, this task is fulfilled by the Evaluation

170 World Heritage Committee, Decision 26 COM 9 (2002).
171 World Heritage Convention Operational Guidelines, para 24(j).
172 World Heritage Convention, art 8(3). IUCN and ICOMOS are international NGOs; ICCROM is an intergovernmental organisation.
173 World Heritage Convention Operational Guidelines, para 31.
174 Ibid para 31(a).
175 Intangible Cultural Heritage Convention, art 4(1).
176 Ibid art 8(1). See Guido Carducci, 'Art.4–8: Organs of the Convention' in Janet Blake and Lucas Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (Oxford University Press 2020).
177 Intangible Cultural Heritage Convention, art 6.
178 Ibid art 26(1).
179 Ibid art 7(g).
180 This is the case, for example, for the adoption and revision of the Operational Directives (art 7(e)), the examination of states' periodic reports (art 7(f)), and the accreditation of advisory organisations to the Committee (art 9).

Body,[181] which is appointed by the Intergovernmental Committee. The Evaluation Body is composed of 'six experts qualified in the various fields of the intangible cultural heritage representatives of States Parties non-Members of the Committee and six accredited non-governmental organizations'.[182] While the Operational Directives stipulate that the members of the Evaluation Body 'shall act impartially in the interests of all the States Parties and the Convention',[183] strictly speaking the Evaluation Body can be seen as less independent than the advisory bodies to the World Heritage Committee: firstly due to its members being directly elected by the Intergovernmental Committee, and secondly due to the fact that half of the Evaluation Body is comprised of representatives of States Parties (albeit expert representatives who are not necessarily career diplomats or otherwise affiliated to the state apparatus).

The Underwater Cultural Heritage Convention only establishes a Meeting of States Parties, which meets every two years.[184] The Meeting of States Parties is responsible for the adoption of the Operational Guidelines, the examination of periodic reports submitted by states, and is in charge of charting the course of the future development of the Convention.[185] That being said, as noted above, the Convention also establishes an expert body, the Scientific and Technical Advisory Body (STAB), which meets on a yearly basis and '[assists] the Meeting of States Parties in questions of a scientific or technical nature regarding the implementation of the Rules';[186] it can do so by making recommendations to the Meeting of States Parties or through the carrying out of missions to States Parties upon the request of the Meeting of States Parties.[187] Similarly to the Intangible Cultural Heritage Convention's Evaluation Body, the STAB is a subsidiary *expert* body and not an intergovernmental body, as its members are required to have 'a scientific, professional and ethical background at the national and/or international level'.[188] While the members of the STAB 'shall work impartially',[189] by comparison to the World Heritage Convention's advisory bodies the STAB is also not strictly speaking wholly independent: its members are nominated by a State Party to represent them in the STAB and are elected by the Meeting of States Parties.[190] The Meeting of States Parties is furthermore responsible for the adoption and amendment

181 Ibid art 8(3); Intangible Cultural Heritage Convention Operational Directives, para 27.
182 Intangible Cultural Heritage Convention Operational Directives, para 27.
183 Ibid para 28.
184 Underwater Cultural Heritage Convention, art 23(1).
185 Rules of Procedure of the Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage (2019) CLT/CEM/UCH/2019/1, Rule 3.
186 Underwater Cultural Heritage Convention, art 23(5).
187 Statutes of the Scientific and Technical Advisory Body to the Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage (2019) CLT/CEM/UCH/2019/2, art 1.
188 CLT/CEM/UCH/2019/1 (n 185) Rule 22.1.
189 CLT/CEM/UCH/2019/2 (n 187) art 2(b).
190 CLT/CEM/UCH/2019/1 (n 185) Rule 3(b), 21, 23.

of the statutes of the STAB and can therefore exert an influence on its working methods.

4.2.2 Operational guidelines

A similar state of affairs exists with respect to the adoption of operational guidelines: whereas the 'older' cultural heritage conventions historically did not rely upon operational guidelines, their use has been regularised across the conventions from the 2000s onwards. The subsidiary bodies of the respective conventions are usually responsible for the adoption and revision of the operational guidelines of the conventions, although the ultimate adoption of these operational guidelines tends to remain the prerogative of the plenary body. The adoption of these operational guidelines can be seen as a way of ensuring the progressive development of the cultural heritage conventions in order to ensure their continuing relevance.

Whereas the 1954 Hague Convention included a set of Regulations for the Execution of the Convention, these Regulations formed an 'integral part' of the Convention and were subject to the same revision procedures as the Hague Convention itself and thus do not form operational guidelines as they are commonly known today.[191] The Meeting of High Contracting Parties has not yet established any operational guidelines for the 1954 Hague Convention. By contrast, the 1999 Second Protocol provides for the development of operational guidelines by the Second Protocol Committee, which can subsequently be endorsed by the Meeting of the Parties.[192] Similarly, operational guidelines for the 1970 Convention were not adopted until 2015;[193] these operational guidelines are also developed by the Subsidiary Committee and subsequently submitted for adoption to the Meeting of States Parties.

The World Heritage Convention is the only convention of which the operational guidelines are not adopted by its plenary body. The first version of the Operational Guidelines of the World Heritage Convention was adopted in 1978; the guidelines have been revised on a regular basis since then.[194] The Operational Guidelines are directly adopted by the World Heritage Committee.[195] By contrast, the Operational Directives of the Intangible Cultural Heritage Convention are formulated by the Intergovernmental Committee and

191 1954 Hague Convention, arts 20, 39.
192 1999 Second Protocol, arts 23(3)(b), 27(1)(a).
193 Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (May 2015) C70/15/3.MSP/Resolutions, Resolution 3.MSP 11 (1970 Convention Operational Guidelines), Annex.
194 Operational Guidelines for the Implementation of the World Heritage Convention (1978) WHC/2.
195 World Heritage Convention Operational Guidelines, para 24(j).

submitted to the General Assembly for adoption;[196] as the Underwater Cultural Heritage Convention does not have a subsidiary intergovernmental body, its operational guidelines are both developed and adopted by the Meeting of States Parties.[197]

4.2.3 Periodic reporting

Periodic reports are an integral part of the monitoring of the cultural heritage conventions, with the exception of the 2001 Convention. Thus in the case of the 1954 Hague Convention and the 1999 Second Protocol, both instruments establish periodic reporting mechanisms in which States Parties must submit a report on the implementation of the instrument to the Director-General of UNESCO or the 1999 Protocol Committee.[198] In practice, both the reports of the 1954 Convention and the 1999 Protocol are examined by the 1999 Protocol Committee,[199] which can comment on states' reports and seek clarification if necessary; it subsequently prepares a report on the implementation of the Second Protocol and can also make recommendations based upon its findings.[200] While for many years a large number of states failed to submit their periodic reports,[201] these submissions have significantly increased in the last few years.[202]

The main monitoring mechanism of the 1970 Convention involves the submission of periodic reports every four years by the States Parties.[203] These periodic reports are reviewed by the Subsidiary Committee, which is also tasked with the function of '[identifying] problem areas, trends and challenges arising from the implementation of the Convention, including issues relating

196 Intangible Cultural Heritage Convention, art 7(e).
197 CLT/CEM/UCH/2019/1 (n 185) Rule 3(a).
198 1954 Hague Convention, art 26(2); 1999 Second Protocol, art 37(2). See also Second Protocol Guidelines, para 121.
199 Committee for the Protection of Cultural Property in the Event of Armed Conflict, Report on the Best Practices in the Implementation of the 1954 Hague Convention and its two (1954 and 1999) Protocols (23 October 2019) C54/19/14.COM/INF.5.I, para 5. See also 1999 Second Protocol, art 27(1)(c).
200 Second Protocol Guidelines, para 126.
201 An overview is available at: https://en.unesco.org/node/343239.
202 Committee for the Protection of Cultural Property in the Event of Armed Conflict, Analytical Report on Good Practices in the Implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and/or its two (1954 and 1999) Protocols (3 November 2022) C54/22/17.COM/INF.8.I, para 5. For an analysis of the reports submitted by States Parties, see *inter alia* Committee for the Protection of Cultural Property in Armed Conflict, Consideration of National Reports on the Implementation of the 1954 Hague Convention and/or its two (1954 and 1999) Protocols (29 November 2021) C54/21/16.COM/11.Rev.
203 1970 Convention, art 16; Records of the General Conference, 32nd Session (vol 1), 32 C/ Resolution 38 (2003) para 3.

to the protection and return of cultural property'.[204] While the Convention currently has 141 States Parties, in its most recent cycle of periodic reports only 68 States Parties submitted reports,[205] leading UNESCO's Internal Oversight Service to conclude that the convention's monitoring mechanism 'has not been particularly effective',[206] particularly as there is no mechanism to verify the accuracy of the information submitted by states and there is no procedure to follow-up on potential issues flagged in the periodic reports.[207]

The World Heritage Convention has a number of monitoring mechanisms which have developed since the adoption of the Convention,[208] one of which is the submission of periodic reports to the World Heritage Committee by States Parties on the basis of article 29 of the Convention. These periodic reports are a form of self-reporting by States Parties,[209] intended to outline 'the legislative and administrative provisions they have adopted and other actions which they have taken for the application of the Convention, including the state of conservation of the World Heritage properties located on their territories'.[210] According to the current Operational Guidelines, States Parties submit their periodic reports every six years on the basis of a regional cycle.[211] These periodic reports are subsequently collated into regional reports by the World Heritage Centre and assessed by the World Heritage Committee, and lead to the develop of a regional Action Plan which sets objectives for States Parties for the next six years with respect to the management of World Heritage in the region.[212] At the end of each six-year cycle, the World Heritage Committee moreover reflects on possible revisions to the periodic reporting procedure on the basis of feedback from States Parties and other stakeholders involved in the process in order to ensure its efficacy.[213]

In the current version of the periodic reporting form, states are required to report on a wide variety of questions, including the level of involvement of a range of stakeholders (including local communities, residents and Indi-

204 C70/21/9.SC/3b.bis (n 159) para 1(d).

205 Although this is a marked increase from the situation in the early 2000s: in 2003, only 19 reports were submitted, for example. An overview of all reports is available at https://en.unesco.org/fighttrafficking/1970/national_reports. UNESCO's IOS noted in 2014 that '[i]n none of the seven rounds of reporting since the Convention was adopted have more than 50% of State Parties responded': IOS/EVS/PI/133 REV. 2 (n 42) 81.

206 Ibid iv.

207 Ibid 81.

208 See e.g. Christina Cameron and Mechtild Rössler, *Many Voices, One Vision: The Early Years of the World Heritage Convention* (Ashgate 2013).

209 World Heritage Convention Operational Guidelines, para 200.

210 Ibid para 199.

211 Ibid para 203.

212 Ibid para 208-10.

213 See World Heritage Committee, Reflection on the Preparation of the Next Cycle of Periodic Reporting (30 June 2006) WHC-06/30.COM/11G; World Heritage Committee, Follow-up of the Second Cycle of the Periodic Reporting Exercise for the Other Regions and General Reflection on Periodic Reporting (15 May 2015) WHC-15/39.COM/10B.

genous peoples) in the preparation of Tentative Lists and nomination dossiers (ranging from 'not applicable', 'none', 'poor', 'fair', and 'good'), whether there are national policies which give cultural and natural heritage a function in the life of communities, and whether the state is using policies such as the Sustainable Development Policy. The State Party is subsequently requested to identify the top ten issues which require action with respect to their implementation of the World Heritage Convention; the issues which can be selected are automatically populated based on the answers provided elsewhere in the periodic reporting form. In turn, the State Party is requested to indicate what actions it will take to address these issues, which authorities are responsible within the state, the timeframe for the action to be taken, and whether international assistance from the World Heritage Fund will be required.[214] With respect to the state's World Heritage sites, the periodic reporting form askes the state to indicate, amongst other questions, the 'factors affecting the property'.[215]

As already noted above, the 2001 Convention is the only cultural heritage convention which does not provide for a periodic reporting system, leading UNESCO's Internal Oversight Service to conclude that it is difficult to assess how successful the convention has been. While some States Parties have submitted information on their implementation of the Convention to the Secretariat of the Convention on an *ad hoc* basis, these reports are few and far between.[216] However, as noted in the previous chapter, the 2001 Convention does establish a number of reporting and notification obligations, such as in relation to underwater cultural heritage in the EEZ and on the continental shelf of one of the States Parties or in the Area; States Parties must thus notify the Director-General of UNESCO of discoveries or planned activities directed at the underwater cultural heritage.[217] The Director-General subsequently makes this information available to all States Parties,[218] after which any State Party can declare its interest on being consulted on ensuring the protection of the underwater cultural heritage in question.[219] However, once again, the

214 A template for the current periodic reporting format can be accessed via https://whc.unesco.org/en/368/?page=draft&did=5154&pageNum=17.

215 A list of these factors can be found at: https://whc.unesco.org/en/factors/. The factors include 'buildings and development' (including 'housing'); 'biological resource use/modification' (including 'fishing', 'livestock farming/grazing', 'subsistence wild plant collection', and 'subsistence hunting'); and 'social/cultural uses of heritage' (including 'ritual/spiritual/religious and associative uses' and 'indigenous hunting, gathering and collecting').

216 IOS/EVS/PI/132 REV.3 (n 67) 41.
IOS/EVS/PI/174.REV (n 103) 23, on the basis of Rule 3(d) of the Rules of Procedure of the MSP.

217 Underwater Cultural Heritage Convention, art 9(3), 11(2).

218 Ibid art 9(4), 11(3).

219 Ibid art 9(5), 11(4).

Convention contains no provisions on ensuring that these reporting obligations are indeed implemented.

Finally, in the case of the 2003 Convention, States Parties are required to submit periodic reports on the implementation of the Convention every six years; these reports cover both national measures of implementation as well as the 'current status' of all elements on the Representative List which are located in its territory.[220] The same requirement exists with regards to elements on the Urgent Safeguarding List, although reports must be submitted every four years instead of six and the Committee can also request additional reports 'in cases of extreme urgency'.[221] Pursuant to a major revision of the Operational Directives of the Convention in 2018, states now report every six years on a regional basis, rather than – as initially required – on the basis of the date upon which they ratified, accepted or approved the Convention.[222] As a result, no reports were examined in 2019 and 2020; the first set of these new reports was examined in 2021, for Latin America and the Caribbean; after which Europe, the Arab States, Africa, and Asia and the Pacific will follow in 2022, 2023, 2024, and 2025.

The entire reporting structure was moreover reoriented around a new 'overall results framework'. States Parties are now expected to report on 24 indicators which are each in turn divided into a number of assessment factors,[223] intended to 'represent an agreed consensus about what information can be considered as a sign of success or progress in the implementation of the Convention'.[224] In line with these assessment factors, States Parties are expected to report on the implementation of the Convention in their territory in a wide range of ways, ranging from the establishment of competent bodies for safeguarding, the creation of inventorying systems, the adoption and implementation of policies and legal and administrative measures, to more pragmatic issues, such as awareness raising of the importance of ICH through the media. In the reporting form, states respond to questions related to each assessment factor on the basis of multiple-choice questions, and are able to provide a short elaboration on their chosen answer. On the basis of their answers to the questions for the assessment factors, the reporting form generates a 'baseline' for future reporting, based on the extent to which each of the 24 indicators is met (either 'not satisfied', 'partially', 'largely' or 'satisfied');

220 Intangible Cultural Heritage Convention Operational Directives, paras 152-7.

221 Ibid paras 160-1.

222 General Assembly of the States Parties to the Convention, Revision of the Operational Directives for the Implementation of the Convention (31 May 2018) ITH/18/7.GA/10 Rev., Annex.

223 The entire Overall Results Framework is comprised of 26 indicators, with 86 factors. Of the 26 indicators, two are only to be assessed at the global level.

224 General Assembly of the States Parties to the Convention, Draft Overall Results Framework (4 May 2018) ITH/18/7.GA/9, para 7; see annex for the Overall Results Framework.

subsequently, the State Party is allowed to voluntarily set a target for their next periodic report in six years, and explain how they plan to reach this target.

However, as Blake and Nafziger note, in the past many states have failed to meet their obligations to submit their periodic reports, either submitting reports late or not at all; in addition, 'there is a great variety in the quality of the reporting and the information set provided.'[225] Moreover, due to the restructuring of the reporting procedure, some states have not yet submitted a single periodic report on their implementation of the Convention, even though some have been parties to the Convention for more than ten years – whereas other states may have submitted one or even two previous periodic reports.[226]

4.2.4 Monitoring

Many critiques of the monitoring mechanisms employed within cultural heritage law focus on the limitations of a system which is heavily reliant upon state reporting, as it requires states to carry out their reporting obligations in good faith and prevents an independent assessment by the supervisory bodies of the veracity of the information which has been submitted.[227] However, with the exception of the 1970 Convention, each of the conventions surveyed above have actually developed a range of mechanisms which allow for the gathering of information on the implementation of the convention independently of the information submitted by the State Party in its periodic reports. Notably, each of these mechanisms have been established on the basis of the progressive development of the operational guidelines of their respective conventions.[228]

These procedures can be divided into two types: firstly, the sending of (expert) advisory missions upon the request of a State Party, often in order

225 Janet Blake and James A. R. Nafziger, 'Art. 29-30: Reports by the States Parties and the Committee' in Janet Blake and Lucas Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (Oxford University Press 2020) 406.

226 As of 2023, Afghanistan, Angola, Benin, Brunei Darussalam, Cabo Verde, Cameroon, Chad, Comoros, Congo, Cook Islands, DRC, Equatorial Guinea, Eritrea, Eswatini, Fiji, Gambia, Guinea, Guinea-Bissau, Kiribati, Lao PDR, Lesotho, Malaysia, Marshall Islands, Micronesia, Myanmar, Nauru, Nepal, Niger, Palau, Papua New Guinea, Rwanda, Samoa, San Marino, Sao Tome and Principe, Singapore, Solomon Islands, Somalia, South Sudan, Tajikistan, Thailand, Timor-Leste, Togo, Tuvalu, United Republic of Tanzania, Vanuatu.

227 Laurence Boisson de Chazournes, 'Monitoring, Supervision and Coordination of the Standard-Setting Instruments of UNESCO' in Abdulqawi A Yusuf (ed), *Standard-setting at UNESCO: Essays in Commemoration of the Sixtieth Anniversary of UNESCO* (Martinus Nijhoff 2007) 71.

228 The following section is limited to a discussion of monitoring bodies with respect to the cultural heritage conventions of UNESCO. On the monitoring and supervision bodies within UNESCO more generally, see ibid.

to provide technical assistance on the implementation of the convention in question with respect to a specific issue. The possibility of requesting such missions has been established by the 1972 Convention, the 1999 Second Protocol, and the 2001 Convention – although, in the case of the other conventions the possibility of such missions potentially remains possible on an *ad hoc* basis, given that they are carried out with the consent of the state. In the case of the second type of procedure, the state can be subjected to an enhanced monitoring procedure on a non-voluntary basis; this enhanced monitoring procedure is usually paired with the sending of an expert mission to the state in question in order to gather information on the implementation of the convention. This type of procedure has been established with respect to the 1972 Convention, the 1999 Second Protocol, and the 2003 Convention; in the case of the 1999 Second Protocol and the 2003 Convention, these procedures are of relatively recent vintage (2023 and 2022, respectively) and have been explicitly modelled upon similar procedures developed in the context of the World Heritage Convention.

4.2.4.1 Voluntary advisory missions

In the case of the 2001 Convention, the Statutes of the STAB provide a possibility for states to request a mission from the STAB upon the approval of the Meeting of States Parties or the Bureau of the Meeting of States Parties; the cost of the mission is usually borne by the State Party requesting it.[229] The modalities of the mission are decided upon by the Chairperson of the STAB in consultation with the Secretariat of the Convention and the State Party which requested assistance.[230] Following the mission, the Secretariat drafts a report which is subsequently adopted by the members of the STAB.[231] These missions are intended to help States Parties by providing them with scientific and technical advice on the implementation of the Rules annexed to the 2001 Convention.[232] Five missions have been carried out to date in relation to the investigation of potentially historically significant shipwrecks or underwater archaeological sites, including on one occasion an examination whether a commercial salvage company had respected the Rules.[233]

229 CLT/CEM/UCH/2019/2 (n 187) art 5(a).
230 Ibid art 5(b).
231 Ibid art 5(e).
232 Ibid art 1(c).
233 Report and Evaluation, Mission of the Scientific and Technical Advisory Body to Haiti (3 October 2014); Report of the mission to Panama (6-14 July and 21-29 October 2015) to evaluate the Project related to the wreck of the *San José*) (7 December 2015) UCH/16/7.STAB/5; Report and Evaluation, 16-24 June 2015 Mission of the Scientific and Technical Advisory Body to Madagascar (16 January 2016) UCH/16/7.STAB/4; Advisory mission Report of the World Heritage Property of the Ancient City of Nessebar, Bulgaria (2017); Report on STAB Mission to Guatemala (9 October 2019) UCH/19/1.EXT.STAB/INF.2.2;

Similarly, States Parties to the World Heritage Convention can request an advisory mission in order to receive 'expert advice … on specific matters', such as 'evaluating [the] possible impact of a major development project on the Outstanding Universal Value' of a World Heritage site.[234] These missions are usually funded by the requesting State Party,[235] and can be carried out by the advisory bodies, such as ICOMOS or IUCN.[236] Numerous advisory missions have been carried out since 2008.[237] Proposals are also currently underway to allow States Parties to the 1999 Second Protocol to request an advisory mission in order to receive advice with respect to their compliance with the Protocol's obligations with respect to the adoption of preparatory peacetime measures for the safeguarding of cultural property or concerning (the imminent threat of) damage to or destruction of cultural property during an armed conflict.[238] The costs of these advisory missions would also in principle be borne by the State Party requesting them.[239]

4.2.4.2 Non-voluntary monitoring procedures

However, alongside the potential of such voluntary procedures, a number of the cultural heritage conventions have non-voluntary monitoring procedures which can be initiated if there are concerns with regard to the implementation of the convention in question.

– *1972 World Heritage Convention*

As already noted above, the World Heritage Convention has a number of monitoring mechanisms which have been developed over the course of the years in the Convention's operational guidelines.[240] Alongside the regional periodic reporting cycle, the World Heritage Convention also has a reporting procedure which focuses on individual sites when there are reasons to believe that the outstanding universal value of the site is (possibly) under threat. This process is known as reactive monitoring, and is defined as 'the reporting by the Secretariat, other sectors of UNESCO and the Advisory Bodies to the Com-

234 World Heritage Convention Operational Guidelines, para 28(f), fn 2. See also paras 176(b), 184 (in relation to Reactive Monitoring).
235 Ibid para 28(f), fn 2.
236 Ibid para 31(d).
237 For an overview, see https://whc.unesco.org/en/documents/?action=list&mode=&id_keywords=462&maxrows=75.
238 Committee for the Protection of Cultural Property in the Event of Armed Conflict, Decisions adopted during the 17th meeting of the Committee for the Protection of Cultural Property in the Event of Armed Conflict (16 December 2022) C54/22/17.COM/Decisions, Decision 17.COM 9A, Annex, para 134(b).
239 Ibid para 136.
240 See e.g. Cameron and Rössler (n 208); Evan Hamman and Herdis Hølleland (eds), *Implementing the World Heritage Convention: Dimensions of Compliance* (Elgar 2023) 119-3.

mittee on the state of conservation of specific World Heritage properties that are under threat'.[241] Sites on the In Danger List or which will potentially be deleted from the World Heritage List are in practice always subject to the reactive monitoring procedure; however, other sites can also be subjected to reactive monitoring if there is information that the site is under threat. Such information can be submitted by the State Party itself,[242] but can also be the result of information submitted by other stakeholders to the World Heritage Centre such as NGOs.[243]

The World Heritage Committee can subsequently request the preparation of a State of Conservation (SOC) report by the World Heritage Centre and the Advisory Bodies, to be examined by the Committee.[244] This SOC report can be based on information submitted by the State Party, usually upon request by the Committee,[245] or information received from other stakeholders.[246] If the Secretariat receives such information from an actor other than the State Party, 'it will, as far as possible, verify the source and the contents of the

241 World Heritage Convention Operational Guidelines, para 169. Reactive Monitoring is to be distinguished from the Reinforced Monitoring Mechanism, which is reserved for a small number of sites where the Committee fears an impending loss of OUV at the site and which therefore '[require] a more effective monitoring and reporting activity beyond the standard state of conservation report asked for by the Committee' which can indicate the urgency of the need for the State Party to take action: World Heritage Committee, Mechanism proposed by the Director-General to Ensure the Proper Implementation of the World Heritage Committee Decisions (15 June 2007) WHC-07/31.COM/5.2. This Reinforced Monitoring Mechanism is an ad hoc procedure which has developed on the basis of the practice of the World Heritage Committee and the Director-General of UNESCO, and is intended to be a flexible procedure which can also take place outside the scope of regular Committee meetings. It has been selectively applied thus far to eleven World Heritage sites: the Old City of Jerusalem and its Walls; Virunga National Park; Kahuzi-Biega National Park, Garamba National Park; Salonga National Park; Okapi Wildlife Reserve; the Temple of Preah Vihear; the Medieval Monuments in Kosovo site; Manovo-Gounda Saint-Floris; Timbuktu; and the Tomb of Askia.

242 World Heritage Convention Operational Guidelines, paras 169, 172. Paragraph 169 thus states that 'States Parties shall submit specific reports and impact studies each time exceptional circumstances occur or work is undertaken which may have an impact on the Outstanding Universal Value of the property or its state of conservation'. In addition, in accordance with paragraph 172, States Parties are invited 'to inform the Committee, through the Secretariat, of their intention to undertake or to authorize in an area protected under the Convention major restorations or new constructions which may affect the Outstanding Universal Value of the property'.

243 Ibid para 174: '[w]hen the Secretariat receives information that a property inscribed has seriously deteriorated, or that the necessary corrective measures have not been taken within the time proposed, from a source other than the State Party concerned, it will, as far as possible, verify the source and the contents of the information in consultation with the State Party concerned and request its comments.'

244 Ibid paras 175-6.

245 Somewhat confusingly, these reports are *also* known as State of Conservation reports; the standard reporting procedure for such reports can be found in Annex 13 of the Operational Guidelines.

246 World Heritage Convention Operational Guidelines, para 174.

information in consultation with the State Party concerned and request it comments';[247] the State Party thus retains a modicum of control over what information is used to assess its implementation of the Convention. However, the SOC report can also be based on the results of reactive monitoring missions which have been requested by the Committee.[248]

These reactive monitoring missions can be carried out by members of the advisory bodies or other international or non-governmental organisations invited by the World Heritage Committee;[249] what distinguishes them from advisory missions is that they are coordinated and conducted by the World Heritage Centre,[250] and are paid for by the World Heritage Fund of the Convention. In addition, the decision to undertake a reactive monitoring mission is made by the World Heritage Committee and not the State Party; although this decision happens 'in consultation with the State Party concerned', the process is not voluntary.[251] The trigger for the creation of such reactive monitoring missions is if a previous SOC report does not provide sufficient information for the Committee to make a decision on the next steps to be taken,[252] or if the Committee is considering to inscribe a site on the List of World Heritage in Danger in order to 'evaluate the nature and extent of the threats [to the site] and propose the measures to be taken'.[253]

After receiving information as necessary – whether through a reactive monitoring mission report or one of the other information sources outlined above – the World Heritage Centre and the advisory bodies draw up a SOC report, which identifies any threats which are likely to affect or are affecting the outstanding universal value (OUV) of the site.[254] Upon examination of

247 Ibid para 174.

248 Ibid para 176(e); see also para 184. Such reactive monitoring missions are carried out by the World Heritage Centre and the Advisory Bodies. They are to be distinguished from advisory missions, which are 'carried out at the request of the States Parties and are usually funded by the inviting States Parties themselves. Such mission reports are not addressed at the Committee but are considered by the State Party itself': David Sheppard and Gamini Wijesuriya, 'Strengthening the Effectiveness of the World Heritage Reactive Monitoring Process' (UNESCO 2019) 55; see also World Heritage Convention Operational Guidelines, paras 160, 176(b) and (e), 184. Other international organisations and NGOs may also assist in reactive monitoring missions: para 38.

249 World Heritage Convention Operational Guidelines, paras 31(d), 38.

250 Ibid para 28(f).

251 Ibid fn 1; see also para 176(e).

252 Ibid para 176(e).

253 Ibid para 184.

254 Since 2008, the Committee has used a standardized list of threats which can potentially affect OUV at World Heritage sites in the context of periodic reporting and the reactive monitoring procedure: buildings and development; transportation infrastructure; services infrastructure; pollution; biological resource use/modification; physical resource extraction; local conditions affecting physical fabric; social/cultural uses of heritage; other human activities; climate change and severe events; sudden ecological or geological events; invasive/alien species or hyper-abundant species; and management and institutional factors.

the SOC report, the Committee can recommend measures which the State Party can take to mitigate the threat; it can also subsequently repeat its request for the preparation of such SOC reports or reactive monitoring missions until the threat is resolved to its satisfaction.[255] The Committee can also decide to inscribe the site on the In Danger List or to delete it from the List, in line with the appropriate procedures in the Operational Guidelines;[256] the following section will elaborate upon the latter two procedures.

– *1999 Second Protocol*

In recent years a similar procedure has been developed with respect to the 1999 Second Protocol, as the Second Protocol Committee noted in 2020 that both the Second Protocol and its Implementation Guidelines were focused around the submission of periodic reports by States Parties, and '[did] not provide any proactive role for the Committee to request [information and advice from stakeholders] or take any other measure to monitor the effective protection of cultural property';[257] in addition, 'the Guidelines do not clarify the supervision function of the Committee, which may entail different measures than of the monitoring'.[258] An intergovernmental sub-committee was subsequently tasked with defining the scope of the tasks of the 1999 Protocol Committee related to the monitoring and supervision of the 1999 Second Protocol.[259]

The need to balance state consent with the development of potential monitoring mechanisms was a recurrent element in the discussions of the sub-committee,[260] linked to the issue of which information can be received; a number of states were reticent to broadly define the powers of the Secretariat

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See World Heritage Committee, Decision 32 COM 11E, and https://whc.unesco.org/en/factors/.

255 There is, however, no provision in the Operational Guidelines on when a site will no longer be subject to Reactive Monitoring.

256 World Heritage Convention Operational Guidelines, paras 176(c)-(d).

257 Committee for the Protection of Cultural Property in the Event of Armed Conflict, Monitoring and Supervision Mechanism for the Implementation of the 1999 Second Protocol (30 November 2020) C54/20/15.COM/14, para 3.

258 Ibid para 4.

259 Committee for the Protection of Cultural Property in the Event of Armed Conflict, Decisions Adopted During the 15th Meeting of the Committee for the Protection of Cultural Property in the Event of Armed Conflict (10-11 December 2020) C54/20/15.COM/Decisions, Decision 15.COM 14.

260 Committee for the Protection of Cultural Property in the Event of Armed Conflict, Reflection Document on the Application of Article 27(1)(c) of the 1999 Second Protocol, Including the Establishment of Monitoring and Supervision Mechanisms Aiming to Improve the Protection of Cultural Property in the Event of Armed Conflict, Notably in Extreme Emergency Situations (15 June 2021) C54/21/AHS/REF/V2.REV, paras 64, 80; Committee for the Protection of Cultural Property in the Event of Armed Conflict, Report of the *Ad Hoc* Subcommittee (18 November 2021) C54/21/16.COM/INF.12.II, paras 22-25.

to receive information from non-state actors.[261] The 1999 Protocol Committee eventually adopted a number of significant amendments to the Implementation Guidelines in December 2022, which will be examined and potentially adopted by the Meeting of the Parties to the 1999 Second Protocol in December 2023. These amendments establish an additional monitoring and supervision mechanism alongside the already existing system of periodic reporting, namely ad hoc monitoring.[262] One of the guiding principles underlying the monitoring and supervision mechanism remains the principle of consent, particularly in relation to the deployment of monitoring missions.[263]

The amendments to the Implementation Guidelines define ad hoc monitoring as 'the reporting by the Secretariat on the state of protection of cultural property inscribed on the International List of Cultural Property under Enhanced Protection or other cultural property'.[264] The ad hoc monitoring process is initiated by the Committee if it has received information concerning a state's lack of preparatory peacetime measures (in line with article 5 of the Second Protocol); the damage or destruction, or imminent threat thereof, to cultural property in the course of an armed conflict; if it has reason to believe that there are grounds for the loss of enhanced protection status; or if there is a contravention of the treatment accorded cultural property in occupied territory outlined in articles 9(1) and 21(b) of the Second Protocol.[265]

Such information can either be submitted by one of the High Contracting Parties, which are encouraged to submit information to the Secretariat if there is a potential contravention of the obligations set out in the Second Protocol;[266] however, the Committee can also act if it receives information from 'relevant eminent international and national governmental and non-governmental organizations, having objectives similar to those of the Convention and its Protocols such as those mentioned in article 27(3) of the Second Protocol'.[267] During the drafting of the amendments to the Guidelines, this group

261 Committee for the Protection of Cultural Property in the Event of Armed Conflict, Report of the Ad Hoc Subcommittee (23 June 2022) C54/22/17.COM/INF.9.1, paras 43-54, 77; see also C54/21/16.COM/INF.12.II (n 260) para 13: 'The Chairperson surmised that the 1954 Secretariat could also potentially receive a lot of third-party information, which will require a mechanism in place. In this situation, the Secretariat could bring the matter to the attention of the Committee, or the Committee could itself be the beneficiary of the information. The Committee will then decide on the best means to verify the information and launch the activity that would allow it to discharge its function on monitoring and supervision.'

262 Decision 17.COM 9A (n 238) Annex, para 120.

263 Ibid para 121.

264 Ibid para 127.

265 Ibid para 128.

266 Ibid para 127-8.

267 Ibid para 128. The comments to this amendment noted that '[a]lthough there is no exhaustive list of such organizations, it is important that they have objectives similar to those of the Convention, i.e. operate in the field of the protection of cultural property': Committee for the Protection of Cultural Property in the Event of Armed Conflict, Amendments to the Guidelines for the Implementation of the 1999 Second Protocol: Monitoring and super-

was defined more broadly as simply being 'other parties' than the High Contracting Parties; the language was revised in order to respond to critiques from states that this would lead to an opening of the floodgates in terms of unverifiable information about sensitive issues,[268] and to underline that 'the primary responsibility to inform the Committee' lies with the High Contracting Party or Parties concerned.[269] Subsequently, if the Secretariat to the Convention receives such information, 'it will, as far as possible, verify the contents of the information in consultation with the Party concerned and request its comments. During armed conflict, within its mandate and subject to the availability of funds, the Secretariat conducts independent assessment of the information'; this procedure is modelled on the procedure adopted for the receipt of information for actors other than States Parties in the Reactive Monitoring procedure of the World Heritage Convention.[270]

Subsequently, the Committee can take a number of steps – once again closely modelled on the Reactive Monitoring procedure of the World Heritage Convention.[271] The Committee can thus provide assistance to prevent or mitigate a threat to cultural property; if the state has not adopted preparatory peacetime measures, it can invite the state in question to take such measures, or grant international assistance to help it to implement these measures; in cases of cultural property granted enhanced protection, it can remove the property in question from the Enhanced Protection List. In addition, during an armed conflict, if the Committee 'considers that a cultural property is damaged or destroyed, or it has been subject to theft, pillage, or misappropriation, or acts of vandalism directed against it or that there is an imminent threat to a cultural property',[272] then it can invite the High Contracting Party to enforce its obligations relating to criminal jurisdiction as contained in the Second Protocol. Similarly, if in the case of occupied territories, the Committee considers that the Occupying Power has failed to meet its obligations under the Second Protocol, 'it may invite the Party in control of the cultural property to take the necessary corrective actions or, if applicable, invite the concerned Parties to settle their matters through an appropriate dispute resolution mechanism based on relevant international law'.[273]

Finally, the most far-reaching step the Committee can take is that, if it considers that it does not have sufficient information to decide on the next step to be taken, it 'may invite the Party concerned to submit a State of Pro-

vision of the implementation of the 1999 Second Protocol (19 October 2022) C54/22/17.COM/9A, 9.

268 C54/21/16.COM/INF.12.II (n 260) para 13; C54/22/17.COM/INF.9.1 (n 261) paras 43-54, 77.

269 C54/22/17.COM/9A (n 267) 9.

270 Decision 17.COM 9A (n 238) Annex, para 133.

271 Ibid para 134.

272 Ibid para 134(c).

273 Ibid para 134(e).

tection report', modelled on the State of Conservation reports submitted by states to the World Heritage Centre pursuant to the reactive monitoring procedure. The Second Protocol Committee can moreover request the Secretariat 'to provide complementary information through the use of data acquired from remote sensing technologies … in consultation with the Party concerned',[274] and it may decide to establish a state of protection mission. These state of protection missions are comparable to the World Heritage Convention's reactive monitoring missions; they are established by the Secretariat, albeit in consultation with the States Parties concerned, and composed of representatives of the Secretariat or international and national intergovernmental and non-governmental organisations, as well as experts; '[t]he overall mandate of such missions will be limited to conducting a technical assessment of the state of the cultural property or measures to be taken in a non-investigative manner'.[275] While such procedures certainly hold potential, it remains difficult to assess their effectiveness at present given that the relevant amendments to the Implementation Guidelines have yet to be adopted by the Meeting of the Parties to the 1999 Second Protocol, as noted above.

– *2003 Intangible Cultural Heritage Convention*

While the Intangible Cultural Heritage Convention does not provide for the creation of information-gathering missions such as reactive monitoring missions or state of protection missions, recent practice of the Convention has also highlighted the need for the Secretariat of the Convention and the Intergovernmental Committee to be able to receive and consider information relating to the implementation of the Convention other than that submitted by States Parties in their periodic reports.

This issue first surfaced with respect to the evaluation of nomination files for elements to be inscribed on one of the Convention's two Lists, to which end the Intergovernmental Committee adopted a procedure in 2012 for the treatment of correspondence received from the public or other concerned parties with regard to nominations.[276] According to these guidelines, any correspondence which is received by the Secretariat is submitted to the 'Permanent Delegation, National Commission for UNESCO, duly designated authorities and contact person responsible for the nomination of the concerned

274 Ibid para 134(f). The explanatory notes to this amendment note that 'the principle of consent applies only to the mechanism for aerial remote sensing monitoring of the state of protection of cultural property, in accordance with international air law. It does not apply in the case of satellite monitoring, as per the Principles Relating to Remote Sensing of the Earth from Outer Space adopted by the United Nations General Assembly)': C54/22/17.COM/9A (n 267) 14.

275 Decision 17.COM 9A (n 238) Annex, para 135.

276 Intergovernmental Committee, Decision 7.COM 15 (2012) Annex.

submitting State';[277] the submitting State subsequently provides comments to the Secretariat. Both the initial correspondence and response are made available on the website of the Convention prior to the examination of the nomination, and are subsequently removed after the end of the session.[278] Bortolotto *et al*. note at least one example where such correspondence has led to the non-inscription of an element proposed for inscription on the Urgent Safeguarding List, namely the *Pilgrimage to Wirikuta*: a letter submitted by a Mexico NGO was taken as evidence that the relevant community did not agree with the inscription.[279]

In 2015, the Committee adopted similar guidelines on the treatment of correspondence with respect to the consideration of periodic reports: here, once again, any correspondence which is received by the Secretariat is submitted 'to the Permanent Delegation concerned as well as to the contact person indicated in the periodic report of the submitting State Party concerned';[280] the submitting state subsequently provides comments to the Secretariat. Both the initial correspondence and response are made available on the website of the Convention prior to the examination of the periodic report, and are subsequently removed upon the conclusion of the meeting discussing the report.

However, the need for a procedure to consider information from third parties with respect to elements already inscribed on the Lists outside the context of the periodic reporting procedure was not officially signposted by

277 Ibid para 3.

278 However, these rules only apply with respect to the decision of the Intergovernmental Committee to inscribe an element on one of the Lists; in making its recommendation to the Intergovernmental Committee as to whether or not to inscribe the element, the Evaluation Body is limited to basing its decision on the information presented in the nomination file. The Evaluation Body thus cannot obtain additional information on the compliance of the nomination with the requirements of the Convention from third parties, such as NGOs or communities, groups and individuals. See further Intergovernmental Committee, Reflection on the Listing Mechanisms of the Convention (8 November 2019) LHE/19/14.COM/14, para 25; Intergovernmental Committee, Reflection on the Listing Mechanisms of the Convention and Proposal for Related Revisions to the Operational Directives (15 November 2021) LHE/21/16.COM/14, 13. Work is currently underway on the question of 'the possibility of obtaining additional information regarding nominations by using a dialogue process with accredited NGOs and communities, groups and, where appropriate, individuals concerned': Intergovernmental Committee, Decision 5.EXT.COM 4 (2022) Annex I, para 10.

279 Chiara Bortolotto and others, 'Proving participation: vocational bureaucrats and bureaucratic creativity in the implementation of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage' (2020) 28 Social Anthropology 66, 75. See Intergovernmental Committee, Decision 8.COM 7.A.8 (2013).

280 Intergovernmental Committee, Decision 10.COM 15.B (2015) para 3.

the Committee until 2018.[281] Since 2018, once again partly inspired by the reactive monitoring procedure of the World Heritage Convention,[282] the Secretariat has actively transmitted correspondence which it has received with respect to elements inscribed on the Lists to the Committee, summarising the correspondence which it has received.[283] In accordance with the procedure currently followed by the Secretariat, the correspondence is transmitted to the State Party, who in turn can submit a response to the Secretariat. Neither the correspondence received or the responses by States Parties are made public, but are summarised in the report of the Secretariat to the Intergovernmental Committee. As will be seen in the following section, the consideration of third-party information with regard to inscribed elements has already led to the (partial) removal of two elements from the Lists of the Convention since 2018: *Aalst Carnaval* and the Ducasse of Ath, part of the *Processional giants and dragons in Belgium and France* inscription.

In addition to the procedures concerning the consideration of information from third parties in relation to nominations, the examination of periodic reports, and in general the implementation of the Convention with respect to elements inscribed on the lists – none of which are reflected in the Operational Directives of the Convention and have thus been developed on the basis of the practice of the Intergovernmental Committee – an additional monitoring procedure was added to the 2022 Operational Directives: the 'enhanced follow-up' procedure. This procedure was introduced pursuant to the process of the global reflection on the listing mechanisms of the 2003 Convention which took place from 2017 to 2022.[284]

The enhanced follow-up procedure is closely linked to the procedures for the removal of elements from either of the Lists established by the Convention. In this newly established procedure, the Intergovernmental Committee can decide to place an element under the enhanced follow-up procedure if it has received a request for the removal of an element from one of the Lists; the

281 In response to an increasing amount of correspondence received by the Secretariat from 2017 onwards: Intergovernmental Committee, Issues Concerning the Follow-up of Inscribed Elements on the Lists of the Convention (29 October 2018) ITH/18/13.COM/9, para 9. Of particular interest for the present inquiry is the fact that the correspondence received by the Secretariat up until 2018 included issues linked to the '[r]estriction on the practice of an element through legislative and regulatory measures'; '[l]ack of community involvement in the safeguarding of an element'; '[l]and use affecting spaces associated with an element'; '[e]xploitation of natural resources affecting spaces associated with an element'; and '[i]nfrastructure construction' (para 10). See also Intergovernmental Committee, Decision 14.COM 14 (2019) para 15.

282 ITH/18/13.COM/9 (n 281) para 14-15.

283 Intergovernmental Committee, Follow-up on Elements Inscribed on the Lists of the Convention (14 December 2021) LHE/21/16.COM/11 Rev.; Intergovernmental Committee, Follow-up on Elements Inscribed on the Lists of the Convention (31 October 2022) LHE/22/17.COM/8.

284 LHE/21/16.COM/14 (n 278) 10.

procedure is intended to allow the Intergovernmental Committee to obtain more information in order to make an informed decision on the removal request.[285] The Evaluation Body is in turn responsible for carrying out the procedure, which can take the form of 'written correspondence and/or online consultation with the State Party, communities, groups and, where appropriate, individuals concerned, and the ICH NGO Forum and/or a consultative mission'.[286] The Evaluation Body subsequently submits a recommendation to the Committee whether to remove an element from the List in question,[287] drawing up a report based on 'additional information gathered through exchange and dialogue, as appropriate'.[288]

Depending on the information gathered by the Evaluation Body and the recommendation which it provides, the Committee can decide to retain the element on the follow-up procedure, '[recommending] the implementation of reconciliatory/mediatory measures and [specifying] a session of the Committee in which the issue will be reported back by the State Party for a final decision by the Committee',[289] alternatively to remove the element from the List (potentially including it in an Intangible Cultural Heritage Repository), or to maintain the element on the List. These procedures will be elaborated upon in the following section.

4.2.5 Responding to non-compliance

As noted in the previous sections, information on the potential non-compliance of a state with the obligations established by a cultural heritage convention is made 'visible' in international heritage governance through two routes: either by the state providing such information of its own accord through the submission of its periodic reports on the implementation of the convention; or by a body of the convention engaging in independent monitoring by verifying and gathering information on its own accord (although usually 'in consultation' with the state concerned), for example by collating information submitted by third parties, such as civil society organisations, or by sending expert missions to the state concerned.

As cultural heritage law is generally aimed at assisting states to overcome barriers which might stand in the way of compliance – such as a lack of technical knowledge or financial means to implement the convention – states are usually not 'punished' for non-compliance as such. Indeed, arguably many states frequently fail to meet the obligations established by cultural heritage

285 Intangible Cultural Heritage Convention Operational Directives, para 40.2.d.ii.2, 40.2.e.ii.
286 LHE/21/16.COM/14 (n 278) Annex I.
287 Intangible Cultural Heritage Convention Operational Directives, para 30.
288 Ibid para 40.3(a).
289 Ibid para 40.3(b)(i).

conventions, as is evident, for example, from the historic low response rate to periodic reporting exercises. In the majority of these situations, the monitoring body will simply respond by expressing concern about the situation of non-compliance, and seek to provide ways of providing the state in question with the necessary assistance. In this sense, cultural heritage law shows strong affinities with the monitoring and implementation mechanisms established within international environmental law.

However – similarly, once again to the situation described above with regards to periodic reporting and monitoring – since the 2000s several cultural heritage conventions have established procedures which seek to respond more strongly to situations of non-compliance, usually as the final step of the convention's monitoring procedure. As many of the cultural conventions do not outline any 'legal penalty, sanction or remedy' in response to non-compliance, these procedures have in many cases been developed through subsequent state practice rather than being (extensively) outlined in the conventions themselves.[290] In this regard the World Heritage Convention has often been taken as an example: the Convention's reactive monitoring system, which can result in the inscription of a site on the List of World Heritage in Danger and the deletion of a site from the World Heritage List, has thus influenced the development of the Intangible Cultural Heritage Convention's enhanced follow-up procedure, which allows for the possibility of the removal of an element from the Lists of the Convention, as well as the ad hoc monitoring procedure of the 1999 Second Protocol, which similarly proposes the possibility of the cancellation of a cultural property's enhanced protection status.

4.2.5.1 1972 World Heritage Convention

The World Heritage Convention explicitly provides for the creation of the List of World Heritage in Danger, intended to be a 'list of the property appearing in the World Heritage List for the conservation of which major operations are necessary and for which assistance has been requested under [the] Convention'.[291] A site can be inscribed on the Danger List in situations of ascertained or potential danger,[292] although the threat in question must be 'amenable

290 Diana Zacharias, 'The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010) 327.

291 World Heritage Convention, art 11(4).

292 World Heritage Convention Operational Guidelines, para 179-80; in the case of cultural sites, this can include the 'serious deterioration' of materials, structure, or architectural coherence, the 'significant loss of historical authenticity' or the 'important loss of cultural significance', the lack of a conservation policy for the property, the threatening effects of regional planning projects or town planning, or threats posed by armed conflict. On the development of the criteria surrounding the Danger List in the Operational Guidelines, see Hamman and Hølleland (n 240) 163-4.

to correction by human action'.[293] The practice of the World Heritage Committee has established that placement on the Danger List does not require the consent of the territorial state.[294]

As noted by Hølleland, Hamman and Phelps, the Danger List was initially intended to serve as a 'fire alarm', in order to '[draw] attention to threats at World Heritage sites, and serve to elicit financial and practical help from the international community', and as such carried positive connotations.[295] However, over time the Danger List has also become a form of non-compliance procedure used to 'name and shame' states that have failed to meet their obligations under the Convention, '[serving] as a disciplinary instrument or reputational sanction aimed at recalcitrant states'.[296] The Danger List has thus been used in response to States Parties which have not notified the World Heritage Committee of the undertaking of 'major restorations or new constructions' within the boundaries of World Heritage sites;[297] in some cases, even the threat of including a site on the Danger List has been used to force states to comply with (repeated) requests from the World Heritage Committee concerning the desired management and protection of the site, as was evident in the case of the *Great Barrier Reef* site in Australia.[298]

In addition to the Danger List, the Committee has on three occasions decided to delete sites from the World Heritage List entirely, a step not initially envisaged in the text of the Convention itself. The Committee thus delisted the *Arabian Oryx Sanctuary* in Oman in 2007; *Dresden Elbe Valley* in 2009; and *Liverpool Maritime Mercantile City* in 2021.[299] In addition, the Committee has on occasion used the threat of deletion from the List in order to ensure state

293 World Heritage Convention Operational Guidelines, para 181.

294 Herdis Hølleland, Evan Hamman and Jessica Phelps, 'Naming, Shaming and Fire Alarms: The Compilation, Development and Use of the List of World Heritage in Danger' (2018) 8 Transnational Environmental Law 35 39; this question was at the heart of discussions surrounding the potential inclusion of *Kakadu National Park* in Australia on the Danger List. On the debates surrounding Kakadu, see Graeme Aplin, 'Kakadu National Park World Heritage Site: Deconstructing the Debate, 1997-2003' (2004) 42 Australian Geographical Studies 152.

295 Hølleland, Hamman and Phelps (n 294) 38.

296 Ibid 38.

297 Hølleland, Hamman and Phelps provide a number of examples of this trend, including 'the Ancient city of Thebes and its Necropolis (Egypt); the Old Town of Regensburg with Stadtamhof (Germany); Kaziranga National Park (India); Ibiza (Spain); the Ancient City of Nessebar (Bulgaria); and the Great Barrier Reef (Australia)': ibid 49-50.

298 Ibid 52.

299 See Diana Zacharias, 'Cologne Cathedral versus Skyscrapers - World Cultural Heritage Protection as Archetype of a Multilevel System' (2006) 10 Max Planck Yearbook of United Nations Law 273; Sabine von Schorlemer, 'Compliance with the UNESCO World Heritage Convention: Reflections on the Elbe Valley and the Dresden Waldschlössen Bridge' (2008) 51 German Yearbook of International Law 321; Bénédicte Gaillard and Dennis Rodwell, 'A Failure of Process? Comprehending the Issues Fostering Heritage Conflict in Dresden Elbe Valley and Liverpool – Maritime Mercantile City World Heritage Sites' (2015) 6 The Historic Environment: Policy & Practice 16.

compliance with the Committee's decisions, as in the case of *Cologne Cathedral*.[300] Accordingly, deletion from the List can also be seen as a type of non-compliance mechanism which has been developed on the basis of the practice of the World Heritage Committee.[301]

4.2.5.2 1999 Second Protocol

As noted in previous sections, neither the 1954 Hague Convention or the 1999 Second Protocol contain provisions which are explicitly aimed at responding to situations of non-compliance. Nonetheless, both the Convention and the Second Protocol do establish individual criminal responsibility for violations of the Convention.[302] The Hague Convention thus sets out that '[t]he High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committee a breach of the present Convention'.[303] The 1999 Protocol establishes extended rules in relation to establishing criminality responsibility and jurisdiction; States Parties must establish a set list of offences set out within the Protocol within their domestic law and make these offences punishable;[304] and 'each Party shall take the necessary legislative measures to establish its jurisdiction' over these offences,[305] as well as an *aut dedere aut judicare* obligation.[306]

In addition, the 1999 Second Protocol can be seen as containing a mechanism which can be construed as a method of responding to non-compliance by states, similarly to the development over time of the World Heritage Convention's Danger List into a non-compliance mechanism: the suspension from or removal of cultural property from the Enhanced Protection List. As already noted above, both the 1954 Hague Convention and the 1999 Second Protocol establish lists of cultural property which enjoy a higher standard of protection: the International Register of Cultural Property under Special Protection established by the Hague Convention; and the International List of Cultural Property under Enhanced Protection established by the Second Protocol.

Whereas the Hague Convention only establishes procedures for the withdrawal of inscriptions from the International Register in situations where the

300 Zacharias, 'The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution' (n 290) 327.
301 Hamman and Hølleland (n 240) 216.
302 Somewhat comparably, the 1970 Convention requires States parties to 'undertake to impose penalties of administrative sanctions' on any person responsible for the infringement of the prohibitions on the illicit import or export of cultural property: art 8.
303 1954 Hague Convention, art 28.
304 1999 Second Protocol, art 15.
305 Ibid art 16.
306 Ibid arts 17-18.

High Contracting Party concerned requests such a withdrawal or denounces the Convention,[307] the 1999 Second Protocol provides both for situations of the temporary loss of enhanced protection,[308] as well as the suspension and cancellation of inscriptions on the Enhanced Protection List by the Second Protocol Committee rather than the State Party.[309] While the Implementation Guidelines establish the procedure for suspension and cancellation[310] – namely if the cultural property concerned no longer meets the criteria for inscription, or if there is either a 'serious violation' or 'continuous and serious violation' of the prohibition of the use of such cultural property in support of military action – the Guidelines provide little to no assistance on *how* the Second Protocol Committee can gather information on potential situations of non-compliance beyond its ability to consult with 'eminent professional organisations'.[311] As such, these cancellation and suspension procedures have yet to be used.

The 1999 Protocol Committee has sought to further develop these procedures through a recent amendment of the Implementation Guidelines of the 1999 Second Protocol in December 2022. While the amendments have yet to be officially adopted by the Meeting of the Parties, they would establish an ad hoc monitoring procedure which is closely modelled on the reactive monitoring procedure of the World Heritage Convention.[312] As noted above, this ad hoc monitoring procedure can be triggered if the 1999 Protocol Committee has reason to believe that there are grounds for the loss of enhanced protection status,[313] either on the basis of information submitted by one of the High Contracting Parties or 'relevant eminent international and national governmental and non-governmental organizations'.[314] On the basis of the information provided, the Committee can subsequently decide to remove a cultural property from the Enhanced Protection List.[315]

The ad hoc monitoring procedure can also be used to respond to other potential situations of non-compliance, such as a state failing to take sufficient preparatory measures for the protection of cultural property during peacetime, if there is a threat of damage or destruction of cultural property in the course

307 Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, art 16. See International Register of Cultural Property under Special Protection (23 July 2015) CLT/HER/CHP: a number of High Contracting Parties have indeed cancelled the inclusion of a range of refuges which had been granted special protection, namely Austria and the Netherlands.

308 'if, and for as long as, the property has, by its use, become a military objective': 1999 Second Protocol, art 13(b).

309 Ibid art 14.

310 Second Protocol Guidelines, paras 82-96.

311 Ibid para 91.

312 C54/21/AHS/REF/V2.REV (n 260) para 32 onwards.

313 Decision 17.COM 9A (n 238) Annex, para 128.

314 Ibid.

315 Ibid para 134.

of an armed conflict, or if cultural property in occupied territory is not granted protection in line with the provisions of the Second Protocol. On the basis of the information gathered, the Committee can subsequently decide to grant international assistance, invite the state concerned to enforce its obligations related to criminal jurisdiction, or invite it to take the 'necessary corrective actions' with respect to the treatment of cultural property in occupied territory.[316]

4.2.5.3 2003 Intangible Cultural Heritage Convention

The Intangible Cultural Heritage Convention mirrors the set-up of the World Heritage Convention, also providing for the possibility of inscribing intangible cultural heritage on the List of Intangible Cultural Heritage in Need of Urgent Safeguarding. However, unlike the World Heritage Convention, intangible cultural heritage can only be inscribed either on the Representative List or the Urgent Safeguarding List; in addition, the practice of States Parties to the Convention thus far would seem to indicate that they do not necessarily perceive inscription on the Urgent Safeguarding List as a form of punishment, but rather as a way to draw attention to intangible cultural heritage requiring additional resources from the international community in order to ensure its safeguarding.[317]

Inclusion of an element on the Urgent Safeguarding List thus occurs 'at the request of the State Party concerned',[318] unless there are 'cases of extreme urgency' which would require inscription (albeit still 'in consultation with the State Party concerned').[319] Elements can thus in principle only be inscribed on the Urgent Safeguarding List or transferred from the Representative List to the Urgent Safeguarding List pursuant to a request from the State Party or in any event a strong presumption of its consent.[320] By comparison, many of the sites currently inscribed on the Danger List of the World Heritage Convention have been placed on the Danger List pursuant to a request of the governing bodies of the World Heritage Convention, rather than that of the territorial state concerned.[321] Moreover, no procedure was even envisaged for the transfer of elements from the Urgent Safeguarding List to the Represent-

316 Ibid para 134(e).

317 By comparison with the World Heritage Convention, a larger proportion of ICH is also inscribed on the Urgent Safeguarding List: 76 elements compared to the 599 elements on the Representative List; the World Heritage List counts a total of 1157 properties, of which only 55 are simultaneously inscribed on the Danger List.

318 Intangible Cultural Heritage Convention, art 17(1).

319 Ibid art 17(3).

320 Intangible Cultural Heritage Convention Operational Directives, paras 1, 38.1, 39.1. See also Federico Lenzerini, 'Art.16–17: Listing Intangible Cultural Heritage' in Janet Blake and Lucas Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (Oxford University Press 2020) 321.

321 Hølleland, Hamman and Phelps (n 294) 49-50.

ative List until 2017.[322] As such, it is arguably inappropriate to view the Urgent Safeguarding List as a non-compliance mechanism.

However, as noted in the previous section, the Convention has nonetheless been faced with increasing tensions surrounding elements already inscribed on the Lists, and how to manage situations where such elements potentially no longer meet the criteria for inscription. Indeed, the Secretariat noted in 2019 that it was 'evident that a list which does not set limits on the duration of inscriptions also requires an enhanced and robust monitoring mechanism.'[323] This has led to the first removals of elements from the Lists: the 2019 removal of *Aalst Carnaval*, and the 2022 removal of a specific practice which formed part of the broader inscription of *Processional giants and dragons in Belgium and France*, namely the Ducasse of Ath procession in Belgium. The Convention did not initially provide a procedure for the removal of elements from either of the Lists; the need for such a procedure was precipitated by the controversy surrounding Aalst Carnaval and the Ducasse of Ath in Belgium, both of which were ultimately removed pursuant to a request from the territorial state in consultation with the communities involved with the practices.

In the case of *Aalst Carnaval*, carnaval participants were widely criticised for displaying racist and antisemitic caricatures of Jews during the 2019 edition of the carnaval. This led to an official press release from UNESCO critiquing the carnaval, calling upon the Belgian authorities to respond to the events.[324] Fairly swiftly, the Bureau of the Intergovernmental Committee requested the Secretariat to inscribe item on the agenda for the subsequent meeting of the Committee for a potential removal of the element from the List.[325] The Secretariat had received 'more than twenty letters and emails, as well as an online petition gathering over 19,000 signatures' in relation to incidents in 2013, 2018 and 2019, with the majority of complaints addressing the 2019 edition. The Secretariat further considered that the situation surrounding Aalst Carnaval was distinguished from other communications it received, based on the severity and repetition of the issue, the number and diversity of the correspondence it had received, and the problematic reaction from the community surrounding

322 The first time such a transfer was required in the case of the element *Xoan singing of Phu Tho Province, Vietnam*, the Evaluation Body concurrently examined the report of the element with a new nomination of the element for the Representative List: Intergovernmental Committee, Decision 12.COM 14 (2017) para 5. In order to avoid having to repeat this cumbersome process, a procedure was subsequently elaborated: see Intangible Cultural Heritage Convention Operational Directives, para 39.2.

323 LHE/19/14.COM/14 (n 278) para 12.

324 'UNESCO condemns the racist and anti-Semitic representations at the Carnival in Aalst, Belgium, on 3 March' (*UNESCO*, 6 March 2019) <https://www.unesco.org/en/articles/unesco-condemns-racist-and-anti-semitic-representations-carnival-aalst-belgium-3-march>.

325 Intergovernmental Committee, Decision 14.COM 1.BUR 4 (2019).

Aalst carnaval.[326] It considered that the element contradicted the 2003 Convention, in particular the requirement that any given element must be compatible with human rights and mutual respect amongst communities, in addition to the founding principles of UNESCO.[327] In light of the controversy brought about by numerous editions of the Carnaval, it added that it was not compatible with the purpose of the Representative List, which was to raise (positive) awareness of the significance of intangible heritage. As such, it no longer met the requisite criteria for inclusion on the Representative List. The Secretariat therefore recommended that the Committee should remove the element from the Representative List. However, before the matter could be discussed at the Committee meeting, Belgium submitted a note verbale to the Secretariat requesting the removal of the element from the Representative List 'at the request of the city of Aalst [and] on behalf of community of the [Aalst] carnival'.[328] In light of this, as well as the consideration by the Committee that the element no longer met two of the criteria for inscription, the Committee removed Aalst carnaval from the Representative List.[329]

The removal of Aalst Carnaval was followed by the removal of a specific manifestation recognised in the element 'Processional giants and dragons in Belgium and France' in 2022, specifically the 'Ducasse of Ath', a yearly procession in the town of Ath (Belgium) which included a figure entitled 'Le Sauvage', who was painted black and wore a hat made of feathers (and, until 2021, also wore a nose ring and chains arounds his wrists and was therefore meant to be strongly suggestive of an enslaved individual).[330] Here, once again, following discussions on the figure within the Intergovernmental Committee (with the Secretariat proposing that the Committee could decide, for

326 Intergovernmental Committee, Follow-up on Elements Inscribed on the Lists of the Convention (7 December 2019) LHE/19/14.COM/12 Add, 7-8. The letter submitted by the City of Aalst noted that the city 'formally [distanced] itself from the UNESCO recognition … Not only because it threatens to damage the intangible heritage itself, but also because of UNESCO's approach to the whole process over the past months … The parties involved never signed up for this'. The letter furthermore emphasized that '[n]o laws were broken by the carnavalists involved', pointing to the assessment by Unia which considered that Aalst Carnaval did not violate anti-discrimination laws and the outcome of a community gathering in September 2019 in which 58% of the attendees voted against continued inclusion on the Representative List: https://immaterieelerfgoed.be/nl/attachments/view/brief%20stad%20aalst_terugtrekking%20unesco%20conventie%202003_engels.

327 On the compatibility of the caricatures employed within Aalst carnaval with human rights, see e.g. Marike Lefevre and Marthe Van Damme, 'De perikelen van UNESCO en Aalst carnaval: Tussen lachen en spel zegt de zot zijn mening wel' (2020) 13 Faro 116; Marthe Van Damme and Dirk Jacobs, 'UNESCO's intangible cultural heritage and its polarising nature: A case study on Aalst Carnaval' (2022) 17 International Journal of Intangible Heritage 116.

328 LHE/19/14.COM/12 Add (n 326) 2.

329 Intergovernmental Committee, Decision 14.COM 12 (2019).

330 Elien Doesselaere, 'Ducasse van Ath geschrapt van Unesco-lijst' (*Faro*, 12 December 2022) <https://faro.be/blogs/elien-doesselaere/ducasse-van-ath-geschrapt-van-unesco-lijst>.

the first time, to initiate an 'enhanced follow-up procedure', which would see members of the Evaluation Body undertaking a mission to Ath to engage in dialogue with the authorities and communities concerned),[331] Belgium decided to withdraw the 'Ducasse of Ath' from inclusion within the 'Processional giants' element on the Representative List. The Intergovernmental Committee subsequently took note of Belgium's request to have the Ducasse removed from the element, and indeed decided to remove it, simultaneously '[expressing] the strong wish that the character of the "Sauvage" be removed from the "Ducasse of Ath"'.[332]

The controversies surrounding the removal of these two elements from the Representative List precipitated not only the development of a procedure in the Operational Directives on the removal of elements from the Lists, but also an additional monitoring procedure in the Operational Directives, namely the enhanced follow-up procedure which was outlined in the previous section. The enhanced follow-up procedure is triggered when the Intergovernmental Committee receives a request for the removal of an element from one of the Lists, and allows the Intergovernmental Committee to obtain additional information in order to inform its decision whether to maintain the element on the List or remove it.

The procedure for the removal of an element from one of the Lists differs according to whether the removal request originates from the territorial State Party or from a third party.[333] If the request is submitted by the State Party concerned, it is automatically transmitted to the Committee;[334] if it is submitted by another actor, such as communities, groups or individuals, then the request is transmitted to the Bureau of the Intergovernmental Committee, which decides whether to in turn transmit the request to the Committee.[335] Subsequently, two options are possible: if the removal request was submitted by the State Party itself, the Committee can choose to place the element under 'follow-up' status, if additional information is needed; it can maintain the element on the List (potentially against the wishes of the state which initially inscribed the element);[336] or it can remove the element from the List 'with

331 Intergovernmental Committee, Follow-up on Elements Inscribed on the Lists of the Convention (28 September 2022) LHE/22/17.COM 5.BUR/5; Intergovernmental Committee, Decision 17.COM 8.A (2022). On the proposed 'enhanced follow-up', see LHE/22/17.COM/8 (n 283) para 17.

332 Intergovernmental Committee, Decision 17.COM 8.A (2022) para 12.

333 On the development of the removal procedure, see LHE/21/16.COM/14 (n 278)

334 Intangible Cultural Heritage Convention Operational Directives, para 40.2(d)(i).

335 Ibid para 40.2(e)(i)

336 While the Operational Directives do not explicitly provide for the possibility of maintaining and element on the List if the removal request is submitted by the State Party concerned and the Committee decides not to place the element under the enhanced follow-up procedure, this possibility was explicitly discussed during the drafting of the amendments to the Operational Directives. When discussing whether an element could be maintained on the lists even after a State Party had requested its removal, the open-ended intergovernmental

the possibility of placing it in an Intangible Cultural Heritage Repository'.[337] If the information was submitted by a party other than the territorial State Party, the Committee can either maintain the element on the List, or place the element under 'follow-up' status in order to gather additional information; after further information has been obtained, the Committee can subsequently decide to either maintain the element or remove it, once again potentially placing it in the Intangible Cultural Heritage Repository.[338]

While the precise modalities for the Intangible Cultural Heritage Repository have yet to be elaborated upon, the concept finds its origins in the idea of a 'Hall of Fame' for elements retired from the List after a set number of years and broader discussions on the evolving nature of the Lists established by the Convention.[339] Initial proposals included the possibility of a 'sunset clause', after which an element would be removed from the List after a number of years and they could be moved to a 'hall of fame' which would not include reporting obligations for the States Parties, but this idea ultimately did not attract enough support.[340] Instead, this proposal was incorporated into the outcome of the follow-up procedure, with the possibility of inscribing an element after removal on a 'memory bank', 'memory register', or 'archive' in order to 'preserve a record of elements that no longer existed',[341] or simply a record of those elements which were no longer inscribed on the Lists.[342] Somewhat curiously, during these discussions the chairperson of the open-ended intergovernmental working group noted that such a 'register might be useful if, for instance, there was a regime change in a particular state and the new government no longer wished to inscribe its intangible cultural heritage'.[343]

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working group consulted Legal Affairs, which responded by pointing 'to paragraph 1 of Article 16 of the Convention … A similar reference was made to Article 17.1 on the Urgent Safeguarding List. As a result, in line with the spirit of the Convention, it followed that the Committee held the authority to establish such Lists and also keep them up to date in the interest of humanity as a whole. Legal Affairs therefore had no legal object to amending the Operational Directives to reflect the decision that the Committee could maintain an element on a list when the state concerned had requested its removal': Intergovernmental Committee, Summary Records of the Open-ended Intergovernmental Working Group Meeting in the Framework of the Global Reflection on the Listing Mechanisms of the 2003 Convention (15 November 2021) LHE/21/16.COM/INF.14, para 666, see responses by States at para 687-736.

337 LHE/21/16.COM/14 (n 278) Annex I. See Intangible Cultural Heritage Convention Operational Directives, para 40.2(d)(ii)2.

338 Intangible Cultural Heritage Convention Operational Directives, para 40.3(b).

339 LHE/19/14.COM/14 (n 278) para 12.

340 LHE/21/16.COM/INF.14 (n 336) paras 83, 115, 251.

341 Ibid paras 501-25, 564-74.

342 Ibid para 568. A proposal which was notably made by the Belgian delegate, who noted that such a repository 'created an elegant possibility for removing elements that stakeholders might wish to delist for other reasons while maintaining a record of their inscription'.

343 Ibid para 507.

4.2.6 Dispute settlement

Many of UNESCO's cultural heritage conventions do not contain provisions on dispute settlement.[344] Both the 1954 Hague Convention and the 1999 Second Protocol establish limited provisions on dispute settlement in the form of conciliation and mediation procedures, as well as the ability of the Director-General of UNESCO to lend their good offices in order to resolve a dispute between the contracting parties.[345] Similarly, the 1970 Convention only provides for the extension of UNESCO's good offices over potential disputes;[346] the World Heritage Convention and Intangible Cultural Heritage Convention both contain no dispute settlement clauses at all. A notable exception is the Underwater Cultural Heritage Convention, which follows the dispute settlement procedure established by Part XV of UNCLOS;[347] however, this procedure is limited to inter-state claims, although most disputes under the Underwater Cultural Heritage Convention are likely to be between states and non-state actors.[348]

As such, most judicial discussion of issues relating to the UNESCO cultural conventions is limited to discussions in 'borrowed fora', such as human rights courts, international criminal courts and tribunals, investment arbitration, and – albeit very scarcely – the International Court of Justice,[349] resulting in diverging approaches to the interpretation of cultural heritage law depending on the forum employed. Furthermore, unlike other international conventions which safeguard common interests, cultural heritage conventions also do not provide international standing to non-state actors such as individuals or communities.[350] Similarly, due to the generally non-self-executing character of the majority of the obligations in cultural heritage treaties, domestic enforcement of the conventions is also often difficult to achieve in practice and often remains ad hoc.[351]

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344 Sabine von Schorlemer, 'UNESCO Dispute Settlement' in Abdulqawi A Yusuf (ed), *Standard-setting at UNESCO: Essays in Commemoration of the Sixtieth Anniversary of UNESCO* (Martinus Nijhoff 2007) 78; Chechi (n 160) 98 onwards.

345 1954 Hague Convention, art 22; 1999 Second Protocol, arts 35-6.

346 1970 Convention, art 17(5).

347 2001 Convention, art 25. Part XV of UNCLOS allows for the submission of disputes concerning the interpretation or application of the convention to ITLOS, the ICJ, or an arbitral tribunal.

348 Chechi (n 160) 113.

349 Francesco Francioni, 'Plurality and Interaction of Legal Orders in the Enforcement of Cultural Heritage Law' in Francesco Francioni and James Gordley (eds), *Enforcing International Cultural Heritage Law* (Oxford University Press 2013) 18-19.

350 Andreas Paulus, 'Reciprocity Revisited' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011) 125-6.

351 Chechi (n 160) 118; Novic (n 144) 643-4.

Perhaps the sole exception to the general absence of dispute settlement mechanisms in cultural heritage law is the Committee on Conventions and Recommendations (CCR). The CCR is a subsidiary body of UNESCO's Executive Committee and is tasked with monitoring the implementation of the conventions and recommendations adopted under the aegis of UNESCO (similarly to the tasks ascribed to bodies such as the World Heritage Committee),[352] and additionally examines individual communications 'concerning cases and questions of violations of human rights within UNESCO's fields of competence'.[353] In this sense, it is comparable to the individual complaint mechanisms established by many human rights treaties. However, one important distinction with these bodies is that CCR procedures must remain confidential for twenty years; practice thus far does not seem to indicate that the procedure has been used for the types of disputes considered in the present work.[354]

4.2.7 Conclusion

A first glance at many of the cultural heritage conventions of UNESCO gives the impression that they establish little in the way of monitoring mechanisms; this has indeed been the critique of many heritage law scholars, who lament the toothless nature of cultural heritage law and argue that the current state of affairs results in uneven and inconsistent implementation and the continued dominance of states in decision-making processes.[355] While cultural heritage law certainly continues to be characterised by a paucity of dispute settlement mechanisms, since the early 2000s the field has undergone an important shift, characterised by the regularisation of international heritage governance drawing upon synergies between the various cultural heritage conventions, and the extensive proceduralisation of the monitoring of the implementation of these conventions.

As seen above, the 2000s saw the establishment of regular meetings of the conventions' plenary bodies (in the case of the 1954 Hague Convention and the 1970 Convention) or the adoption of new conventions which have had regular meetings of their plenary bodies since their inception (in the case of

352 This task is specifically reserved for those conventions without their own monitoring procedures and a limited subset of recommendations decided upon by the General Conference of UNESCO: see UNESCO, *Committee on Conventions and Recommendations* (UNESCO 2022) 214 EX/BROCHURE CR/2, 14-15.

353 Executive Board of UNESCO, 104 EX/Decision 3.3 (2023) para 14.

354 For an overview of the practice of the CCR, see inter alia Leif Hölmstrom (ed) *Cases of the UNESCO Committee on Conventions and Recommendations: Communications examined under the 104 EX/Decision 3.3 Procedure of the Executive Board (1978-1988)* (Brill Nijhoff 2019); 214 EX/BROCHURE CR/2 (n 352) 30. See also Francesco Seatzu and Andrea Lai, 'Mission Impossible: Revitalizing the Role of UNESCO as a Human Rights Organization' (2017) 11 Human Rights & International Legal Discourse 222.

355 Chechi (n 160) 1-2; Vigni (n 140) 641; Novic (n 144) 643-4.

the 2001 and 2003 Conventions). In this sense, the conventions have increasingly mirrored each other with respect to practices relating to implementation and monitoring. Such meetings can ensure general awareness amongst states of their obligations and demonstrate a baseline commitment to the importance of not leaving implementation to the purview of individual States Parties. To a certain extent, this development can also be construed as evidence of the acceptance by states of the status of cultural heritage protection as a common interest, by potentially subjecting decision-making concerning the cultural heritage located within their territory to decisions which are adopted by a group of peers. That same group of peers can simultaneously exert a great deal of influence on the potential interpretation of the convention – and subsequently the scope of a state's obligations pursuant to that convention – by developing it through subsequent practice.

In addition, each of the conventions (with the exception of the Underwater Cultural Heritage Convention) has a subsidiary intergovernmental body which meets on a more frequent basis than the plenary body and is thereby better placed to respond to issues relating to the implementation of the conventions, if need be on an urgent basis. Moreover, the implementation of each of these conventions (with the exception of the 1954 Hague Convention) is guided by the adoption of operational guidelines which can be amended in order to take into account new developments as necessary; many of these operational guidelines have established extensive procedures which were not initially foreseen by their founding treaties.

This is particularly the case when it comes to the conventions' monitoring mechanisms. Whereas all conventions but the Underwater Cultural Heritage Conventions establish state-led periodic reporting mechanisms, these procedures have generally been deemed insufficient to ensure effective monitoring of the respective conventions. Thus the World Heritage Convention, the 1999 Second Protocol, and the 2003 Intangible Cultural Heritage Convention all provide for potentially far-reaching monitoring mechanisms which are not subject to state consent and are initiated by their subsidiary bodies. These procedures have been explicitly modelled on the reactive monitoring procedure established by the World Heritage Convention, and are relatively recent additions to the practice of these conventions (2022 in the case of the Intangible Cultural Heritage Convention's enhanced follow-up procedure, and 2023 in the case of the 1999 Second Protocol's ad hoc monitoring procedure). Perhaps most importantly, none of these procedures are provided for in the text of the respective conventions, having been developed through the revision of the conventions' operational guidelines.

These monitoring mechanisms also have greater possibilities of gathering information concerning the implementation of the conventions without having to solely rely upon states' periodic reports, as in the case of the World Heritage Convention's reactive monitoring missions, the 1999 Second Protocol's state of protection missions, and the Intangible Cultural Heritage Convention's

consultative missions. These monitoring mechanisms can moreover be triggered pursuant to information submitted by third parties, such as NGOs, and potentially even local communities and individuals. These procedures usually lead to the drawing up of a report on the implementation of the convention based on information gathered by the convention's secretariat, through monitoring missions, or as a result of information submitted by third parties.

Finally, as many authors point out, the efficacy of international heritage law should not only be measured by the strength of the regime at the international level, for example by looking at the presence of compulsory dispute settlement mechanisms. The impact of cultural heritage law thus can also be measured by examining policy changes adopted by states at the domestic level, as well as the role these regimes increasingly play in domestic decision-making procedures, including in national administrative law procedures.[356] In addition, UNESCO's cultural conventions have gained increasing prominence in other parts of the UN. An example in point is provided by the work of the UN Security Council in response to cultural heritage destruction in Mali, Syria and Ukraine and the case-law of the ICC on cultural heritage, both of which have drawn upon developments initially spurred on by cultural heritage law.[357] These actions are a way of enforcing the underlying goals of the cultural heritage conventions, even if not necessarily a way of directly enforcing these obligations themselves.[358]

However, the 2000s simultaneously also saw cultural heritage law take a number of important steps back with respect to monitoring and implementation. Thus whereas the practice of creating subsidiary bodies and adopting operational guidelines is now well-established within cultural heritage law, the precise modalities of these procedures have been curtailed over time. A tension has arisen in this respect with regards to the appropriate division of power between a convention's plenary and subsidiary bodies, with contemporary conventions more clearly delineating the responsibilities of advisory, subsidiary and plenary bodies. They often establish plenary bodies as the

356 Zacharias, 'The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution' (n 290) 3. On this point, see also e.g. Toshiyuki Kono and Stefan Wrbka, 'General Report' in Toshiyuki Kono (ed), *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21st Century* (Martinus Nijhoff Publishers 2010) 223-30, drawing attention not only to the impact of cultural heritage law on domestic law, but also on broader prominence of cultural issues in social life.

357 In relation to the UN Security Council, see: UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483; UNSC Res 2199 (12 February 2015) UN Doc S/RES/2199; UNSC Res 2295 (29 June 2016) UN Doc S/RES/2295; UNSC Res 2347 (24 March 2017) UN Doc S/RES/2347. In relation to the ICC, see *Prosecutor v. Ahmad Al Faqi Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15 (27 September 2016).

358 On this see e.g. Tullio Scovazzi, 'International Cultural Heritage Law: The Institutional Aspects' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020) 740-4.

'sovereign' bodies of the convention to which other bodies must answer and which are ultimately responsible for the adoption of certain decisions which will shape the future of the convention, such as the adoption of operational guidelines. These developments indicate that while states are content to establish more regular monitoring of the implementation of the conventions, they are loath to wholly relinquish their sovereignty to consensus-based decision-making by their fellow states – let alone an independent expert body. As the reach of international heritage governance has expanded, the freedom of subsidiary bodies has accordingly decreased.

Having been adopted in the 1970s, the World Heritage Convention is thus the only cultural heritage convention which allows its subsidiary body to directly adopt revisions to its operational guidelines and take important decisions relating to implementation and monitoring; all conventions and procedures adopted or developed since then only allow the subsidiary body to propose amendments to operational guidelines, in order for them to ultimately be adopted by the plenary body (although the plenary body will, in practice, usually accept these amendments as is). The Intangible Cultural Heritage Convention strictly curtails the ability of its subsidiary body to adopt decisions which could surpass its plenary body: whereas removal from the World Heritage List can be done *proprio motu* by the convention's subsidiary body, such removal from the Lists established by the Intangible Cultural Heritage Convention can only follow from a request from the State Party concerned or from third actors. More critically, the Underwater Cultural Heritage Convention does not even establish such a subsidiary body. Similarly, the World Heritage Convention is the only convention which grants a significant role to independent expert bodies. By comparison, while both post-2000 cultural heritage conventions provide for the establishment of expert bodies in the form of the STAB and the Evaluation Body, both also require the members of these expert bodies to be nominated by states and elected by an intergovernmental body of the convention.

Yet the practice of the World Heritage Committee simultaneously shows that the establishment of subsidiary intergovernmental bodies is far from a panacea when it comes to resolving tensions surrounding the implementation of international heritage conventions. The General Assembly has thus adopted a number of progressive policies aimed at increasing the influence of individuals and local communities in World Heritage governance, as will be seen in the following section; yet due to its relative autonomy, these policies have by and large failed to influence the actual practice of the World Heritage Committee. More broadly speaking, the politicisation of the World Heritage Committee has significantly impacted its legitimacy, with the Committee increasingly ignoring the recommendations of the World Heritage Centre and the advisory bodies in the course of inscription and reactive monitoring procedures, adopting decisions which do not fully give force to the provisions

of the Operational Guidelines.[359] In 2021, the General Assembly of the Convention even went so far as to adopt a Declaration of Principles which effectively sought to call the members of the World Heritage Committee into line, noting that their actions should be 'guided by the core principles of integrity, objectivity, impartiality and respect for cultural diversity'.[360] The adoption of these principles is generally perceived to be in response to the repeated ignoring by the World Heritage Committee of the advice of the advisory bodies in relation to nominations. These developments raise important questions with regards to the legitimacy of international heritage governance, particularly when viewed from the perspective of domestic decision-makers and of the local communities affected by the decisions adopted by intergovernmental bodies.[361]

It also draws into question the wisdom of the 1999 Second Protocol and the Intangible Cultural Heritage Convention's reliance on the World Heritage Convention's reactive monitoring procedure as a model monitoring mechanism. While the reactive monitoring procedure has indeed produced some success stories,[362] it is effectively useless if the World Heritage Committee disregards the outcome of reactive monitoring on a regular basis.[363] Hølleland and Hamman thus critique 'the unaccountability of the Committee to its own rules', which 'enables an atmosphere of decision-making where the outcomes of compliance are neither comparable nor consistent across States Parties or their properties'.[364] The end result is that States Parties frequently fail to comply with decisions adopted by the World Heritage Committee in the course of reactive monitoring; this non-compliance is 'rarely reprimanded in any meaningful sense'[365] by the Committee.

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359 Sheppard and Wijesuriya (n 248) 19. See also World Heritage Committee, Decision 42 COM 12A (2018). See also the following principles suggested by the expert meeting tasked with reflection on the possible reform of the World Heritage nomination process, including that that there is a need to '[m]aintain high standards and a scientific-based approach throughout the overall evaluation process, bearing in mind that an evaluation is not a negotiated outcome, rather a rationale [sic] independent and evidence-based assessment' and to '[e]nsure that practices are rule-based': World Heritage Committee, Outcomes of the Reflection Meeting on Reforming the World Heritage Nomination Process (20 May 2019) WHC/19/43.COM/INF.8, 5-6.

360 General Assembly, Declaration of Principles to Promote International Solidarity and Cooperation to Preserve World Heritage (2021) Resolution 23 GA 10.

361 Zacharias, 'The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution' (n 290) 303.

362 Hamman and Hølleland (n 240) mention the inscriptions of the Ruins of Kilwa Kisiwani and Ruins of Songo Mnara, the Old Town of Lijiang, and the Melaka and George Town, Historic Cities of the Straits of Malacca: 127; Sheppard and Wijesuriya (n 248) call attention to the prevention of infrastructure construction which would have a negative impact on the OUV of a range of sites, such as Cologne Cathedral, St Petersburg, Lake Baikal (at 16-17; see also Annex G).

363 Sheppard and Wijesuriya (n 248) 19.

364 Hamman and Hølleland (n 240) 235-6.

365 Ibid 152.

Moreover, the World Heritage Committee has had to examine an increasing number of State of Conservation reports over time due to increasing use of the In Danger List, rising numbers of sites on the World Heritage List, and generally greater information being communicated with respect to World Heritage sites.[366] As a result, not all sites placed under reactive monitoring can be discussed each year by the World Heritage Committee;[367] it is not always clear on what basis SOC reports are selected for discussion by the Committee as there are no clear criteria for this selection process.[368] This shows that while cultural heritage conventions may be better placed to 'collect more and better information about the nature and frequency of threats'[369] to cultural heritage, this information will be of little use if the decision-making procedures of the conventions with respect to monitoring and non-compliance are not consistent and predictable for the States Parties.

A further indication of the fact that the extension of monitoring and implementation mechanisms in cultural heritage law has not necessarily resulted in a limitation of state sovereignty is evident from the fact that while the 1972 and 2003 Conventions and the 1999 Second Protocol have indeed established monitoring mechanisms, the deployment of these monitoring mechanisms remains subject to consultation with the state concerned. It is thus relatively unlikely that these mechanisms will be deployed against a state's will. Likewise, while information from third parties such as NGOs can potentially influence decision-making processes within these monitoring mechanisms, their role remains specifically curtailed – with the assumption being that any information which does *not* fall within the scope of these procedures cannot be considered. The information submitted by third parties is also usually not made available to the public at large. Somewhat paradoxically, the adoption of rules concerning information from third parties is thus a way for states to curtail their influence.

In this regard it is important to remember that the establishment of subsidiary bodies does not signal a move away from a state-centric status quo: states remain the central actors in these developments. There is a slight devolution of power, but it is to *other states*. The same holds for the increasing utilisation of operational guidelines within the conventions: whereas the continuous revision of many of these operational guidelines at face value lends credence to the hypothesis that the community interests represented in the Convention are given shape through a minimising of the role of absolute state consent – as embodied, for example, in the possibility in the case of the World Heritage Convention to delist heritage without the consent of the territorial

366 Sheppard and Wijesuriya (n 248) 45-6.
367 World Heritage Committee, Decision 39 COM 15 (2015) para 22, which limited the number of SOC reports examined by the Committee to 150 per year.
368 Sheppard and Wijesuriya (n 248) 47.
369 Hamman and Hølleland (n 240) 30.

state, a possibility not provided for in the text of the Convention itself – these operational guidelines are still composed, debated upon, and adopted by states.

As such, while cultural heritage law is indeed comparable to other common interest regimes through its establishment of institutions in which states are expected to answer to the international community with respect to the management of the common interest under their protection, the regime's recognition of cultural heritage as a common interest continues to run up against the limits of a system of international law which is centred around states as central actors, and more broadly speaking the tensions between 'form and function' which plague many common interest regimes in international law as outlined in the previous chapters.

4.3 Fostering individual and community participation

As noted in the introduction to the dissertation, disciplines related to the protection and management of cultural heritage – such as archaeology, anthropology, and cultural heritage studies – have undergone a radical shift since the mid-twentieth century, whereby community participation has assumed an ever-greater role in the conceptualisation of heritage value and conceptions on the best ways to manage cultural heritage.[370] This development has gradually also been reflected in cultural heritage treaties, and more broadly the approach of UNESCO as an organisation to the issue of cultural heritage protection. At the level of UNESCO's cultural heritage treaties, increasing emphasis is thus placed on the importance of living heritage value and its direct association with the individuals and communities which contribute to the construction of this heritage.[371]

This development has also been particularly prominent at the regional level within the Council of Europe, with both the European Landscape Convention and the Faro Convention on the Value of Cultural Heritage for Society adopting a participatory approach.[372] The European Landscape Convention thus requires its States Parties to undertake to 'establish procedures for the participation of the general public … and other parties with an interest in the

370 Gill Chitty, 'Introduction: Engaging Conservation - Practising Heritage Conservation in Communities' in Gill Chitty (ed), *Heritage, Conservation and Communities: Engagement, Participation and Capacity Building* (Routledge 2017) 1-2.

371 Yvonne Donders, 'Cultural Heritage and Human Rights' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020) 382.

372 European Landscape Convention (adopted 20 October 2000, entered into force 1 March 2004) ETS No. 176 (Landscape Convention); Council of Europe Framework Convention on the Value of Cultural Heritage for Society (adopted 27 October 2005, entered into force 1 June 2011) CETS No. 199 (Faro Convention).

definition and implementation of landscape policies';[373] particularly in the context of the identification of landscapes situated within their territories which will be subjected to such policies.[374] Along similar lines, the Faro Convention establishes that States parties must establish conditions allowing members of the public to participate in heritage governance; in particular, they must undertake to 'encourage everyone to participate in … the process of identification, study, interpretation, protection, conservation and presentation of the cultural heritage'.[375]

That being said, many of the participatory objectives of the Faro and Landscape Conventions have been described as 'aspirational', and 'difficult to operationalize and implement in any conventional political or administrative sense'.[376] As a result, their realisation by States Parties is often more top-down than the wording of the conventions would suggest, with the implementation of community participation standards remaining little more than a paper tiger.[377] Moreover, the Faro Convention explicitly excludes the possibility

373 European Landscape Convention art 5(c).

374 Ibid art 6(c)(1).

375 Faro Convention art 12(a); see also art 1(a), 7(b) and 9(a).

376 Adrian Olivier, 'Communities of Interest: Challenging Approaches' (2017) 4 Journal of Community Archaeology & Heritage 7, 16; see further Gian Franco Cartei, 'The Implementation of the European Landscape Convention and Public Participation' (2012) 18 European Public Law 269, 272; Amy Strecker, *Landscape Protection in International Law* (Oxford University Press 2018) 106-7. However, with respect to the Landscape Convention, more recent policy documents have adopted more robust participation standards: see in particular Council of Europe, Recommendation of the Committee of Ministers to Member States with a View to the Implementation of the European Landscape Convention of the Council of Europe – Landscape and Democracy: Public Participation (16 October 2019) CM/Rec(2019)8. Compare also the Napflion Declaration adopted by the Council of Europe Conference of Ministers Responsible for Spatial/Regional Planning, which mirrors the approach adopted in the Aarhus and Escazú Conventions: Council of Europe, Napflion Declaration: Promoting Territorial Democracy in Spatial Planning (17 June 2014) 16CEMAT(2014)5Fin E.

377 In relation to the Landscape Convention, see e.g. Michael Jones, 'The European Landscape Convention and the Question of Public Participation' (2007) 32 Landscape Research 613; Elisabeth Conrad and others, 'Rhetoric and Reporting of Public Participation in Landscape Policy' (2011) 13 Journal of Environmental Policy & Planning 23; Olivier (n 376) 13; Andrew Butler and Ulla Berglund, 'Landscape Character Assessment as an Approach to Understanding Public Interests within the European Landscape Convention' (2014) 39 Landscape Research 219, 219. More broadly in relation to the challenges of fostering participation in landscape management, see e.g. Michael Jones and Marie Stenseke (eds), *The European Landscape Convention: Challenges of Participation* (Springer 2011); Karsten Jorgensen and others (eds), *Mainstreaming Landscape through the European Landscape Convention* (Routledge 2015); Shelley Egoz, Karsten Jørgensen and Deni Ruggeri (eds), *Defining Landscape Democracy: A Path to Spatial Justice* (Elgar 2018); Strecker (n 376) 95-112. In relation to the Faro Convention, see e.g. Chiara Rabbiosi, 'The Frictional Geography of Cultural Heritage: Grounding the Faro Convention into Urban Experience in Forlì, Italy' (2022) 23 Social & Cultural Geography 140; Laia Colomer, 'Participation and Cultural Heritage Management in Norway: Who, When and How People Participate' (forthcoming) International Journal of Cultural Policy, doi: 10.1080/10286632.2023.2265940.

that it creates enforceable rights for individuals and communities,[378] with similar conclusions having been drawn with respect to the Landscape Convention.[379] As will be seen in the remainder of this chapter and in the following chapter, UNESCO's heritage conventions are plagued by similar problems; it is for this reason that Chapter Six turns to the elaboration of participatory principles within international environmental law and human rights law.

At the international level, the increasing emphasis on living heritage value and the role of communities within cultural heritage law has in turn been associated with a human rights-based approach to cultural heritage governance and the emergence of more far-reaching forms of community participation in heritage governance.[380] The Special Rapporteur in the Field of Cultural Rights thus already noted in 2011 the existence of a right of access to and enjoyment of cultural heritage, which included 'the right to participate in the identification, interpretation and development of cultural heritage, as well as to the design and implementation of preservation/safeguard policies and programmes'.[381] She thus recommended that '[c]oncerned communities and relevant individuals should be consulted and invited to actively participate in the whole process of identification, selection, classification, interpretation, preservation/safeguarding, stewardship and development of cultural heritage'.[382] This raises the question whether individuals and communities are indeed able to effectively participate in international heritage governance and thereby challenge the state-centric nature of cultural heritage law outlined in the previous sections of this chapter.

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378 Faro Convention art 6(c).

379 Cartei (n 376) 273-4. However, see Michel Prieur, 'The Human Right to Landscape' in Michael Faure (ed), *Elgar Encyclopedia of Environmental Law* (Elgar 2023); Council of Europe, Recommendation of the Committee of Ministers to Member States on the Guidelines for the Implementation of the European Landscape Convention (6 February 2008) CM/Rec(2008)3, Appendix 2: Suggested Text for the Practical Implementation of the European Landscape Convention at National Level, para 3(2) (which notes that '[l]andscape protection, management and planning entail rights and responsibilities for everyone'); Council of Europe, Recommendation of the Committee of Ministers to Member States on the Contribution of the European Landscape Convention to the Exercise of Human Rights and Democracy with a View to Sustainable Development (27 September 2017) CM/Rec(2017)7, para (g) (which recommends that States Parties to the Landscape Convention 'guarantee the right to participation by the general public, local and regional authorities, and other relevant parties including non-governmental organisations, with an interest in the definition, implementation and monitoring of landscape policies').

380 Ibid 382. See e.g. Executive Board of UNESCO, UNESCO Policy on Engaging with Indigenous Peoples (9 August 2017) 202 EX/9, para 3; World Heritage Committee, World Heritage and Sustainable Development (15 May 2015) WHC-15/39.COM/5D, Annex, para 20; World Heritage Convention Operational Guidelines, paras 12, 14bis.

381 Human Rights Council, Report of the Independent Expert in the Field of Cultural Rights (21 March 2011) UN Doc A/HRC/17/38, para 79.

382 Ibid para 80(c).

For the purposes of the present discussion, the following section distinguishes between three potential forms of community and individual participation in cultural heritage law: (a) participation of communities and individuals in the drafting of cultural heritage treaties; (b) participation in the monitoring of the implementation of these treaties at the international level; and (c) participation of communities and individuals in the process of inscription of cultural heritage on international heritage lists and the subsequent domestic implementation of the treaties in relation to these inscriptions. As the focus of the present chapter is on the implementation of cultural heritage treaties, the following section will not discuss the contributions of communities and individuals to the drafting of these treaties, particularly as these contributions have been extremely limited in practice. The following section will thus first address the general capabilities of individuals and communities to participate in international meetings of the governing bodies of UNESCO's cultural heritage conventions, before addressing participation in monitoring procedures and inscription processes in turn.

4.3.1 International meetings

Many of the cultural heritage conventions provide for some form of participation for non-state actors within international decision-making bodies, such as plenary or subsidiary bodies. Thus in the case of the plenary body of each of the conventions, NGOs can participate as observers if they have been invited by the UNESCO Director-General; these observers can subsequently address the meeting with the consent of its chairperson.[383] Slightly broader categories of observers are admitted to the meetings of the various subsidiary bodies: the 1999 Second Protocol thus allows for 'public or private organizations of qualified individuals' to attend meetings of the Second Protocol Committee upon invitation in order to consult upon particular problems;[384] the 1970 Convention allows its Subsidiary Body to invite not only NGOs, but also 'public and private organizations as well as individuals' to participate as observers;[385] the World Heritage Committee makes similar provisions for NGOs and 'non-profit making institutions having activities in the fields covered by the Conven-

383 Meeting of Parties to the Second Protocol to the Hague Convention, Rules of Procedure of the Meeting of Parties to the Second Protocol to the Hague Convention (April 2005) CLT-05/CONF/208/2, Rules 2.2, 7.3; C70/21/6.MSP/15.FINAL (n 157) Rules 3.2-3, 14.3; CLT/CEM/UCH/2019/1 (n 185) Rules 2.2, 11.3; General Assembly of States Parties to the World Heritage Convention, Rules of Procedure (14 November 2014) WHC-14/GA/1 Rev. 4, Rules 2.2, 7.3; General Assembly of States Parties to the Intangible Cultural Heritage Convention, Rules of Procedure, Decision 9.GA 12 (2022) Rules 3, 16.

384 Committee for the Protection of Cultural Property in the Event of Armed Conflict, Rules of Procedure (15 February 2012) CLT-11/CONF/211/5 Rev., Rule 7.

385 C70/21/9.SC/3b.bis (n 159) Rules 7.4, 20.3.

tion';[386] and the Intergovernmental Committee of the 2003 Convention can authorise 'public or private bodies and private persons, with recognized competence in the various fields of intangible cultural heritage' to participate in its meetings.[387] In each case, these observers can once again address the meeting of the subsidiary body with the consent of the chairperson.

Over time, the number of non-state attendees at these meetings has indeed increased.[388] This is particularly the case for the 2003 Convention, which provides for a specific procedure through which NGOs can be accredited and can subsequently provide advisory services to the Intergovernmental Committee, *inter alia* through being elected to the Convention's Evaluation Body.[389] However, the influence of observers on the decision-making processes undertaken within both the plenary and subsidiary bodies of the conventions remains limited, particularly as in many situations observers will only be invited to take the floor after the States Parties have made their interventions, and have thus usually already settled upon the agreed text to be adopted and in many cases will have decided whether to vote against or in favour of the resolution under discussion.[390] Moreover, in certain cases non-state actors will only be granted a relatively short time to make their contributions – in the case of the World Heritage Convention, for example, two minutes – which pales in comparison to the time granted to States Parties.[391] Although these limitations are in many cases not laid down in the relevant rules of procedure (with the exception of the Second Protocol's Subsidiary Body), these uncodified practices can critically influence the potential impact of non-state actors on international decision-making processes.

A further important limitation of many of the statutory bodies' rules of procedure is that observer status, or the ability to be consulted by the body on issues relating to the decision to be made, is often limited on the basis of the expertise of the non-state actor. These rules thus reinforce the situation which has been observed as endemic within cultural heritage law: the privileging of expert knowledge.[392] In this respect it is notable that not even the

386 World Heritage Committee, Rules of Procedure (July 2015) WHC-2015/5, Rule 8.3, 22.4.

387 Intergovernmental Committee, Rules of Procedure, Decision 12.COM 3 (2017) Rules 8.3, 22.3.

388 Jihon Kon, *Non-State Actors in the Protection of Cultural Heritage: An Analysis on Their Rights, Obligations, and Roles* (Springer 2021) 103.

389 Chiara Bortolotto and Jorijn Neyrinck, 'Art.9: Accreditation of Advisory Organizations' in Janet Blake and Lucas Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (Oxford University Press 2020).

390 International World Group for Indigenous Affairs, International Indigenous Peoples' Forum on World Heritage, Indigenous Peoples of Africa Co-ordinating Committee, Submission to the UN Special Rapporteur on the Rights of Indigenous Peoples for his Report to the 77th Session of the UN General Assembly (30 March 2022) 11.

391 Hamman (n 70) 438.

392 Also known as the 'Authorised Heritage Discourse': see Laurajane Smith, *The Uses of Heritage* (Routledge 2006).

Intangible Cultural Heritage Convention explicitly provides for participation by communities, groups and individuals in intergovernmental meetings, despite their privileged position elsewhere in the Convention. While it can arguably be inferred that communities, groups and individuals could possess the necessary 'competence' to participate in these meetings in light of their central role in identifying and safeguarding intangible cultural heritage, this will not always seem an obvious or easy step for these actors to take.

4.3.2 Periodic reporting and monitoring mechanisms

As already noted above, there are a number of routes through which individuals and communities can participate in the monitoring mechanisms of UNESCO's cultural conventions, albeit indirectly. In the case of the World Heritage Convention, the Intangible Cultural Heritage Convention, the 1999 Second Protocol, individuals and communities can thus submit information to the secretariats of the conventions concerning their implementation by the respective States Parties. While these groups can of course submit information to the convention secretariats outside the scope of these procedures, this information is likely to be treated on an ad hoc and informal basis, and is thus difficult to track through official documents.

Nonetheless, the World Heritage Convention's Operational Guidelines explicitly provide that individuals and communities can submit information to the Secretariat as part of the reactive monitoring procedure.[393] This information can relate to the fact that a property on the World Heritage List which has been subjected to reactive monitoring has 'seriously deteriorated, or that the necessary corrective measures have not been taken within the time proposed'; the Secretariat will subsequently 'verify the source and the contents of the information in consultation with the State Party concerned and request its comments'.[394]

Such information, particularly in the case of NGO submissions, has in the past indeed influenced the World Heritage Committee's decision-making with respect to World Heritage sites; although, as Hamman notes, there is a need for a 'stronger and clearer' overall role of information submitted by non-state actors within World Heritage governance.[395] A 2019 review of the reactive monitoring procedure thus pinpointed that the Advisory Bodies of the Convention and the World Heritage Centre are placed under increasing pressure due to their responsibility to examine information submitted pursuant to the reactive monitoring procedure; the communications which they receive increase

393 This paragraph was included for the first time in the 2005 version of the Operational Guidelines.
394 World Heritage Convention Operational Guidelines, para 174.
395 Hamman (n 70).

on a yearly basis, yet both the Advisory Bodies and the World Heritage Centre often do not have sufficient time or the necessary financial resources to examine all of the communications received.[396]

Being modelled on the reactive monitoring procedure, similar provisions can be found in the operational guidelines of the 1999 Second Protocol (pending their adoption by the General Assembly in December 2023) and the Intangible Cultural Heritage Convention. The Subsidiary Committee of the Second Protocol can thus trigger its ad hoc monitoring procedure if its receives information about situations of non-compliance; this information can be submitted by 'relevant eminent international and national governmental and non-governmental organizations, having objectives similar to those of the Convention and its Protocols such as those mentioned in article 27(3) of the Second Protocol'.[397] As already noted above, this is a significant reduction of the types of non-state actors which are empowered to submit information, as states were keen to ensure that the primary responsibility for the submission of information on the compliance with the Second Protocol should remain with the state concerned.[398] Nonetheless, a limited role remains for non-state actors to submit such information, which will subsequently be verified by the Secretariat with the State Party which the information concerns.[399] However, it is ultimately questionable whether these 'eminent international and national governmental and non-governmental organizations' will necessarily include representatives of local communities, thereby frustrating the ability of individuals and local communities to directly influence the decision-making of the 1999 Second Protocol.

The 2003 Convention grants perhaps the most extensive role to communities and individuals in its monitoring procedures. Through its practice, the Intergovernmental Committee has thus adopted procedures for the treatment of communications received by non-state actors with respect to nominations, the examination of periodic reports, and on an ad hoc basis any other communications received with respect to intangible cultural heritage inscribed on one of the Convention's Lists.[400] In all cases, correspondence received by the Secretariat is submitted to the State Party concerned, which subsequently provides comments to the Secretariat. In the case of correspondence relating

396 Sheppard and Wijesuriya (n 248) 25.

397 Decision 17.COM 9A (n 238) Annex, para 128. The comments to this amendment noted that '[a]lthough there is no exhaustive list of such organizations, it is important that they have objectives similar to those of the Convention, i.e. operate in the field of the protection of cultural property': C54/22/17.COM/9A (n 267) 9.

398 C54/21/16.COM/INF.12.II (n 260) para 13; C54/22/17.COM/INF.9.1 (n 261) paras 43-54, 77; C54/22/17.COM/9A (n 267) 9.

399 Decision 17.COM 9A (n 238) Annex, para 133.

400 Intergovernmental Committee, Decision 7.COM 15 (2012) Annex; Intergovernmental Committee, Decision 10.COM 15.B (2015) para 3; Intergovernmental Committee, Decision 14.COM 14 (2019) para 15.

to nominations or the examination of periodic reports, the correspondence remains available on the website of the Convention during the meeting at which the nomination or periodic report will be discussed, after which it is removed from the website. Correspondence received in other circumstances is simply summarised by the Secretariat in its report to the Intergovernmental Committee.[401]

In addition, the Convention establishes a number of requirements for States Parties with regards to community participation. When preparing their periodic reports on elements inscribed on the Representative List, States Parties shall thus 'endeavour to ensure the widest possible participation' of CGIs concerned;[402] in relation to inscriptions on the Urgent Safeguarding List they are merely required to 'endeavour to involve' these actors 'as broadly as possible'.[403] Although the Operational Directives thus do not set out an absolute obligation for states to ensure participation of CGIs, they are nonetheless required to address the participation of CGIs in safeguarding processes in their periodic reports.[404] States are thus requested to address how the participation of CGIs is fostered in safeguarding and management processes, for example 'through consultative bodies', and whether '[t]he importance of customary rights of communities and groups to land, sea and forest ecosystems necessary for the practice and transmission of ICH is recognized in policies and/or legal and administrative measures'.[405] Similar requirements can be found with respect to the periodic reporting form of the World Heritage Convention, which includes questions on the level of involvement of stakeholders, such as local communities, residents, and Indigenous peoples, in the preparation of tentative lists and nomination dossiers.

Finally, the most far-reaching form of community involvement in the monitoring procedures of the 2003 Convention – and in fact any of the cultural heritage conventions – is the fact that communities, groups and individuals can also submit a request to the Secretariat for the removal of an element from one of the Lists of the Convention. While such requests from the State Party concerned are directly submitted to the Intergovernmental Committee, requests from third parties will be transmitted to the Bureau of the Intergovernmental Committee, which decides whether to transmit the request to the Commit-

401 See LHE/21/16.COM/11 Rev. (n 283); LHE/22/17.COM/8 (n 283).

402 Intangible Cultural Convention Operational Directives, para 157.

403 Ibid para 160.

404 Ibid paras 157(e), 162(e).

405 As outlined in the recently adopted Overall Results Framework for the Convention: ITH/18/7.GA/9 (n 224) Annex, Assessment Factors 1.3, 14.2. See also Assessment Factors 8.1 and 8.2 (on community participation in the inventorying process), 16.1 (on the inclusivity of safeguarding plans and programmes), 17.2 (on FPIC relating to awareness-raising activities), and 21.1 (on general participation of CGIs in safeguarding). The Overall Results Framework was adopted by the General Assembly in 2018: see Resolution 7.GA 9.

tee.[406] The Committee can in turn decide to place the element under the enhanced follow-up procedure, which can ultimately result in the delisting of the element.[407]

4.3.3 Listing processes and domestic treaty implementation

In comparison to the relative paucity of procedures for the involvement of communities and individuals in monitoring processes which chiefly take place at the international level, the conventions establish a range of obligations for states to ensure community participation in the implementation of the conventions at the national level and more broadly establish communities and individuals as stakeholders in the implementation of the respective conventions.

For most of the conventions, this is limited to a general acknowledgment of the role of non-state actors. Thus the Guidelines of the 1999 Second Protocol note that the key actors of the Protocol (namely the States Parties, the Meeting of the Parties, the Subsidiary Committee and UNESCO) are 'encouraged to ensure the participation of a wide variety of stakeholders, including international and national governmental and non-governmental organizations',[408] and thus do not explicitly focus on individuals or communities. The operational guidelines of the 2001 Convention, by comparison, are more inclusive, encouraging States Parties 'to ensure the participation of a wide variety of professionals, site managers, local and regional governments, local communities, underwater archaeologists, conservation specialists, non-governmental organizations ('NGOs') and the public at large in the protection of the underwater cultural heritage and the implementation of the Convention'.[409] In addition, the Operational Guidelines provide that '[w]here and when appropriate, local communities directly linked to the underwater cultural heritage sites should be engaged in any activity directed at this heritage'.[410] Finally, at the national level, 'States Parties are encouraged to establish cooperation with and among non-governmental organizations, communities, groups and individuals … to enhance the protection of the underwater cultural heritage',[411] for example in relation to the identification and protection of that heritage. However, these provisions on individual and community participation appear to remain largely

406 Intangible Cultural Heritage Convention Operational Directives, para 40.2(e)(i).
407 Ibid para 40.3(b).
408 Second Protocol Guidelines, para 13, although in providing examples of such participation the Guidelines only mention 'the national implementation, awareness-raising and dissemination of the Second Protocol both within target groups and the general public' and 'offering technical advice related to safeguarding of cultural property'. See also para 24.
409 Underwater Cultural Heritage Convention Operational Guidelines, para 11.
410 Ibid para 49; see also para 54 on the public enjoyment and awareness of underwater cultural heritage.
411 Ibid para 81.

hortatory, as they are not assessed elsewhere in the 2001 Convention's mechanisms.

By contrast, a far greater emphasis is placed on the importance of the participation of individuals and local communities with respect to the implementation of the World Heritage Convention and Intangible Cultural Heritage Convention; the following sections will discuss each convention in turn.

4.3.3.1 1972 World Heritage Convention

'Communities' have formed the fifth strategic objective of the World Heritage Convention since 2005, 'recognizing the critical importance of involving indigenous, traditional and local communities in the implementation of the Convention'.[412] Individuals, local communities and Indigenous peoples are moreover explicitly identified in the Convention's Operational Guidelines as '[p]artners in the protection and conservation of World Heritage'.[413] In recent years, their participation has increasingly been framed as one element of a human rights-based approach to the Convention (HRBA).[414] The Operational Guidelines thus encourage States Parties 'to adopt a human-rights based approach',[415] and to mainstream international human rights standards when implementing the Convention.[416] Beyond underlining the importance of the human rights-based approach, the Sustainable Development Policy 'specifically encourages the effective and equitable involvement and participation of indigenous peoples and local communities in decision-making, monitoring and evaluation of World Heritage properties and the respect of indigenous peoples' rights in nominating, managing and reporting on World Heritage properties in their own territories', noting that States Parties should '[e]nsure adequate consultations, the free, prior and informed consent and equitable and effective participation of indigenous peoples where World Heritage nomination, management and policy measures affect their territories, lands, resources and ways of life'.[417]

At the UNESCO-wide level, the Executive Committee has moreover adopted the UNESCO Policy on Engaging with Indigenous Peoples, which is intended

412 World Heritage Committee, Decision 31 COM 13A (2007) para 5. See also World Heritage Convention Operational Guidelines, para 26. These strategic objectives had first been formulated in the Budapest Declaration, adopted by the Committee in 2002: World Heritage Committee, Decision 26 COM 9 (2002).

413 World Heritage Convention Operational Guidelines, para 40.

414 The HRBA was first concretely outlined in the context of the UNDP Guidelines on the Human Rights Based Approach to Development Cooperation.

415 World Heritage Convention Operational Guidelines, para 12. See also Sustainable Development Policy (n 164) paras 20, 7(j).

416 World Heritage Convention Operational Guidelines, para 14bis. See also Sustainable Development Policy (n 164).

417 Sustainable Development Policy (n 164) para 21-2.

to shape the action of all UNESCO organs.[418] The policy similarly commits to the adoption of a human rights-based approach in UNESCO programming relating to Indigenous peoples.[419] As a guiding principle, the policy establishes that Indigenous peoples have the right to full and effective participation in matters affecting their culture. As a result, they should be able to participate in the development of policies concerning their cultural heritage, 'including through effective participation in relevant consultative bodies and coordination mechanisms', and they have a right to be consulted with regard to activities concerning their heritage.[420] In addition, Indigenous peoples have a right of access to the 'instruments, objects, artefacts, cultural and natural spaces and places of memory' necessary for the expression of their intangible cultural heritage, and more broadly a right to their traditional lands, territories and resources.[421] Consequently, Indigenous peoples should not be subject to forced relocation from their heritage sites, and when 'nomination, management and policy measures of international designations affect their territories, lands, resources and ways of life', then such interventions should ensure adequate consultation, free, prior and informed consent and the equitable and effective participation of Indigenous peoples.[422]

A number of significant amendments to the Convention's Operational Guidelines were moreover adopted in 2019, which provide several important guarantees relating to community participation and partially implement the standards established in the Sustainable Development Policy and the Policy on Engaging with Indigenous Peoples.[423] States Parties are thus encouraged to 'ensure gender-balanced participation of a wide variety of stakeholders and rights-holders, including site managers, local and regional governments, local communities, indigenous peoples, non-governmental organizations (NGOs) and other interested parties and partners in the identification, nomination, management and protection processes of World Heritage properties'.[424] In

418 202 EX/9 (n 380).

419 Ibid para 3. In relation to the World Heritage Convention, see also World Heritage Committee, Decision 35 COM 12E (2011) paras 15(e)-(f), where the Committee encouraged States parties to 'respect the rights of indigenous peoples when nominating, managing and reporting on World Heritage sites in indigenous peoples' territories'.

420 202 EX/9 (n 380) para 77.

421 Ibid.

422 Ibid.

423 World Heritage Committee, Decision 43 COM 11A (2020).

424 World Heritage Convention Operational Guidelines, para 12. See also para 111(b), which notes that one of the elements of an effective management system for a World Heritage site could be 'a respect for diversity, equity, gender equality and human rights and the use of inclusive and participatory planning and stakeholder consultation processes'. In addition, para 117 notes that 'States Parties are responsible for implementing effective management activities for a World Heritage property. States Parties should do so in close collaboration with property managers, the agency with management authority and other partners, local communities and indigenous peoples, rights-holders and stakeholders in

addition, '[l]egislation, policies and strategies affecting World Heritage properties should …promote and encourage the effective, inclusive and equitable participation of the communities, indigenous peoples and other stakeholders concerned with the property'.[425]

Specific guidelines are also provided with respect to participation in the preparation of Tentative Lists and the nomination process. States Parties are encouraged to prepare their Tentative Lists with the 'full' and 'effective' participation of a 'variety of stakeholders and rights-holders', including local communities.[426] More broadly, in the preparation of nominations to the World Heritage List, states are 'encouraged to prepare nominations with the widest possible participation of stakeholders'.[427] The nomination form which states submit to the World Heritage Centre requires states to indicate relevant stakeholders, as well as to '[d]emonstrate the extent of participation in the nomination process of stakeholders and rights-holders through, inter alia, making the nomination publicly available in appropriate languages and through public consultations and hearings', and to 'demonstrate the extent of consultation and collaboration with stakeholders and rights-holders in the management of the nominated property'.[428]

The World Heritage Committee has also increasingly incorporated notions of community participations in its decision-making in relation to World Heritage sites. The Committee has thus adopted a string of decisions on the involvement of local communities in the promotion of sustainable resource practices at sites.[429] Particularly in cases where the site has traditionally been used by Indigenous communities (for example as grazing and hunting lands), the Committee requests states to develop policies on sustainable use 'in close cooperation with the indigenous communities using these areas',[430] at times even requesting consultation with Indigenous peoples which are dependent on the use of the site, 'to find mutually acceptable ways to resolve any ongoing resource use conflicts, while respect any rights of use'.[431] At a broader level, it has also requested states 'to strengthen the cooperation with local communities, civil society and in particular the indigenous communities',[432] and to engage 'customary owners in … decision-making processes'.[433]

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property management, by developing, when appropriate, equitable governance arrangements, collaborative management systems and redress mechanisms'.

425 Ibid para 119.

426 Ibid para 64.

427 Ibid para 123.

428 Ibid Annex 5, section 5.a.

429 See e.g. World Heritage Committee, Decision 38 COM 7B.62 (2014); Decision 38 COM 7B.84 (2014); Decision 40 COM 7B.85 (2016); Decision 41 COM 7B.15 (2017); Decision 41 COM 7B.17 (2017); Decision 43 COM 7B.8 (2019).

430 See e.g. World Heritage Committee, Decision 36 COM 7B.25 (2012).

431 See e.g. World Heritage Committee, Decision 40 COM 7B.88 (2016).

432 See e.g. World Heritage Committee, Decision 43 COM 7A.2 (2019).

433 See e.g. World Heritage Committee, Decision 35 COM 7B.15 (2011).

However, despite this practice of the World Heritage Committee, ultimately many of the standards established by the Operational Guidelines with respect to community participation remain hortatory. By contrast, requirements relating to respect for the free, prior and informed consent (FPIC) of Indigenous peoples in relation to the preparation of tentative lists and nominations to the World Heritage List form an exception to this trend, as the Operational Guidelines related to these processes are phrased in obligatory language.[434] In the case of tentative lists, States Parties thus 'shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before including the sites on their Tentative List'[435] if the site concerned would affect their lands, territories or resources. Similarly, with respect to the preparation of nomination requests, states are not merely encouraged but 'shall demonstrate, as appropriate, that the free, prior and informed consent of indigenous peoples has been obtained, through, inter alia, making the nominations publicly available in appropriate languages and public consultations and hearings.'[436]

States are also required to demonstrate issues relating to the FPIC of Indigenous peoples in the preliminary assessment and nomination forms which they submit to the World Heritage Centre if the nomination in question 'might affect the lands, territories or resources of indigenous peoples and/or local communities'.[437] Thus in relation to their preliminary assessment requests, states must 'explain how [indigenous peoples] are represented, and in how far they have participated in the preparation of the Tentative List and the Preliminary Assessment request … [and] [d]emonstrate, as appropriate, that the free, prior and informed consent of indigenous peoples has been obtained',[438] for example by 'making the planned nomination publicly available in appropriate languages and public consultations and hearings.'[439] For nomination requests, States Parties must similarly 'demonstrate whether their free, prior and informed consent to the nomination has been obtained';[440] in addition to this, the State Party must '[d]emonstrate the extent of consultation and collaboration with indigenous peoples, as applicable, in the management of the nominated property'.[441]

In recent years, the World Heritage Committee has referred to the importance of free, prior and informed consent in relation to four natural sites: *Talamanca Range – La Amistad Reserves/La Amistad National Park*, a transbound-

434 See also World Heritage Committee, Decision 35 COM 12E (2011) paras 15(e)-(f).
435 World Heritage Convention Operational Guidelines, para 64.
436 Ibid para 123.
437 Ibid, Annex 3 (95) Annex 5 (111).
438 Ibid, Annex 3 (95).
439 Ibid.
440 With, once again, the example being provided of 'making the planned nomination publicly available in appropriate languages and public consultations and hearings.'
441 Ibid, Annex 5 (111).

ary site of Costa Rica and Panama which was inscribed in 1983; *Salonga National Park* in the Democratic Republic of the Congo, which was inscribed on the World Heritage List in Danger in 1999; and during the inscription processes of *Kaeng Krachan Forest Complex* in Thailand and *Fanjingshan* in China. In the case of Talamanca Range, the Committee thus urged the State Party to halt a hydropower project until the FPIC of Indigenous communities with territorial rights in the areas concerned had been achieved.[442] Similarly, in relation to Salonga National Park the Committee requested the State Party to ensure that the resettlement of an Indigenous community in the national park was voluntary and in accordance with the principle of FPIC.[443]

The role of FPIC in nomination processes is somewhat spottier. Issues surrounding FPIC were thus raised during the nomination process of Kaeng Krachan, with the Committee referring the nomination back to Thailand in order to allow it to address concerns raised with respect to respect for the human rights of Indigenous peoples within the site, 'including the implementation of a participatory process to resolve rights and livelihood concerns and to achieve a consensus of support for the nomination of the property that is fully consistent with the principle of free, prior and informed consent'.[444] However, the matter of FPIC did not feature in the other decisions of the Committee concerning the nomination, and Kaeng Krachan was inscribed (in the face of overwhelming criticism from the human rights community) in 2021.[445] The Committee similarly inscribed Fanjingshan in 2018 despite a

442 World Heritage Committee, Decision 39 COM 7B.28 (2015) para 7(c). This was a reiteration of a previous request to Panama in response to the construction of two dams which had caused significant tensions with local Indigenous populations: Decision 37 COM 7B.30 (2013) para 8(a). Of interest, however, is the fact that the WHC also requested the States Parties to '[c]ompile and monitor field data on the present state of human activities, including intensity of cattle grazing and impact on OUV, extent of illicit crop cultivation within and directly adjacent to the park, including number of hectares affected, number of families making use of resources within the property, and nature and extent of overland pathways/trails present' (para 8(e)).

443 World Heritage Committee, Decision 43 COM 7A.10 (2019) para 6.

444 World Heritage Committee, Decision 40 COM 8B.11 (2016) para 4.

445 The nomination was once again referred in 2019, with the Committee asking Thailand to 'demonstrate that all concerns have been resolved, in full consultation with the local communities, in accordance with paragraph 123 of the Operational Guidelines': World Heritage Committee, Decision 43 COM 8B.5 (2019) para 6. Upon the inscription of the site in 2021, the Committee merely noted that Thailand should 'continue the work in progress on the following issues … [e]nsuring consultations with the local communities on their livelihoods and their active engagement in management of the property': World Heritage Committee, Decision 44 COM 8B.7 (2021) para 5(c). IUCN had in fact recommended that the Committee should defer the inscription so that Thailand could 'fully resolve concerns regarding rights, in light with paragraph 123 of the Operational Guidelines, and Decisions 39 COM 8B.5, 40 COM 8B.1 and 43 COM 8B.5, demonstrating that consensus of support for the nomination of the property has been obtained from all affected indigenous peoples and local communities, fully consistent with the principle of free, prior and informed

lack of information surrounding relocation of residents within the site, simply requesting the State Party 'to undertake and document significant further work', in order to ensure that these relocations were 'fully voluntary and in line with the policies of the Convention and relevant international norms, including principles related to free, prior and informed consent [and] effective consultation'.[446] As of 2023, the Committee has not yet followed up on this recommendation. As such, in each of these situations the Committee has not followed up on its request to the respective States Parties to ensure FPIC, despite issues remaining in many of the sites concerned.[447]

In conclusion, while there have certainly been improvements in recent years with respect to the position of individuals and communities in World Heritage governance, such as the adoption of a range of significant amendments to the Operational Guidelines in 2019, these changes have yet to have a measurable impact in practice. One of the core issues in this respect is that individual and community participation is not construed of as being part of the outstanding universal value of a World Heritage site, whereas the monitoring mechanisms of the Convention focus on threats to OUV. Issues relating to a lack of community participation are thus obscured within monitoring processes. As such, a lack of community participation does not form sufficient grounds for inscription on the Convention's Danger List. Furthermore, whilst the majority of the references to community participation in the Operational Guidelines focus on such participation with respect to inscriptions, it nonetheless seems likely that a nomination can nonetheless still be considered by the Committee even if the state does not provide sufficient information on community participation in its nomination documents,[448] making these amendments largely a dead letter. Moreover, community participation is not only important in

consent': IUCN Evaluations of nominations of natural and mixed properties to the World Heritage List (2021) WHC/21/44.COM/INF.8B2.ADD, 40.

446 World Heritage Committee, Decision 42 COM 8B.6 (2018) para 4(a).

447 In the case of Talamanca Range, this was because the project which was subject to the Committee's request with respect to ensuring FPIC was ultimately cancelled by the State Party concerned. In the case of Salonga National Park, the site was removed from the Danger List in 2021, despite issues remaining with respect to human rights and FPIC; the DRC was simply requested to implement recommendations with respect to relocation and FPIC: World Heritage Committee, Decision 44 COM 7A.44 (2021).

448 In their recent submission to the Special Rapporteur on the Rights of Indigenous Peoples, IWGIA, IIPFWH and IPACC thus note that '[t]he evidence of Indigenous peoples' FPIC to World Heritage nominations affecting them is not mentioned in para 12 of the Operational Guidelines (on the necessary documentation for a nomination to be considered as "complete"); it is thus unclear whether the Secretariat can treat nominations lacking such evidence as "incomplete" and send them back to the submitting State Party(ies) upon receipt': International Work Group for Indigenous Affairs, Indigenous Peoples' Forum on World Heritage and Indigenous Peoples of Africa Co-ordinating Committee, Submission to the UN Special Rapporteur on the Rights of Indigenous Peoples for his report to the 77th Session of the UN General Assembly: Indigenous Peoples' Rights and UNESCO World Heritage Sites (30 March 2022) para 20.

relation to inscription processes but is critical throughout the life of a site on the World Heritage List, yet the Operational Guidelines do not set out any requirements with regards to post-inscription participation processes.

In any event, the politicisation of the World Heritage Committee has demonstrated the Committee's lack of consistency in ensuring respect for provisions relating to community participation. Consideration of issues relating to community participation appears to be highly dependent on the composition of the Committee and whether broader political interests are at stake with respect to the site; the treatment of the Karen residents of Kaeng Krachan is an example in point of this trend. Furthermore, issues relating to free, prior and informed consent only rarely surface in the decisions of the Committee, despite potentially being of import at many sites; when FPIC is raised as a point of discussion, it is often treated inconsistently and is not subject to the necessary follow-up by the Committee to ensure compliance with its previous decisions.

4.3.3.2 2003 Intangible Cultural Heritage Convention

Communities, groups and individuals (CGIs) form a core part of the Intangible Cultural Heritage Convention; by contrast to the World Heritage Convention, the former thus contains a specific provision on the importance of the participation of communities, groups and individuals.[449] This article sets out that States Parties to the Convention 'shall endeavour to ensure the widest possible participation' of CGIs in the context of safeguarding activities, involving these groups actively in the management of intangible cultural heritage. However, this article is notably phrased in hortatory terms, as States Parties were reticent during drafting to adopt a stronger terminology which would establish absolute obligations with regards to participation. As such, 'the content and means of community participation were left to the different State Parties' discretion'.[450] Nonetheless, the Convention does explicitly require the identification and definition of intangible cultural heritage at the national level to take place 'with the participation of communities, groups and relevant non-governmental organizations'.[451]

In addition, the role of CGIs in the implementation of the Convention has been further reaffirmed through the progressive development of the Convention's Operational Directives, which effectively 'establish a higher standard of participation' than that set out in the text of the Convention.[452] As for

449 Intangible Cultural Heritage Convention, art 15.

450 Gabriele D'Amico Soggetti, 'Art.15: Participation of Communities, Groups, and Individuals. Participation and Democracy' in Janet Blake and Lucas Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (Oxford University Press 2020) 293.

451 Intangible Cultural Heritage Convention, art 11(b).

452 Lenzerini, 'Art.16–17: Listing Intangible Cultural Heritage' (n 320) 318.

inscription on the Lists of the Convention, the Operational Directives thus stipulate with regard to both Lists that nomination must be preceded by 'the widest possible participation of the community, group or, if applicable, individuals concerned and with their free, prior and informed consent'.[453] Similarly, transfer of an element from one List to another must occur with the free, prior and informed consent of CGIs,[454] as well as in cases of reduction of an element, where States Parties are required to provide evidence for the free, prior and informed consent of CGIs.[455] A lower standard of FPIC is required for awareness-raising action undertaken at the national level, where states are merely 'encouraged to observe' that CGIs 'have given their free, prior and informed consent'.[456]

States are further 'encouraged to create a consultative body or a co-ordination mechanism' to facilitate community, group and individual participation in relation to identification, the creating of inventories, and nomination of manifestations of ICH to either List.[457] The Directives furthermore prescribe that States Parties 'shall endeavour to ensure' that inscriptions on the Lists 'are not misused to the detriment of intangible cultural heritage and communities, groups or individuals concerned, in particular for short-term economic gain'.[458] Finally, with respect to safeguarding at the national level, and in particular the development of plans, policies and programmes involving intangible cultural heritage, States Parties are expected to endeavour to 'ensure the widest possible participation of [CGIs] that create, maintain and transmit such heritage, and involve them actively in elaboration and implementation of such plans, policies and programmes',[459] and to additionally ensure that these CGIs 'are the primary beneficiaries, both in moral and material terms' of these plans, policies and programmes.[460] Such activities thus must not 'decontextualise or denaturalise' the intangible cultural heritage concerned.[461]

The role of CGIs has also been reaffirmed through the development of policies by the Intergovernmental Committee, specifically in the form of the 2015 Ethical Principles for Safeguarding Intangible Cultural Heritage.[462] The Ethical Principles thus state that CGIs 'should have the primary role in safe-

453 Intangible Cultural Heritage Convention Operational Directives, paras 1.U.4, 2.R.4.
454 Ibid para 38.1.
455 Ibid para 17.2.
456 Ibid para 101. However, States Parties are nonetheless also encouraged to observe that CGIs 'widest possible participation in the awareness-raising actions is ensured', and that these actions 'fully respect customary practices governing access to specific aspects of such heritage, in particular secret and sacred aspects'.
457 Ibid para 80.
458 Ibid para 176.
459 Ibid para 171(a).
460 Ibid para 171(c).
461 Ibid para 171(c).
462 Intergovernmental Committee, Decision 10.COM 15.A (2015).

guarding their own intangible cultural heritage'.[463] Moreover, '[a]ll interactions with the [CGIs] who create, safeguard, maintain and transmit intangible cultural heritage should be characterized by transparent collaboration, dialogue, negotiation and consultation, and contingent upon their free, prior, sustained and informed consent'.[464] However, these principles were notably only endorsed by the Intergovernmental Committee, and not the Convention's General Assembly – despite the latter being the 'sovereign body' of the Convention,[465] reducing their normative force.

At face value the Intangible Cultural Heritage Convention thus establishes far-reaching obligations upon States Parties to ensure individual and community participation in the implementation of the Convention. Unlike any of the other cultural conventions of UNESCO's, CGIs can directly influence the processes for the transfer of elements from one List to another and the removal of an element from a List, as already outlined in the previous section: CGIs can thus communicate their wishes to the Secretariat, which will accordingly inform both the State Party concerned and the Intergovernmental Committee.[466]

However, similarly to the World Heritage Convention, most of the requirements established by the Operational Guidelines are set out in relation to inscription of intangible heritage on one of the Convention's Lists. Even in relation to inscriptions, the Operational Directives ultimately do not clearly set out criteria with respect to the modalities of community participation: thus whereas some have interpreted the requirement that elements on the Lists must be nominated with the free, prior and informed consent of CGIs as establishing a 'veto' for CGIs of nominations, this seems unlikely.[467] The Operational Directives do not provide a definition of FPIC; given that the issue of whether the principle of FPIC indeed provides a veto to the communities concerned remains controversial, it seems unlikely that this is indeed the intended interpretation of this provision.[468] Quite to the contrary: the only party whose consent is explicitly required in the nomination process is that of states, as inscription can only occur with the consent and upon the action of the territorial state.[469]

Several commentators have moreover pointed out that the practice of the Convention thus far does not give a proper indication whether the obligation to secure the FPIC of communities, and more broadly the requirement of community participation, has indeed been respected in practice.[470] Commun-

463 Intergovernmental Committee, Expert Meeting on a Model Code of Ethics (15 October 2015) ITH/15/10.COM/15.a, Annex, Principle 1.
464 Ibid Principle 4.
465 Intangible Cultural Heritage Convention, art 4(1).
466 Intangible Cultural Heritage Convention Operational Directives, para 38.2.
467 Lenzerini, 'Art.16–17: Listing Intangible Cultural Heritage' (n 320) 318.
468 On the definition of FPIC, see Chapter 6.
469 Nomination files can only be submitted by a State Party to the Convention.
470 Lenzerini, 'Art.16–17: Listing Intangible Cultural Heritage' (n 320) 318.

ity participation is primarily assessed through the submission by the state of signed consent forms (even amongst communities which are largely non-literate) and lists of participants at events concerning inscription; independent assessment of the veracity of these documents is politically sensitive and financially prohibitive for the governing bodies of the Convention.[471] As such, 'the degrees of actual participation [of CGIs] may differ widely' amongst States Parties.[472] In the past, members of the Evaluation Body have moreover indicated that the Convention's nomination forms 'do not provide adequate space to reflect the true nature of involvement of communities'.[473] Even then, the Intergovernmental Committee often ignores the Evaluation Body's recommendations with regards to potential nominations, mirroring the trends described above with respect to the politicisation of the World Heritage Committee.[474]

Perhaps most surprisingly, the Intangible Cultural Heritage Convention is arguably less progressive with regards to the incorporation of human rights in comparison to the World Heritage Convention. Whereas in recent years the Operational Guidelines of the World Heritage Convention have incorporated numerous references to the importance of adopting a human rights-based approach in the implementation of the Convention, concrete references to human rights in the Intangible Cultural Heritage Convention and its Operational Directives are limited to the context of assessing which intangible heritage can be inscribed on the Lists.[475] The main affirmation of human rights at the policy level can be found in the non-binding Ethical Principles adopted by the Intergovernmental Committee, which broadly reaffirm the right of CGIs to 'continue the practices, representations, expressions, knowledge and skills necessary to ensure the viability of the intangible cultural heritage'.[476] However, even here the Committee chose to not refer to explicit human rights

471 Bortolotto and others (n 279) 72.

472 Janet Blake, 'Engaging "Communities, Groups and Individuals" in the International Mechanisms of the 2003 Intangible Heritage Convention' (2019) 26 International Journal of Cultural Property 113, 119. See also D'Amico Soggetti (n 450) 296.

473 Internal Oversight Service, Evaluation of UNESCO's Action in the Framework of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (November 2021) IOS/EVS/PI/200, 7.

474 Blake, 'Engaging "Communities, Groups and Individuals" in the International Mechanisms of the 2003 Intangible Heritage Convention' (n 472) 120.

475 Intangible Cultural Heritage Convention, art 2(1): 'For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments'. See also Intangible Cultural Heritage Convention Operational Directives, paras 73 (in relation to contributions to the Fund), 170 (in relation to national safeguarding activities).

476 ITH/15/10.COM/15.a (n 463) Annex, Principle 2.

standards, eschewing the use of the term 'human rights' as much as possible.[477]

4.3.4 Conclusion

As the foregoing demonstrates, while much of the current international political discourse surrounding cultural heritage protection emphasises the need to balance between the common interest in safeguarding cultural heritage and the particular interests of individuals and local communities,[478] a closer analysis of UNESCO's cultural heritage conventions proves that there is still a long way to go. As recently as June 2022, the ILA Committee on Participation in Global Heritage Governance was thus able to note that while significant progress has been made in this respect in recent heritage conventions such as the Intangible Cultural Heritage Convention, the state-centrism of cultural heritage law 'is still a prevalent issue impairing participation'.[479] States remain the 'driving force of organizational agendas', thereby complicating participation at a later stage by other actors such as communities.[480]

As noted above, the strongest guarantees in this respect relate to requirements imposed upon States Parties to the cultural heritage conventions, in

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477 The preamble to the Ethical Principles simply notes that the Principles 'have been elaborated in the spirit of … existing international normative instruments protecting human rights and the rights of indigenous peoples'. In addition to this, Principle 4 mentions the concept of 'free, prior, sustained and informed consent'. While it is not entirely clear why the Ethical Principles eschew any further explicit reference to human rights, an indication can be found in its preparatory works: a memorandum prepared for the expert meeting at which the Ethical Principles were drafted thus noted that 'the Convention incorporates (without enumerating them) all the fundamental principles of human rights that have been recognized by the international community. Ethical codes for intangible cultural heritage must therefore necessarily respect those human rights principles, but might also follow the Convention's example of referring to them in their totality rather than enumerating them in what will likely be an incomplete list': Intergovernmental Committee of the Intangible Cultural Heritage Convention, Towards Codes of Ethics for Intangible Cultural Heritage? (20 February 2015) ITH/15/EXP/2.

478 Of particular interest is the recognition in both the World Heritage Convention's Sustainable Development Policy and the Ethical Principles of the ICHC's Intergovernmental Committee that: (in the case of the WHC) States Parties should recognise 'both universal and local values within management systems for World Heritage properties' and that (in the case of the ICHC) '[t]he safeguarding of intangible cultural heritage is of general interest to humanity and should therefore be undertaken through cooperation among bilateral, sub regional, regional and international parties; nevertheless, communities, groups and, where applicable, individuals should never be alienated from their own intangible cultural heritage': see WHC-15/39.COM/5D (n 380) Annex, para 21-2; ITH/15/10.COM/15.a (n 463) Annex, Principle 12.

479 Committee on Participation in Global Cultural Heritage Governance, 'Final Report' in International Law Association Report of the Eightieth Conference (Lisbon 2022) (International Law Association, London 2023) para 77.

480 Ibid.

particular within the scope of the World Heritage Convention and the Intangible Cultural Heritage Convention, to ensure participation in the processes leading up to international inscription, as well as domestic safeguarding processes undertaken pursuant to the conventions. In the case of the World Heritage Convention, states are merely encouraged to ensure that nominations are prepared with the 'widest possible participation' of stakeholders;[481] if a site concerns the lands, territories or resources of Indigenous peoples, states 'shall demonstrate, as appropriate, that the free, prior and informed consent of [I]ndigenous peoples has been obtained'.[482] In the case of the Intangible Cultural Heritage Convention, nominations must be preceded by the 'widest possible participation'[483] of communities and individuals and with their free, prior and informed consent; such free, prior and informed consent is similarly required with regards to the transfer of elements from one list to another and the reduction or removal of an element from one of the lists.

However, less guidelines have been formulated with respect to ensuring continued community participation throughout the life of cultural heritage on international lists. Moreover, the requirements currently established with respect to inscriptions and domestic safeguarding processes do not establish corresponding rights for individuals and communities through which they can seek to enforce that the State Party concerned does indeed meet its obligations, and it is unclear whether such provisions could form the subject of non-compliance procedures. Finally, these requirements also stand on shaky ground with respect to their obligatory force for States Parties, given that in almost all cases they find their origin not in the text of the conventions at stake but in the conventions' operational guidelines.[484]

By comparison to the baseline expectation of participation in domestic nomination processes, there are very limited possibilities for individuals and communities to participate in their own right in international decision-making processes, despite international fora constituting the venues where some of the most important aspects of international governance take place. This is due to the fact that provisions concerning participation by individuals and communities in the meetings of the governing bodies of the cultural heritage conventions are relatively limited.[485]

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481 World Heritage Convention Operational Guidelines, para 123.

482 Ibid.

483 Intangible Cultural Heritage Convention Operational Directives, para 1.U.4, 2.R.4.

484 On whether the operational guidelines of the World Heritage Convention are binding, see von Schorlemer, 'Compliance with the UNESCO World Heritage Convention: Reflections on the Elbe Valley and the Dresden Waldschlössen Bridge' (n 299) 331-3; Zacharias, 'The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution' (n 290) 320-2.

485 See also the General Assembly of the World Heritage Convention's Declaration of Principles, which called upon the World Heritage Committee to commit to, '[i]n the interest of recognising global cultural diversity and equitable representation, encourage interventions from observers including local communities' and Indigenous peoples' representatives in items

As such, the main way for individuals and communities to participate in decision-making processes concerning their cultural heritage is by submitting information concerning that heritage to the secretariats of the conventions. This information will subsequently be considered at the intergovernmental level. In the case of the World Heritage Convention, the 1999 Second Protocol, and the Intangible Cultural Heritage Convention, there are thus specific procedures through which this information can be considered as part of monitoring or inscription procedures. However, here the territorial state nonetheless retains an important role, as this information is always first offered to the State Party concerned in order to verify it and is usually not made available to the general public.

At the practical level, where individual and community has been facilitated through the progressive development of cultural heritage treaties, it remains difficult for these groups to actually participate in decision-making processes due to the '[t]he increasing complexity of … procedures in several UNESCO regimes, including periodic reporting and participating in developing nomination files'.[486] It is also often difficult to assess whether standards with respect to individual and community participation have been met in practice, as there is a 'general deficit of methodologies for measuring participation'.[487]

While there have been some success stories of communities being able to shape, or sometimes even directly influence these decision-making procedures – such as in the case of the removal processes surrounding Dresden Elbe Valley from the World Heritage List and Aalst Carnaval from the Representative List, both of which were heavily driven by the wishes of local community – there have also been a number of recent occasions where communities have been side-lined in international decision-making procedures concerning their heritage. The inscription of Kaeng Krachan Forest Complex against the wishes of the Indigenous Karen community is a case in point, demonstrating that even where guarantees for individual and community participation exist, they are often flagrantly ignored by states.

More broadly, in 2022, the Special Rapporteur on the Rights of Indigenous Peoples considered that there were several examples of the exclusion of Indigenous peoples from the nomination and management of World Heritage sites located on their lands, concluding that boundaries remained towards the meaningful participation of Indigenous peoples and international and

concerning such groups with the prior consent of the Chairperson, and in full respect of Article 6 of the 1972 Convention before decisions are made by the Committee': General Assembly, Declaration of Principles to Promote International Solidarity and Cooperation to Preserve World Heritage (9 November 2021) WHC/21/23.GA/INF.10.

486 ILA Committee Final Report (n 479) para 82.

487 Ibid para 85.

national decision-making processes related to World Heritage.[488] The Special Rapporteur did so in the context of his report on the obligations of states and international organisations with respect to the right of Indigenous peoples in protected areas; while his comments focus on natural or mixed World Heritage sites, his conclusions are equally valid with respect to cultural sites. The response of UNESCO to the call for submissions from the Special Rapporteur on the issue of protected areas is particularly telling in this regard:

> It is the State Party's responsibility to manage the World Heritage sites and to ensure the application of the Operational Guidelines as well as other internationally recognized principles such as free, prior and informed consent. While it is possible for UNESCO, as the Secretariat of the World Heritage Convention, to bring conservation and management issues, including those related to indigenous peoples, to the attention of the World Heritage Committee, and while the World Heritage Committee, through its decision-making process, may make recommendations to States Parties, their implementation remains the responsibility of the State Party concerned.[489]

A similarly reticent attitude can be detected with regards to the status of human rights standards in international heritage governance. Thus while the governing bodies of the World Heritage Convention have on occasion advocated for the adoption of a human rights-based approach to World Heritage governance (an approach notably absent with respect to the Intangible Cultural Heritage Convention), and both the World Heritage Convention and the Intangible Cultural Heritage Convention set out standards in relation to the principle of free, prior and informed consent, it remains unclear what is explicitly expected of states in order to fulfil these standards. As will be seen in the following chapter, while the World Heritage Committee has made several requests to ensure that the displacement or relocation of individuals from World Heritage sites is 'in accordance with the policies of the Convention and relevant international standards', the Committee provides no clarification to States Parties on how they can harmonise their obligations under the Convention with human rights standards. In any event, the recalling of the need to implement the World Heritage Convention in line with human rights law happens inconsistently and is not independently assessed in the Convention's inscription or monitoring procedures, and thus seems to provide little support to affected individuals or communities.

488 Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples, Protected Areas and Indigenous Peoples' Rights: the Obligations of States and International Organizations (19 July 2022) UN Doc A/77/238, paras 43-4.

489 UNESCO Secretariat, *UNESCO submission to the UN Special Rapporteur on the Rights of Indigenous Peoples Regarding Protected Areas* (2022) 11, available at https://www.ohchr.org/en/calls-for-input/2022/call-submissions-protected-areas-and-indigenous-peoples-rights-obligations..

As such, the ILA Committee's conclusion with respect to international heritage governance that 'participation still appears to be primarily consultative only, and to take place early in the process of decision-making'[490] appears to be largely correct; moreover, when individual and community participation takes place, this is often 'outside of international fora and restricted to other environments which may be less effective in bringing up issues that go against state priorities',[491] with the state remaining the key 'translator' of domestic issues to international fora. Ultimately, where non-state actors have made inroads into decision-making practices, this role often remains the prerogative of expert actors such as cultural heritage NGOs rather than individuals or communities directly.[492] A disparity thus remains between the state and individuals and local communities, not only in terms of who has a seat at the table in developing the norms of cultural heritage law, but also in their implementation. States are exceedingly reluctant to relinquish control of the means and modalities of the implementation of cultural heritage treaties, as well as their prerogative to assess whether such implementation is in line with international standards.[493]

4.4 Conclusion

This chapter set out to enquire whether it is possible to identify a common approach within international law with regards to the protection of cultural heritage, in terms of the types of obligations and the monitoring and implementation mechanisms employed. In doing so it sought to answer the overarching question whether, as a common interest regime, it is possible to identify the same tension within cultural heritage law between 'form and function' that can be identified with respect to other common interest regimes in public international law.[494]

Both questions can arguably be answered in the affirmative. The above overview of the five core conventions of international law heritage demonstrates that the field shows many affinities with other common interest regimes in public international law, both with respect to the methods of protection

490 ILA Committee Final Report (n 479) para 84.

491 Ibid para 85.

492 Kristin Hausler, 'The Participation of Non-State Actors in the Implementation of Cultural Heritage Law' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020) 763; Valentina Vadi, 'Exploring the Borderlands: The Role of Private Actors in International Cultural Law' in James Summers and Alex Gough (eds), *Non-State Actors and International Obligations: Creation, Evolution and Enforcement* (Brill Nijhoff 2018) 110, 118.

493 D'Amico Soggetti (n 450) 294.

494 Brölmann (n 38) 95; Catherine Brölmann, 'Law-Making Treaties: Form and Function in International Law' (2005) 74 Nordic Journal of International Law 383, 386.

employed and the tensions it faces with respect to ensuring effective implementation and compliance with the rules established by cultural heritage law.

The conventions examined above thus draw heavily upon the principle of international cooperation; their provisions have a largely inward-facing character, and frequently do not establish obligations of result but of conduct. The procedures established by the conventions, such as the creation of international heritage lists and the provision of technical and financial assistance, allow the international community to provide states with the necessary expertise and financial means to ensure the goals of the conventions: the protection of cultural heritage as a common interest. However, in doing so, these conventions explicitly do not set out to establish limitations on state sovereignty. Accordingly, they do not focus on punishing states for non-compliance with their international obligations, but set up a situation through which the international community can assist the state in safeguarding the common interest located within its borders.

In this sense, cultural heritage law shows similarities to other common interest regimes in light of its approach to issues of monitoring and implementation. Over time, states have become required to justify their protection of cultural heritage to assemblies of fellow states, and have delegated certain roles within the conventions to independent expert bodies. The development of the interpretation of the cultural heritage conventions has thus – at least in part – been decoupled from the actions of States Parties acting on an individual basis. The implementation of the conventions is shaped by successive meetings of the intergovernmental bodies established by the conventions, which have progressively developed these conventions through the adoption of operational guidelines.

In certain situations, the governing bodies of the conventions have established a range of monitoring mechanisms which go further than the periodic reporting procedures initially established by the conventions. The latter have been widely deemed to be insufficient to assess compliance due to their reliance upon self-reporting by states. While these new innovations – reactive monitoring, ad hoc monitoring and the enhanced follow-up procedure – have in part managed to circumvent the centrality of state consent in cultural heritage law, they still do not manage to overcome the inherent tension between state sovereignty and compliance which plagues many other common interest regimes.

This is because these monitoring mechanisms are still, by and large, state-led processes. As the practice of the World Heritage Committee's reactive monitoring procedure shows, objective and consistent monitoring of the World Heritage Convention remains difficult to achieve in practice. The outcomes of reactive monitoring are inconsistent, and States Parties frequently fail to follow up on the recommendations of the Committee yet often do not face subsequent sanctions. This contributes to an uncertain regulatory environment for States Parties to the Convention and lowers the incentive of complying

with the progressive requirements relating to community participation which have been established in the Operational Guidelines.

At a more fundamental level, it remains doubtful whether the governing bodies of the conventions are well-equipped to assess compliance with requirements related to community participation when this requires a legal (rather than a technical) assessment of standards such as the principle of free, prior and informed consent. Moreover, these monitoring mechanisms often remain subject to consultation with the State Party concerned and thus certainly shouldn't be seen as radical procedures seeking to upend state sovereignty.

This is also the case when one looks at broader developments within the conventions in recent years which seem to characterise states' wishes to limit the freedom of action, not only of independent expert bodies, but also that of subsidiary intergovernmental bodies. As such, both conventions which have been adopted since 2000 – the Underwater and Intangible Cultural Heritage Conventions – privilege the position of plenary intergovernmental bodies within their decision-making procedures.

Nor has the state-centric nature of cultural heritage law been remedied by the emergence in recent years of requirements with respect to individual and community participation in international heritage governance. The modalities of such participation remain strictly limited and do not provide for participation where it counts most, namely within the intergovernmental bodies where decisions are made with respect to inscriptions and monitoring. The requirements established within the conventions' operational guidelines moreover do not provide sufficient guidance in order to judge whether community participation has truly taken place. Nor do they establish clear guidelines which can shape state action, particularly in relation to issues which would inherently require a legal assessment by the State Party, as in the case of the principle of free, prior and informed consent.

As such these conventions, with their focus on states as the sole players able to implement and act upon them, demonstrate the limitations of international law in the protection of common interests. Indeed, as Blake notes, 'the challenge facing international law in this field is to try to satisfy as many of the legitimate interests in heritage as possible while, at the same time, operating within a system primarily established by and for sovereign and equal States'.[495] When a state is less inclined to act selflessly on behalf of the international community – which, in many situations of cultural heritage protection, will be the case – then cultural heritage law is ultimately powerless to intervene. This is due to the nature of its legal norms, which largely do not prohibit certain forms of action but establish forms of international cooperation. As

495 Blake, *International Cultural Heritage Law* (n 1) 21-2.

such, the following chapter will discuss situations in which problems such as these arise, and the difficulties in responding to these problems within the current framework of cultural heritage law, demonstrating the necessity of a new approach.