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"The conservation and promotion of the 'cultural heritage of mankind': which obligations under international law?"

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Introduction

Among all the events occurred, within the last years, at the global scope, one of the issues which has been received with major clamor by the international community consists in the reiterated episodes of intentional destruction of the cultural heritage situated in the territories of States, carried out, in rather different circumstances, in several areas of the world. Entailed in the history of humanity and civil societies since the first episodes of *damnatio memoriae* carried out, during the Roman Empire, to eradicate from the concerned territories any monumental expression of avowed governors or politicians, the intentional destruction of artistic, historic, or architectonic goods or sites representing the values and traditions of determined societies or groups has always characterized the history of humankind. As a matter of fact, historians and sociologists have reported us how, through the centuries, several societies and governments have experienced the occurring of 'cultural cleansing' campaigns or cultural heritage destruction plans within their territories, carried out, depending on the circumstances, by armed or non-armed groups, revolutionaries, civil society, or the government itself. Representing indeed a distinctive feature of the human civilization, such phenomenon appears as having emerged with improved vigor in the last two decades, and, in particular, within the very last years.

As a matter of fact, the international press has reported how, since the first 2000s, reiterated episodes of intentional attacks addressed against elements of the cultural heritage of peoples have occurred within the territories of several States, thereby provoking the massive deterioration or destruction of pieces of the worldwide cultural inheritance or, even, their irreversible loss. In this context, the first and most notorious episode consists in the destruction of the two Buddhas of Bamiyan, occurred in Afghanistan in 2001, which has been ordered and carried out by the Taliban forces to eradicate from the Afghan territories every symbol perceived as in contrast with their totalitarian regime. Few years later, several attacks against the cultural heritage of the concerned peoples have occurred in the territories of Libya, Mali, and Iraq, as well as in Palestine, Armenia and Azerbaijan. Notwithstanding with the general concern with which these episodes have been received at the global level, both by the establishment and civil society, this destructive phenomenon seems as showing no sign of slowing down. On the contrary, such 'new wave of iconoclastic propaganda' appears as having gained renewed strength within the global context, becoming a central issue of the international debate. As a matter of fact, the international community has experienced how, since May 2020, a series of reiterated attacks addressed against monuments, statues and cultural sites is being carried out in the

United States and in several other areas of the globe by the protesters of the 'Black Lives Matter' movement. In the same way, even if in rather different circumstances, a new cultural cleansing campaign aiming at the complete eradication of any expression or symbol perceived as in contrast with the principles of *shari'a* is once again perpetrated by the new government of the Taliban, re-established in Afghanistan since August 2021.

Although received with the clamor of global society, these reiterated acts of intentional destruction of cultural heritage appear as having provoked a rather blurred reaction by the international community.

Notwithstanding with the warnings launched by the United Nations in the aftermath of the facts of Bamiyan – converging in the adoption of the UNESCO 2003 Declaration concerning the Intentional Destruction of Cultural Heritage – as well as with the concern regarding the fate of those elements of the cultural heritage of peoples endangered, in peace time and in war, in the territories of States, raised by the Former Special Rapporteur in the field of cultural rights in its 2016 Report on the intentional destruction of cultural heritage, in fact, these acts appear as having occurred, and still occurring, without incurring in any effective resistance from the part of the international community.

Apart from some declarations released, in the aftermath of the attacks, by isolated politicians or fonctionnaires, in fact, such episodes of intentional destruction of cultural heritage seem as having been mainly overlooked by the international community, and, notably, by the global established framework for the worldwide protection of cultural heritage of peoples. In particular, no effective reaction to these very last attacks appears as having been registered, at the global scope, under the aegis of UNESCO, the United Nations Specialized Agency dedicated to the enhancement of education, science and culture and representing, at the current time, the referential international body for the worldwide safeguard and conservation of cultural heritage. On the contrary, these acts of intentional destruction of cultural heritage appear as having been relegated as purely domestic issues, to be handled and regulated by the national authorities competent in the concerned territories – remarkably, also in the event in which the cultural heritage destruction was ordered or carried out by the local governments themselves, as in the case of the Taliban in Afghanistan and of several municipalities of the United States involved in the Black Lives Matter protests.

Hence, in the apparent silence of the global community, and, notably, of United Nations and UNESCO in face of such 'cultural cleansing' episodes, an increasing number of scholars devoted to international cultural heritage law studies has progressively recognized the emergence of a so-called 'right to destroy', such as to allow, in certain conditions, the intentional destruction of elements of the cultural heritage of States perpetrated by the concerned communities and municipalities.

Having followed with concern such increasing wave of cultural heritage destruction progressively affecting various areas of the globe, the present research inserts itself in such debate with the objective of investigating, in such a scenario, the possible reasons, consequences and alternatives to such rather reluctant approach apparently adopted by the international community.

Taking into account the actual *absence* of any effective reaction from the part of international framework for cultural heritage protection set up by global organizations for the conservation and protection of the cultural goods endangered by such attacks, in fact, the analysis aims at investigating the causes and circumstances which have possibly led to the adoption of such a reluctant attitude, notably under the aegis of UNESCO – which is uncharged, since its institution in 1945, of the worldwide promotion of the cultural heritage of humankind.

Consisting in an interdisciplinary analysis grounded on the principles and methods of international public law studies, the present research aims, indeed, at investigating the features and scope of the current international framework – established, notably, by the United Nations and UNESCO – for the safeguard, protection and conservation of the elements of the cultural heritage of humankind situated in the territories of States and possibly endangered, in the event of war or in peace time, by both human or natural threats. Concerning this latter point, the present study proposes as its core research question the analysis of the international framework currently applicable, under the aegis of the United Nations and UNESCO, for the protection and conservation cultural heritage, notably, *in times of peace*. As a matter of fact, the study acknowledges the rather urgent necessity, as it has been recognized also by the Former Special Rapporteur in the field of cultural rights in her 2016 Report, of reaching a deeper awareness and understanding of the current global norm-set applicable in the above-mentioned context, being it necessary to strengthen the international community reaction towards of such events.

In this sense, the present analysis identifies, as its core research question, the possible identification, within the current international cultural heritage framework set up by United Nations and UNESCO of any *existing norm*, applicable worldwide, such as to establish the *duty of protecting, safeguarding, and conserving all the elements of the cultural heritage of peoples* possibly endangered, in the territories of States, notably by intentional destruction.

Pursuing such issue as its main objective, the research opens with an analysis of the current international framework for the worldwide protection of cultural heritage progressively put in place by the global community, and, notably, by the United Nations and UNESCO. In the research carried out in Chapter I, the present study aims at analyzing the actual scope and features of such existing framework, as well as its effectiveness in terms of veritable safeguard and conservation of the cultural goods and sites situated in the territories of States together with its shortcomings. In this context, an

overview of the positive and negative obligations set up by the main UNESCO tools for the international safeguarding of cultural property and heritage will be provided, as well as of a study of the different definitions for 'culture' and 'cultural heritage' provided by the UNESCO norm-set from case to case. In particular, this first part of the research focuses on the comparison between the framework put in place by UNESCO for the protection of cultural property in the event of armed conflict, thereby concentrating on the UNESCO 1954 Hague Convention provisions, and the one established by the organization for the conservation of cultural heritage in times of peace, referring notably to the obligations pending on States pursuant to the UNESCO 1972 World Heritage Convention. On this latter point, in particular, the research aims at investigating the *actual extent* of the international protection conferred to the cultural heritage of peoples by the means of the treaty, notably focusing on the notion of 'cultural heritage of Outstanding Universal Value', which is at the core of the UNESCO 1972 World Heritage Convention framework.

As a result of the outcomes of this first part of the study, the present research moves forward to a series of considerations concerning the effective scope of the global framework put in place by UNESCO for the worldwide protection and conservation of the cultural heritage of peoples, situated in the territories of States and deserving international protection. In this context, the study highlights the presence of an existing discrepancy between the norm-set dedicated to the safeguard of cultural property in times of war – regulated mainly by the UNESCO 1954 Hague Convention – and the framework put in place by the organization for the conservation of cultural heritage in peacetime – which dwells, notably, around the provisions of the UNESCO 1972 World Heritage Convention.

In the light of the above, and in view to analyze of the effective consequences, as well as the feasible reasons, of such a shortcoming, the present research moves forward to an investigation concerning the UNESCO framework *itself*, together with its characteristics and features. In particular, the study dwells into an analysis of the decisional mechanisms and processes, as well as of the intrinsic *composition* of the organization, in the aim of reaching a deeper understanding of the actual circumstances possibly playing a role in the establishment of the above-mentioned international cultural heritage norm-set put in place under the aegis of UNESCO. In the aim of reaching an exhaustive and more encompassing comprehension of the issue, this part of the research, accomplished in the context of Chapter II, is carried out in an integrated way, such as supporting the international law perspective with an interdisciplinary point of view. In particular, this second part of the study aims at approaching the issue of the current shortcomings of the UNESCO framework for the protection of cultural heritage through the lens of several tools provided by anthropological sciences, and, notably, legal anthropology and cultural anthropology. In this sense, Chapter II opens with a reconstruction of the characteristics and main features of such disciplines, dwelling into the

different anthropological theories which have been applied, through the centuries, in the field of culture and cultural heritage, as well as the main mechanisms and tools progressively elaborated by such social sciences and possibly applicable to the study of international organizations and norm-sets. Done such premise, the research proceeds by applying the outcomes of such interdisciplinary inquiry notably to the analysis of the history, features and functioning of United Nations and UNESCO, focusing in particular on the relevance of the anthropological perspective when applied to the decisional mechanisms carried out within the UNESCO 1972 World Heritage Convention framework.

In this context, the actual status of the international norm-set established by the United Nations and UNESCO for the protection and conservation of cultural goods and sites is approached, together with the inquiry on its intrinsic shortcomings and their consequences, through the lens of the complex, still unsolved, doctrinal debate between *universalism* and *cultural relativism*, which is approached, by the means of the present research, notably with reference to its possible consequences within the fields of cultural matters and international organizations governance.

Aiming at accomplishing, in the context of its Chapter I and II, an integrated and exhaustive analysis of the current status of the global framework set up notably under the aegis of the United Nations and UNESCO for the worldwide conservation of cultural heritage, together with its main features, the final part of the research moves to an inquiry concerning the identification of feasible solutions, possibly applicable at the global level, such as to allow the overcoming of those intrinsic shortcomings currently entailed in the above mentioned framework, thereby ensuring a more encompassing protection for all *the* elements of the cultural heritage of peoples situated in the territories of States, which might be endangered both in peace time and in war. In this sense, the research approaches its core question concerning the possible or progressive establishment of a *general duty of cultural heritage protection* pending on the international community, in the name of the acknowledged universal significance of the cultural inheritance of people.

Indeed, the study of those feasible solutions and alternatives to cope with the current shortcomings entailed within the current international cultural heritage protection framework is at the core of Chapter III. Starting from an inquiry concerning the acknowledged actual, urgent, necessity to find out, at the international levels, feasible strategies and tools to stop the above cited increasing episodes of intentional cultural heritage destruction and ‘iconoclastic propaganda’, thereby strengthening the actions of States and international organizations in the context of cultural heritage protection and safeguard, notably, in times of peace, the research proposes, in particular, two possible approaches to such unsolved issue which may represent feasible alternatives to the current UNESCO approach. In particular, the research suggests how one feasible tool to face the intrinsic limits of the actual global

action for cultural heritage protection could be provided by the international framework put in place, through the decades, for the protection and enhancement of human rights and fundamental freedoms – and, notably, of *cultural rights*. In this context, the 'right to culture' is analyzed notably in the light of the provisions entailed in the International Covenant on Civil and Political Rights ('ICCPR') and in the International Covenant on Economic, Social and Cultural Rights ('ICESCR'). On this latter point, the research concentrates on the study of the actual features and prerogatives of the human right "to take part in cultural life" established by art. 15 para. 1 lett. a) of the ICESCR, notably focusing on the strict interconnection subsisting between such fundamental freedom and the necessity of protecting cultural heritage as a core element for the realization of such right, as well as on the notion of 'human right to cultural heritage' as it is enshrined in the General Comment No. 21 of the Committee on Economic, Social and Cultural Rights ('CESCR').

Accomplished this first analysis, the final part of the research moves to the second consideration concerning the possible solutions applicable in the above mentioned scenario thereby referring, in this latter context, to the feasible contribution to the progressive enhancement of a more encompassing and inclusive protection of all the elements of the cultural heritage of people possibly provided by the emerging global norm set, progressively elaborated, notably, under the aegis of the United Nations, for the enhancement of *sustainable development*. As a matter of fact, the present research acknowledges how the progressively establishing global framework dwelling around the adoption, from the part of the United Nations General Assembly, of the so-called '2030 Agenda' in 2015 may offer a significant contribution in the context of the worldwide protection and enhancement of cultural heritage of peoples, which needs to be protected, according to such sustainability-oriented emerging framework, in all of its diversity and in reason of its unique 'human' and 'identarian' value for both present and future generations.

Chapter I. The international obligations towards the cultural heritage of peoples within the UNESCO framework. From the protection of endangered cultural property and goods to the safeguard and promotion of the 'cultural heritage of mankind'

I.1 Defining cultural heritage by the means of international law. The evolution of the UNESCO framework from the protection of cultural property to the safeguard of cultural heritage

I.1.i. The definition of 'culture' in the UNESCO norm-set. The UNESCO 1982 Mexico City Declaration on Cultural Policies and art. 5 of the UNESCO 1978 Declaration on Race and Racial Prejudice

Since very ancient times, both the international and domestic existing jurisdictions coexisting around the globe have always included norms referring to "culture". As a consequence, many authors and scholars of international law have expressed the importance of finding a definition of "culture" and, in particular, "cultural heritage", in the aim of giving a meaning to such provisions, notably in the context of their interpretation, thereby allowing national and domestic jurisdiction to regulate the matter in the most effective way.

When it comes to the research of a definition of cultural heritage by the means of law, many authors have expressed the contextual issues entailed in such question. As a matter of fact, both at the domestic and international level, since very ancient times In 1989, Lyndell V. Prott expresses the problem as follows: "While cultural experts of various disciplines have a fairly clear conception of the subject matter of their study, the legal definition of cultural heritage is one of the most difficult confronting legal scholars today".[1] As a matter of fact, notwithstanding with the relevant efforts of the international community towards the finding of a shared definition of cultural heritage, this assessment is by no mean fully resolved. Even more, such issue has become more complicated in reason of the plurality of declination of the notion of culture, still evolving, adopted by the international community and, notably, by the United Nations Educational, Scientific and Cultural Organization ("UNESCO").

[1] Lyndell V. Prott, *Problems of Private International Law for the Protection of the Cultural Heritage, Recueil des Cours*, vol. V (1989) pp. 224-317.

Established in 1945 for the purpose of "advancing the […] cultural relations of the peoples of the world", UNESCO recognizes in the enhancement of worldwide cultures its primary objectives.[2]

According to art. 1 of its Constitution, the objective of the Organization is to contribute to peace and security by promoting collaboration among States Parties through the means of education, science, and culture, in order to further universal respect for justice and rule of law as well as a comprehensive recognition of the human rights and fundamental freedoms worldwide recognized for the peoples of the world. This, in particular, by the means of advancing the mutual knowledge and understanding of peoples' cultures, which need to be conserved and protected worldwide.[3]

Notwithstanding with such commitment, and in spite of the central role of culture within the scope of its mandate, UNESCO has never provided a generally accepted definition for 'culture'. On the contrary, when it comes to contextual issues, the Organization appears as defining the notion of 'culture' on a case-by-case basis, focusing on cultures' ones or other element depending on the specific cultural issues tackled time after time. As a result of such tailor-made approach, the variety of definitions of 'culture' provided by UNESCO within the course of decades which, even though shedding some light on the key elements of such notion, seem not to provide a univocal, all-encompassing definition of such widespread concept.

This is comprehensible, if one considers how the find of a definition for 'culture', even outside of the framework of UNESCO and international organizations, has revealed itself as a rather problematic issue for the global community. In reason of the 'fluctuant', erratic nature of the concept of culture, as well as of the traditional conception of culture as a '*question d'Etat'*, hence, many different formulations of such concept have been offered in the last decades both by international legal instruments or documents and by scholars. As a result, the co-existence of many different formulations of the concept of 'culture', all virtually offering a reasonable and valid picture of the notion in question but not able to find any univocal convergence.[4]

However, in the effort of finding out, within the UNESCO framework, a definition of culture such as to include all the main elements of the cultural matter, it appears how the first, feasible solution to such issue may be offered by the UNESCO Declaration on Race and Racial Prejudice, adopted in Paris in 1978 to cope with the possible effects of the process of decolonization and other historical changes – and, notably, with racism – on the "essential unity of the human race" in all of its cultural

[2] Constitution of the United Nations Educational, Scientific, and Cultural Organization ("UNESCO Constitution"), adopted in London the 16 November 1945, preamble.

[3] UNESCO Constitution, art. 1.

[4] See among others Constantine Sandis (ed. by), *Cultural Heritage Ethics. Between Theory and Practice* (Open Book Publishers, 2014), Rodolfo Stavenhagen, 'Cultural Rights and Human Rights: A Social Science Perspective', in Pedro Pitarch, Shannon Speed and Xochitl Leyva-Solano (ed. by), *Human Rights in the Maya Region* (Duke University Press, 2008) and Lorenza Violini, 'Cultura e culture: gli scenari, le prospettive', p. 13.

expressions. [5] Recalling in its preamble the importance of promoting collaboration among States through education, science and culture as it is established in art. 1 of the UNESCO Constitution,[6] the UNESCO Declaration on Race and Racial Prejudice appears as adopting a rather encompassing approach towards the notion of 'culture' such as to entail, within its definition, both the ideas of 'culture' as an element of artistic, historic or scientific significance as well as an identarian phenomenon linked to human dignity. Precisely, in its preamble the document recalls the importance of preserving culture conceived as the ensemble of the "loftiest expressions of philosophy, morality and religion, reflect[ing] an ideal towards which ethics and science are converging today", as well as ultimate expression of human genius to the progress of civilization[7]. Furthermore, art. 5 of the UNESCO Declaration on Race and Racial Prejudice provides that

"Culture, as a product of all human beings and a common heritage of mankind, and education in its broadest sense, offer men and women increasingly effective means of adaptation, enabling them not only to affirm that they are born equal in dignity and rights, but also to recognize that they should respect the right of all groups to their own cultural identity and the development of their distinctive cultural life within the national and international context, it being understood that it rests with each group to decide in complete freedom on the maintenance and, if appropriate, the adaptation or enrichment of the values which it regards as essential to its identity."[8]

Likewise, the same encompassing, non-mutually exclusive definition of culture considering both the 'tangible' and 'intangible' dimension of the cultural element has been provided, a decade later, by the UNESCO 1982 Mexico City Declaration on Cultural Policies.[9] Adopted in the context of the World Conference on Cultural Policies (held in Mexico City, 26 July – 6 August 1982), the Mexico City Declaration recalls the importance of strengthening the cooperation of States in the social and cultural fields, notably as a consequence of the profound consequences of the progress of science and technology on human lives and international relations.[10] Precisely, the Mexico City Declaration

[5] UNESCO Declaration on Race and Racial Prejudice. Adopted in Paris, 28 November 1978.
[6] "The purpose of the Organization is to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations." UNESCO Constitution, art. 1 para. 1.
[7] "Convinced that all peoples and all human groups, whatever their composition or ethnic origin, contribute according to their own genius to the progress of the civilizations and cultures which, in their plurality and as a result of their interpenetration, constitute the common heritage of mankind," UNESCO Declaration on Race and Racial Prejudice, preamble.
[8] UNESCO Declaration on Race and Racial Prejudice, art. 5.
[9] UNESCO Mexico City Declaration on Cultural Policies, adopted in Mexico City, 6 August 1982. (Hereinafter also the "Mexico City Declaration").
[10] "The progress of science and technology has changed man's place in the world and the nature of his social relations. Education and culture, whose significance and scope have been considerably extended, are essential for the genuine

stresses on the key role played by the cultural element in the enhancement of the fundamental freedoms of peoples and of their right to self-determination, because of its capacity to bring to closer communion of peoples and greater understanding among men. In this sense, "expressing trust in the ultimate convergence of the cultural and spiritual goals of mankind", the Mexico City Declaration defines culture as follows:

"[…] in its widest sense, culture may now be said to be the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and the letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs […]";

In this sense, the Mexico City Declaration recognizes that

"it is culture that gives man the ability to reflect upon himself, it is culture that gives man the ability to reflect upon himself [and] that makes us specifically human, rational beings, endowed with a critical judgement and a sense of moral commitment. It is through culture that we discern values and make choices, [and] that man expresses himself, becomes aware of himself, recognizes his incompleteness, questions his own achievements, seeks untiringly for new meanings and creates works through which he transcends his limitations.". [11]

Concerning the significance of such provisions within the UNESCO framework, some authors have suggested how, in view of the clarity and exhaustiveness of such a definition, it might be possible to assume that it is in this occasion that UNESCO has been able, *de facto*, to establish an unequivocal definition for the notion of 'culture' to be uniformly applicable at the international level.[12]
Although not formally recognized as official definition by the organization, in fact, the definition of culture provided the Mexico City Declaration provision appears as having been adopted as a reference benchmark by UNESCO, which has widely referred to its provisions in the context of its activities. As it has been highlighted in doctrine, precisely, the validity of the UNESCO Mexico City Declaration definition for culture may be testified by the fact that it has subsequently been referred to by other

development of the individual and society."; "It is therefore now more urgent than ever to […] construct 'defences of peace' in the mind of each individual, inter alia through education, science and culture, as affirmed in the Constitution of UNESCO.". Mexico City Declaration, preamble.
[11] Mexico City Declaration, preamble.
[12] See Federico Lenzerini, *The Culturalization of Human Rights Law* (Oxford University Press, 2014).

documents and texts adopted by the Organization in the following decades[13]. In particular, the same *rationale* of the Mexico City Declaration has been adopted by the UNESCO Universal Declaration of Cultural Diversity, adopted in 2001 in the context of the thirty-first session of UNESCO General Conference.[14] Focusing on the necessity of ensuring the worldwide respect of cultural diversity and cooperation as key elements in the processes of social development and intercultural exchanges, the document affirms in its preamble that

"[…] culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs,",

and it needs to be protected, as recalled also in the UNESCO Constitution, in the name of its central role in the processes of social cohesion and development, as well as of guarantee of international peace and security. [15]

In the same way, an equivalent approach towards the definition of 'culture' has been adopted by UNESCO in the context of the UNESCO 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions,[16] which recognizes, in its preamble, the "diverse forms across time and space" that culture might assume in reason of the plurality of the cultural identities and expressions coexisting in the globe, all contributing to the uniqueness of humanity. At its art. 4, the treaty recalls how cultural diversity is composed not only by the variety of artistic creations, productions and disseminations, but also through the varied ways in which the cultural identities of humanity are expressed, together with their symbolic meaning. In this sense, the UNESCO 2005 Convention on Cultural Diversity refers to the concept of "cultural concept" as the ensemble of the symbolic meanings, artistic dimensions and cultural values resulting from the creations of individuals, groups and societies, irrespective of their commercial value and together with the cultural activities, goods and services to which they might be related.[17]

[13] See for example *Final Report of the Intergovernmental Conference on Cultural Policies for Development, Stockholm, Sweden, 30 March – 2 April 1998*, UNESCO Doc. CLT-98/Conf.210/5, 31 August 1998, *Action Plan on Cultural Policies for Development*, preamble.
[14] UNESCO Universal Declaration on Cultural Diversity, adopted in Paris, 2 November 2001.
[15] UNESCO Universal Declaration on Cultural Diversity, preamble.
[16] Adopted in Paris, 20 October 2005 ("UNESCO 2005 Convention on Cultural Diversity"). See also *infra*.
[17] UNESCO Universal Declaration on Cultural Diversity, art. 4.

1.I.ii Defining 'cultural heritage' within the UNESCO framework. From the UNESCO 1954 Hague Convention for the Protection of 'Cultural Property' in the event of Armed Conflict to the UNESCO 2005 Convention for the Protection and Promotion of the 'Diversity of Cultural Expressions'

In view of the above considerations, it has come clear the necessity of finding a feasible definition of "culture" and, in detail, of all the aspects and dimensions entailed in such concept, from the point of view of international law.

In particular, after the effort to identify, within the UNESCO framework, any feasible definition of the concept of 'culture' possibly applicable, in the same manner, in the context of all the activities carried out by the organization and its States Parties for the enhancement and promotion of culture, science and education, it seems appropriate to focus, in the following paragraphs, on the specific notion of 'cultural heritage'. As it is established in the UNESCO Constitution, the "conservation and protection of the world's inheritance of books, works of art and monuments of history and science" represents one of the three UNESCO pivotal functions, to be achieved by the organization by collaborating with its States Parties in the strengthening of the international and domestic mechanisms for the protection of such cultural heritage as well as by recommending to the concerned nations the adoption of the necessary measures.[18] In this sense, and in virtue of the key role of cultural heritage in the enhancement of "education, science and culture to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms" recognized by UNESCO,[19] it appears hence necessary to find out the existence of an univocal, if any, definition of the concept of 'cultural heritage' within the UNESCO framework.

To answer this question, part of the doctrine has found out how, as in the case of the definition of 'culture' mentioned in the previous paragraphs, neither in the hypothesis of 'cultural heritage' UNESCO has been able to come up, within its decades of activities, with an unambiguous definition of such concept equally applicable in the context of its norm-set. As it has been found out by the doctrine, in fact, the UNESCO framework does not foresee, in any of its provisions dedicated to the enhancement, conservation and promotion of the "cultural inheritance" of the peoples of the world, any official definition for the notion of 'cultural heritage'. On the contrary, as it has been highlighted, UNESCO seem to intend its *rationale* for cultural heritage depending on the circumstances in which such notion is considered by the organization, as well as on the 'dimensions' of cultural inheritance from time to time taken into account by UNESCO and its States Parties.

[18] UNESCO Constitution, art. 1 para. 2.
[19] UNESCO Constitution, art. 1 para. 1.

In particular, several authors have noted how, when it comes to the definition and regulation of the "cultural inheritance of peoples" as it is defined in the UNESCO Constitution, the organization appears as referring, within the scope of its provision, in a rather interchangeably way to the two concepts of 'cultural property' and 'cultural heritage'.[20] This, as it has been suggested by part of the doctrine, to the detriment of the acknowledged necessity of establishing a clear line of demarcation between the two concepts of 'cultural property', on one side, and 'cultural heritage', on the other side, in reason of the intrinsic characteristics entailed in those concepts.[21] As a matter of fact, these authors have outlined, the former appears as referring rather to the material, monetary and economic value of such "cultural property" – as it will be explained in the next paragraphs – while the latter insists on the spiritual, immaterial, and value-oriented dimension of the "cultural heritage" of peoples – this, notably, also in a perspective of sustainable development and intergenerational justice.[22]

1.I.ii. a) UNESCO and the concept of 'cultural property'. The UNESCO 1954 Hague Convention for the Protection of 'Cultural Property' in the event of Armed Conflict and the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

About the first approach, it appears how, in a variety of treaties and documents adopted since its first years of activity, UNESCO refers to goods and sites with historic or artistic value as 'cultural property'. As for the reasons of such an approach, it appears, the recall of the traditional norm-set established by the international community for the protection of cultural goods and sites which might be endangered in the event of armed conflict. Set up, notably, since the adoption of the Lieber Code in 1863[23], such international humanitarian law framework for the protection of cultural property refers to the importance of preserving from the consequences of warfare the items of cultural significance which might be put at risk during the hostilities, establishing a series of measures to be adopted by belligerents to avoid their destruction and degradation. In particular, arts. 34 and 36 of the Lieber Code recall the necessity of "secur[ing] against all avoidable injury" "foundations for the promotion of knowledge, […] museum of the fine arts, or of a scientific character", as well as "classical works of art, libraries, scientific collections or precious instruments"[24]. In the same way, other relevant

[20] Janet Blake, 'Cultural Heritage Law: Contextual Issues', in Janet Blake, *International Cultural Heritage Law* (Oxford University Press, 2005), p. 6 and ff.
[21] See Manlio Frigo, 'Cultural Property v. Cultural Heritage: A 'Battle of Concepts' in International Law?', (2004) 86 *International Review of the Red Cross*, p. 854.
[22] See *infra*, Chapter III.
[23] Instructions for the Government of Armies of the United States in the Field ("Lieber Code"), 24 April 1863.
[24] Lieber Code, Section II: Public and Private Property of the Enemy – Protection of Persons, and especially of Women, of Religion, the Arts and Sciences – Punishment of Crimes against the Inhabitants of Hostile Countries, arts. 34 and 36.

international humanitarian law provisions dedicated to the protection of cultural property endangered in war times are arts. 8[25] and 17[26] of the Project of an International Declaration concerning the Laws and Customs of War, which establish the necessity of preserving monuments and sites from bombardments and sieges, art. 53 of the Laws of War on Land,[27] and the Inter-Allied Declaration against Acts of Dispossession.[28]

Likewise, the same property-oriented approach towards the preservation of monuments and sites endangered in the event of armed conflict is entailed within the II and IV Hague Conventions[29]. Representing a keystone of international humanitarian law, the treaties establish, at their art. 27, that

"In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes."[30]

and they delineate, at art. 56 para. ii), the responsibilities of an occupying power with regard to the treatment of cultural property as private property – notably prohibiting the "seizure, destruction, or willful damage" or, *inter alia*, historic monuments and works of art and science.[31]

As for the integration of such approach within the UNESCO framework, it appears how a 'cultural property-oriented' perspective is at the core, notably, of the UNESCO 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict ("Hague Convention")[32], UNESCO

[25] "The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences even when State property, shall be treated as private property. All seizure or destruction of, or wilful damage to, institutions of this character, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities." Art. 8, Project of an International Declaration concerning the Laws and Customs of War ("Brussels Declaration"). Adopted in Brussels, 27 August 1874.

[26] "In such cases all necessary steps must be taken to spare, as far as possible, buildings dedicated to art, science, or charitable purposes, hospitals, and places where the sick and wounded are collected provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings by distinctive and visible signs to be communicated to the enemy beforehand." Art. 17, Brussels Declaration.

[27] "The property of municipalities, and that of institutions devoted to religion, charity, education, art and science, cannot be seized. All destruction or wilful damage to institutions of this character, historic monuments, archives, Works of art, or science, is formally forbidden, save when urgently demanded by military necessity." Art. 53, Laws of War on Land ("Oxford Manual"). Adopted in Oxford, 9 September 1880.

[28] Adopted in London, 5 January 1943.

[29] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, and Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land ("II and IV Hague Conventions"). Adopted in The Hague, 29 July 1899 and 18 October 1907.

[30] II and IV Hague Conventions, art. 27.

[31] "All seizure of and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings", art. 56 para. ii), II and IV Hague Conventions. See Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (New York: Cambridge University Press, 2006), p. 31.

[32] UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, adopted in The Hague, 14 May 1954.

referential treaty for the protection of cultural goods worldwide endangered by warfare.[33] Set up in view of the grave damages suffered by worldwide cultural property in the event of the armed conflicts occurred in the XX century – and, notably, of World War II –, the Convention shows the determination of States Parties "to take all possible steps to protect cultural property" possibly endangered in the event of war, notably in view of the "developments in the technique of warfare, it is in increasing danger of destruction". [34]

For the purposes of its safeguard, the treaty refers to cultural property as an element deserving international protection according to the principles established, notably, by the II and IV Hague Conventions. To this end, at its art. 1, it defines 'cultural property' as such:

"(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a); (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as `centers containing monuments'.".[35]

Although having the objective of ensuring the most comprehensive protection of the world cultural property possibly at risk in the event of warfare, the Hague Convention does not provide, at its art. 1, an exhaustive definition of the concept of 'cultural property'. Rather, as it is specified, it confines itself to establishing a list of the most relevant examples of the cultural goods situated in the territories of States Parties, deserving international protection in reason of their great importance for all peoples of the world, irrespective from their origin and tradition.[36]

[33] See Edoardo Greppi, 'La Protezione Generale dei Beni Culturali nei Conflitti Armati: dalla Convenzione dell'Aja al Protocollo del 1999', in Paolo Benvenuti and Rosario Sapienza (ed. by), *La Tutela Internazionale dei Beni Culturali nei Conflitti Armati* (Giuffré, 2007).
[34] Hague Convention, preamble.
[35] Hague Convention, art. 1.
[36] "Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;"; "Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection;" Hague Convention, preamble.

In the same way, although in a rather different context, an analogous 'cultural property-oriented' approach has been adopted by UNESCO with the adoption of the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.[37]

Coming as a result of the previous adoption of Resolution XIV "Protection of Movable Monuments" of the Seventh International Conference of American States (1933)[38], the three drafts of international conventions prepared by the League of Nations (1933, 1936 and 1939) for the adoption of a treaty for the protection of national artistic treasures,[39] and the UNESCO 1964 Recommendation on Means of Prohibiting and Preventing Illicit Export, Import and Transfer of Ownership of Cultural Property,[40] the UNESCO 1970 Convention seeks to protect the cultural property of States Parties from illicit trafficking and transfer of ownership.

As established in its art. 2, the Convention has the objective of opposing the restitution of the cultural heritage of nations through the illicit import, export, and transfer of ownership of national cultural property. This, notably, by strengthening the international cooperation among the relevant stakeholders involved in the field and establishing a set of obligations to be undertaken by States Parties for the protection of cultural goods at risk of illicit trafficking.[41]

To this end, art. 1 of the UNESCO 1970 Convention defines cultural property as such:

"[…] a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest; b) Property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance; c) Products of archaeological excavations (including regular and clandestine) or of archaeological discoveries ; d) Elements of artistic or historical monuments or archaeological sites which have been dismembered; e) Antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; f) Objects of ethnological interest; g) Property of artistic interest […];[42] h) Rare manuscripts and incunabula, old books, documents and publications

[37] UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("UNESCO 1970 Convention"), adopted in Paris, 14 November 1970.

[38] Report of the Delegates of US to the Seventh International Conference of American States (Montevideo, 3-26 December 1933) US Dep't of State Conference series no. 19, 208, 1934.

[39] Draft International Convention for the Protection of National Collections of Art and History, 1 US Dep't of State, Documents and State Papers, 865, 1949.

[40] UNESCO Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property, adopted in Paris, 19 November 1964.

[41] UNESCO 1970 Convention, art. 2.

[42] "[…] such as: i. pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); ii. original works of statuary art and sculpture in any material; iii. original engravings, prints and lithographs; iv. original artistic assemblages and montages in any material;" UNESCO 1970 Convention, art. 1.

of special interest (historical, artistic, scientific, literary, etc.) singly or in collections ; i) Postage, revenue and similar stamps, singly or in collections; j) Archives, including sound, photographic and cinematographic archives; k) Articles of furniture more than one hundred years old and old musical instruments."[43]

As in the case of the Hague Convention, also the definition of cultural property provided by art. 1 of UNESCO 1970 Convention does not consist in an exhaustive notion for such concept. On the contrary, the UNESCO 1970 Convention specifies that the definition of cultural property provided in its art. 1 is intended only for the purposes of its application, and it does not exclude the possible identification, among the national treasures of States Parties, of other elements of cultural property of recognized as of cultural value on the part of the Organization.
In this sense, the UNESCO 1970 Convention provides, in a rather 'national-oriented' perspective, a series of indications to establish which categories of cultural sites and goods, for the purpose of the treaty, should be considered as 'cultural property' of each State. Precisely, the treaty establishes at its art. 4 that States Parties recognize as part of their national cultural property:

"a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory; b) Cultural property found within the national territory; c) Cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property; d) Cultural property which has been the subject of a freely agreed exchange; e) Cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.".

Criticized by some authors as ultimately running counter UNESCO's core missions of enhancing intercultural dialogue mutual exchange cultural expressions and traditions,[44] the UNESCO 1970 Convention has been appointed – notably, by John Henry Merryman – as an expression of 'cultural nationalism'.[45]
This because, although stating in its preamble how

[43] UNESCO 1970 Convention, art. 1.
[44] UNESCO Constitution, preamble.
[45] John Henry Merryman, 'Two ways of thinking about cultural property', in James A. R. Nazfiger (ed. by), *Cultural Heritage Law* (Edward Elgar Pub, 2012). See also John Henry Merryman, 'Cultural Property Internationalism', in Anthony J. Connoly (ed. by), *Cultural Heritage Rights* (Routledge, 2015).

"**[…]** the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations,"[46]

the UNESCO 1970 Convention framework seems rather inconsistent in terms of encouraging multicultural exchanges. On the contrary, in the light of its art. 5 and followings, the treaty appears as placing considerable emphasis on the idea of national retention of the cultural property of States, which are perceived as the exclusive holders and beneficiaries of the cultural property situated in their territories. As for the reasons of such an 'national-oriented' approach, the international historical and political background underpinning the adoption of the treaty and, in particular, the commercial relationships in the field of cultural property existing among States Parties. As it has been highlighted in doctrine, it is possible to divide the States Parties of UNESCO in two main categories, namely market nations and source nations, holding opposite interests in the field of cultural property.[47] As for the conflict of interests between these two categories, according to such perspective, while in market nations the demand of cultural goods exceeds the supply, therefore encouraging the import of cultural property originated in other countries, in source nations it is the supply of cultural property which exceeds the demand. This, naturally encouraging the unrestricted flow of such cultural goods in the former countries, and unavoidably leading to the irreversible impoverishment of the latter ones in terms of cultural property – together with the social and economic consequences of such loss.
To cope with such a scenario, some authors have showed how supply nations recognize their interest in protecting their national cultural property from unrestrained export and trade, notably by adopting legislations prohibiting or limiting cultural property export and trade. This also because, as it has been highlighted, in particular, by Merryman, the case often shows the existence of a relevant economic despair between market nations and source nations, being the former (France, Germany, Japan, Switzerland, the Scandinavian nations and the United States are examples) rather wealthier than the latter (obvious examples are Mexico, Egypt, Greece and India). In the light of the above, coming as a result of negotiations carried out, mostly, by source nations States Parties,[48] the UNESCO 1970 Convention appears, indeed, as reflecting the idea of cultural property as a tangible, material element bearing specific commercial value and an economic interest for its territorial State. In this sense, the treaty seems to show the same protectionist approach towards the circulation and spread of cultural property entailed within the national legislations its source-countries State Parties, thereby supporting

[46] UNESCO 1970 Convention, preamble.
[47] Lyndell V. Prott and Patrick J. O' Keefe, *National Legal Control of Illicit Traffic in Cultural Property* 2 (UNESCO, 1983) include a third category of 'transit countries', not relevant for the present research.
[48] The sessions of the Meetings of States Parties are available at https://en.unesco.org/fighttrafficking/1970/meeting_of_states_parties_and_sessions. Last visit 28 October 2022.

the restraints and limits on export and trade established by the domestic laws of the UNESCO 1970 Convention negotiators. As a result, the strongly material and national-oriented conception of cultural property entailed within the treaty which, built around the idea of combating the "illicit" international traffic in smuggled and stolen cultural objects, has the ultimate objective of providing States Parties the means to preserve their cultural property as national treasures, avoiding the risk of impoverishment possibly deriving from unrestricted international cultural property exchanges.[49]

Although recognized as two of the major keystones of the UNESCO framework for the protection and safeguard of the cultural inheritance of peoples, the Hague Convention and the UNESCO 1970 Convention have been recognized by some doctrine as entailing some limits, notably, in terms of their approach to the definition of 'cultural property'.[50] Representing a category of cardinal importance in the Western legal tradition, the existing legal concept of 'property' has been considered by several authors as not suitable to cover all the relevant aspects entailed in the idea of worldwide cultural inheritance as developed within the UNESCO norm set. As it has been argued by Janet Blake, precisely, the main shortcoming of the use of the term 'cultural property' is that it is too limited to encompass the wide range of possible categories which can comprise the cultural elements being described.[51] Traditionally built around the notion of 'ownership', the concept of 'cultural property' comes in fact together with some intrinsic specific connotations. Consistently with its conception deriving, notably, by Common law, such notion appears as implying an exclusive control on the cultural good in the hands of the owner, which seems able to alienate, to exploit and to exclude others from the object or site in question at its own discretion.[52] In this sense, the notion of 'cultural property' appears as inconsistent, as well as rather limited, with the ultimate UNESCO objective of worldwide enhancing and promoting the cultural inheritance of nations, as established by the Organization since the adoption of its Constitution.[53] On the contrary, the notion of 'cultural property' appears as relegating the issue of cultural inheritance to the traditional socio-political and ideological baggage coming along with the concept of property since the arguments of John Locke to the challenge of Communism, which identifies as fundamental policy behind any property law the protection of the rights of the possessor. According to Blake, indeed, the use of the term 'cultural property' consigns

[49] In particular, the UNESCO 1970 Convention places emphasis on the practice of 'repatriation'. See Manlio Frigo, *La protezione dei beni culturali nel diritto internazionale* (Giuffré, 1986).

[50] The same 'property-oriented' approach to cultural elements is entailed in the provisions of the UNESCO 1978 Recommendation for the Protection of Movable Cultural Property (Paris, 28 November 1978) which provides in its art. 1 the following definition: "movable cultural property shall be taken to mean all movable objects which are the expression and testimony of human creation or of the evolution of nature and which are of archaeological, historical, artistic, scientific or technical value and interest […]".

[51] Janet Blake, 'On defining the cultural heritage', in Anthony J. Connoly (ed. by), *Cultural Heritage Rights* (Routledge, 2015).

[52] Lyndel V. Prott and Patrick J. O' Keefe, ''Cultural Heritage' or 'Cultural Property'?' in James A. R. Nazfiger (ed. by), *Cultural Heritage Law* (Edward Elgar Pub, 2012).

[53] UNESCO Constitution, preamble.

cultural artifacts and sites to their 'commodification', by treating them as commodities to be bought and sold.[54] In this sense, it excludes from the definition of 'cultural property' the discourse about the spiritual value of those cultural elements which, as monuments and sites of archeological or historic significance and works of art associated with the development of a determined society, may be considered as bearing a broader cultural significance by the concerned community, as well as by the international community as a whole. It is for this reason, as argued also by Lyndell V. Prott and Patrick J. O' Keefe, that the notion of 'cultural property' appears as inapt to cover all those aspects and evidence of worldwide cultures that UNESCO tries to preserve. Nor, it should be applied to define those artistic, historic or archaeological expressions which represent the way of live and though if a particular society, being evidence of its intellectual and spiritual achievements.[55]

1.I.ii. b) UNESCO and the notion of 'cultural heritage'. The World Heritage Convention and the reconceptualization of cultural goods and sites as a "common good of humanity"

It is possibly in reason of the above considerations that, as also suggested by part of the doctrine, UNESCO has progressively shift, throughout its decades of activities, from the notion of 'cultural property' as it has been defined in the previous paragraph to a more encompassing vision of the concept of cultural goods. In particular, it appears, UNESCO has gradually moved towards a more comprehensive notion of cultural inheritance such as to include, within the scope of its definition, not only the material aspects linked to the artistic or historic significance of monuments and sites, but also, the 'immaterial'[56] dimension of such cultural items, connected with their meaning and symbolic sphere. It is the case, namely, of the concept of 'cultural heritage'.

Entailing the idea of the existence of a duty to preserve and protect culture as an inheritance received from the previous generations,[57] the concept of 'cultural heritage' appears, on one side, as encompassing the one of 'cultural property' as it has been defined within the UNESCO norm-set, thereby also considering, on the other side, those anthropological and spiritual aspects linked to the necessity of preserving the universal inheritance of mankind conceived as a common good.

[54] Janet Blake, *ibid*. note 35 p. 38.

[55] Lyndel V. Prott and Patrick J. O' Keefe, *ibid*. note 36, p. 307. See also Manlio Frigo, 'Cultural Property v. Cultural Heritage: A 'Battle of Concepts' in International Law?', (2004) 86 *International Review of the Red Cross*, p. 854; Naomi Mezey, 'The Paradoxes of Cultural Property', (2004) 107 *Columbia Law Review*.

[56] About the "immaterial" dimension of cultural heritage, see Francesco Francioni, 'A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage', in Ahmed Yusuf Abdulqawi (ed. by), *Standard-setting in UNESCO, volume I: Normative Action in Education, Science and Culture, Essays in Commemoration of the Sixtieth Anniversary of UNESCO*, (UNESCO, 2007).

[57] "assur[e] the conservation and protection of the world's inheritance of books, works of art and monuments of history and science […]" UNESCO Constitution, art. 1.

Strictly connected, as highlighted in doctrine, [58] with the progressive enhancement of cultural heritage as a necessary component of the human right to culture, this 'heritage-oriented' approach to cultural goods and sites has been embodied, notably, in the UNESCO 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage ("World Heritage Convention" or "WHC")[59]. Coming as a result of the joint effort of the Intergovernmental Working Group on Conservation (IWCG),[60] UNESCO and the International Union for the Conservation of Nature (IUCN)[61] in the aftermath of the UN General Conference on Human Environment (Stockholm, 7 December 1970),[62] the World Heritage Convention occupies a special position in the ever-expanding UNESCO norm-set for the international protection of cultural heritage. This, apart from establishing a new set of obligations for the international protection of cultural heritage endangered by "non-traditional causes of decay", in reason of the rather innovative, unprecedented conception of 'cultural heritage as a common good' entailed within its dispositions. As it has been recognized in doctrine,[63] in fact, the World Heritage Convention represents the first instrument bringing together under the concept of 'World Heritage' cultural goods and natural sites of great importance "to whatever people [they] may belong", object of a collective interest retained not only by the concerned States and communities, but by humanity as a whole.[64] Representing the ultimate expression of States Parties' determination to strengthen their cooperation in the field of the international protection of the cultural inheritance of peoples,[65] the treaty shows the necessity of a stronger and closer international cooperation for the worldwide protection of cultural goods and sites, to be conserved and safeguarded in the name of their unique and irreplaceable value for humanity. In this sense, it is built on the idea of protecting

[58] See Francesco Francioni, 'A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage', in Ahmed Yusuf Abdulqawi (ed. by), *Standard-setting in UNESCO, volume I: Normative Action in Education, Science and Culture, Essays in Commemoration of the Sixtieth Anniversary of UNESCO*, (UNESCO, 2007). See also *infra*, Chapter II.

[59] Adopted in Paris, 16 November 1972.

[60] UN. Doc. A/CONF/. 48/PC.9 (1975), para. 55.

[61] Founded in 1948, ICUN is an international organization including States, government agencies, public and private entities and other international stakeholders involved in the protection of the environment. It has a Secretariat in Gland, Switzerland, and an Environmental Law Centre in Bonn, Germany. See https://www.iucn.org/ [accessed 21 September 2021]

[62] UN General Assembly, *United Nations Conference on the Human Environment*, 7 December 1970, A/RES/2657, available at: https://www.refworld.org/docid/3b00f1cf1c.html [accessed 21 September 2022]

[63] Francesco Francioni, 'World Cultural Heritage', in Francesco Francioni and Ana Filipa Vrdoljak (ed. by), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press, 2020).

[64] World Heritage Convention, preamble. See *infra*.

[65] "Noting that the cultural heritage and the natural heritage are increasingly threatened with destruction not only by the traditional causes of decay, but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction," World Heritage Convention, preamble. According to Francesco Francioni, this provision refers to the general process of rapid industrialization and urbanization that in the 1960s has already begun to produce adverse effects on the worldwide cultural and natural heritage. In particular, the World Heritage Convention has been adopted in the aftermath of the man-made main flooding in the early 1960s of the Nubian monuments of the Upper Nile, provoked by the construction of the Aswan Dam, and the natural disaster of the November 1966 floods in Venice and Florence. Francesco Francioni, 'Preamble', in Francesco Francioni (ed. by), *The 1972 World Heritage Convention: A Commentary* (Oxford Commentaries on International Law, 2008).

those cultural elements situated in the territories of States which, although submitted to the sovereignty of national authorities, should be nevertheless considered of general interest of the international community as a "common heritage of mankind"[66], and therefore necessitate of a wider, more encompassing international protection. To this end, the World Heritage Convention defines the categories of cultural items included within the scope of such protection at its art. 1, which establishes that:

"For the purpose of this Convention, the following shall be considered as "cultural heritage":

- monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
- groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
- sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view."[67]

In addition to that, the World Heritage Convention specifies the inclusion within its marge of application of the protection of those elements of the "natural heritage" as defined by its art. 2,[68] as

[66] Francesco Francioni, 'The Evolving Framework for the Protection of Cultural Heritage in International Law', in Silvia Borelli and Federico Lenzerini (ed. by), *Cultural Heritage, Cultural Rights, Cultural Diversity* (Brill Nijhoff, 2012).
[67] World Heritage Convention, art. 1.
[68] "For the purposes of this Convention, the following shall be considered as "natural heritage": natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty." World Heritage Convention, art. 2.

well as of those "cultural landscapes"[69] and "mixed cultural and natural heritage"[70] items recognized as such pursuant to the provisions of para. 45 and following of the UNESCO *Operational Guidelines for the Implementation of the World Heritage Convention* ("WHC Operational Guidelines")[71].

Focusing the analysis on the definition of 'cultural heritage' provided by the World Heritage Convention, it appears how, as for in the previous cases of the Hague Convention and the UNESCO 1970 Convention, neither in this hypothesis UNESCO is able to provide a global definition for the notion of 'cultural heritage', to be applicable by its States Parties both at the international and domestic level.

On the contrary, also in this case, both the texts of the WHC and of the WHC Operational Guidelines[72] adopt a rather pragmatic approach towards the identification of "the world's cultural heritage" object of the provisions of the treaty, notably providing at its art. 1 a list of those cultural goods and sites which, "for the purposes of this Convention", are considered as deserving the international protection further established in the treaty.

Notwithstanding with such intrinsic limit, the World Heritage Convention has been saluted, in the aftermath of its adoption, as a rather innovative instrument within the UNESCO norm-set for international cultural heritage. As it has been highlighted by some authors, precisely, the World Heritage Convention has the merit to propose a rather innovative approach towards the identification and protection of the worldwide items of cultural heritage, which has been defined as an expression

[69] "Cultural landscapes inscribed on the World Heritage List are cultural properties and represent the "combined works of nature and of man" designated in Article 1 of the Convention. They are illustrative of the evolution of human society and settlement over time, under the influence of the physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces, both external and internal."; "Cultural landscapes fall into three main types, namely: (i) The most easily identifiable is the clearly defined landscape designed and created intentionally by people. This embraces garden and parkland landscapes constructed for aesthetic reasons which are often (but not always) associated with religious or other monumental buildings and ensembles; (ii) The second type is the organically evolved landscape. This results from an initial social, economic, administrative, and/or religious imperative and has developed its present form by association with and in response to its natural environment. Such landscapes reflect that process of evolution in their form and component features. They fall into two sub-types: a) a relict (or fossil) landscape is one in which an evolutionary process came to an end at some time in the past, either abruptly or over a period. Its significant distinguishing features are, however, still visible in material form; b) a continuing landscape is one which retains an active social role in contemporary society closely associated with the traditional way of life, and in which the evolutionary process is still in progress. At the same time it exhibits significant material evidence of its evolution over time; (iii) The final type is the associative cultural landscape. The inscription of such landscapes on the World Heritage List is justifiable by virtue of the powerful religious, artistic or cultural associations of the natural element rather than material cultural evidence, which may be insignificant or even absent.". WHC *Operational Guidelines for the Implementation of the World Heritage Convention*, WHC.21/01, 31 July 2021 ("WHC Operational Guidelines"), paras. 47 and 47*bis*.

[70] "Properties shall be considered as "mixed cultural and natural heritage" if they satisfy a part or whole of the definitions of both cultural and natural heritage laid out in Articles 1 and 2 of the Convention." UNESCO, Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, Operational Guidelines, para. 46.

[71] According to para. 48 of the WHC Operational Guidelines, "Nominations of immovable heritage which are likely to become movable will not be considered".

[72] Periodically revised by the *ad hoc* Intergovernmental Committee for the Protection of World Cultural and Natural Heritage established by the WHC pursuant to its arts. 8 and ss.

of 'cultural internationalism'.[73] Acknowledging in its preamble how "[the] deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world,"[74] the World Heritage Convention is built around the conception of 'cultural heritage' as a 'common good of humanity', to be preserved and safeguarded in the name of its exceptional interest the peoples of the world. This because, according to the WHC, worldwide cultural and natural heritage,[75] through the variety of its expressions, constitutes a common estate of all peoples of the world, expression of the uniqueness of humanity.[76] In this sense, representing the ultimate expression of the core values and traditions of the human society, cultural heritage serves to maintain the collective and distinctive identity of worldwide social groups through generations. In a world characterized by globalization and conflicts, it represents a key factor in the enhancement of the mutual understanding and multicultural dialogue recalled by the preamble of the UNESCO Constitution, and it plays a pivotal role in the promotion of universal respect for justice, rule of law and human rights as well as in the promotion of international peace. It is for this reason that States necessitates of an international safeguarding mechanism ensuring cultural heritage worldwide protection from causes of decay, in the name of the acknowledged "priceless and irreplaceable assets, not only of each nation, but of humanity as a whole" of such property[77].

From the specific point of view of defining cultural heritage, such innovative capacity of the World Heritage Convention has been highlighted the doctrine in particular with reference to the reconceptualization of the notion of 'cultural property' as intended by the traditional UNESCO norm-set – and, notably, by the Hague Convention. As it has been highlighted, the WHC seems to lead to a more comprehensive notion of 'cultural heritage', understood as the ensemble of the tangible essence of cultural expressions and the intangible dimension as meaningful symbols for communities and peoples.[78] In this sense, some other authors have suggested how, in the scope of the WHC provisions, the notion of 'cultural property' is actually embraced within the wider concept of 'cultural

[73] "[…] it is clear that the World Heritage Convention represents a remarkable step forward on the way of the internationalization of the system of safeguarding [cultural heritage]". Francesco Francioni, *supra* note 47, p. 17. According to F. Francioni, a previous, incomplete effort towards the internationalization of cultural heritage protection was entailed within the Hague Convention which, in spite its recognition of cultural property as a "heritage of all mankind" (Hague Convention, preamble), had failed to establish an effective system of international protection until the adoption of its 1999 additional Protocol, which was largely influenced by the experience of the World Heritage Convention. On the international protection of cultural heritage in the event of armed conflict, see *infra*.

[74] World Heritage Convention, preamble.

[75] For the present research, the scope of the World Heritage Convention study will be limited to the UNESCO approach towards the protection of cultural heritage.

[76] Francesco Francioni, *supra* note 47.

[77] WHC Operational Guidelines, para. 4.

[78] On the dynamic evolution of the concept of 'cultural heritage', see Francesco Francioni, 'A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage' in Abdulqawi Yusuf (ed. by), *Standard Setting in UNESCO Vol. I* (Martinus Nijhoff, 2007).

heritage', which combines the material, 'commodified' aspect of cultural sites and items with their spiritual, identity value for humanity as a whole.[79]

Without prejudice to the above-mentioned merits, however, it appears how the definition and conception of the so-called "world heritage of mankind" entailed in the World Heritage Convention does not come without limits. Although recalling how the loss of "*any* item of the cultural and natural heritage" of peoples constitutes an irreversible impoverishment for all the nations of the world, the WHC considers that there are some "*parts* of the cultural or natural heritage" of States Parties which are "of outstanding interest" for the whole humanity, and therefore need to be preserved s common good of mankind.[80] In this sense, as established in WHC art. 1, the items of cultural heritage of peoples are identified, precisely, in name of their "*outstanding universal value*" from "the point of view of history, art or science", being such element a necessary condition for the identification of such goods as cultural goods pursuant to the treaty.[81] In this sense, the 'value-oriented' definition of cultural heritage adopted by the WHC is highlighted by the WHC Operational Guidelines. Defining the notion of "Outstanding Universal Value" as "cultural significance […] so exceptional as to transcend national boundaries", the document precises how the WHC is not intended to ensure the protection of all the cultural elements of States Parties, "but only [of] a selected list of the most outstanding of these.".[82] This, it seems, leaving the door open for a further investigation on a more inclusive notion of 'cultural heritage' within the UNESCO framework, such as to determine the cultural significance of *all* the elements of artistic, historic and archeological relevance situated in the territories of States, irrespective of their eventual 'outstanding value'.

1.I.ii. c) The evolution of the notion of 'cultural heritage' within the UNESCO framework and its progressive dematerialization. From the UNESCO 2003 Convention for the Safeguarding of the Intangible Cultural Heritage to the UNESCO 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions

Notwithstanding with its intrinsic limits, it has been exposed how the World Heritage Convention, with its innovative conception of 'cultural heritage' as a material and spiritual inheritance of the whole

[79] Janet Blake, *supra* note 11, p. 8.
[80] World Heritage Convention, preamble, emphasis added.
[81] "[…] as well as from the historical, aesthetic, ethnological or anthropological point of view", World Heritage Convention, art. 1, emphasis added.
[82] WHC Operational Guidelines, paras. 49 and 52.

mankind, has had a rather significative impact on the global framework for the safeguard and promotion of the cultural heritage of peoples, both at the national and at the international scope.[83]

In detail, from the point of view of the national legislations, it appears how several States have adapted their provisions in the field of cultural heritage protection to the principles and duties outlined by the World Heritage Convention,[84] by strengthening their participation to the collective assistance mechanism for the protection of outstanding heritage set up by art. 4 and following of the WHC. [85]

On the other side, the World Heritage Convention appears as having played a rather influential role in the – wide range of – international instruments which have been adopted after 1972 in the field of cultural heritage protection. In particular, the conception of cultural heritage as an inheritance of humankind is at the core of the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage[86] and of the UNESCO 2003 Convention for the Safeguarding of the Intangible Cultural Heritage.[87] Both recalling the necessity of strengthening the international community effort towards the protection and preservation of worldwide cultural heritage, notably, by the means of the normative instruments set up by the World Heritage Convention,[88] the two treaties refer to underwater and intangible cultural heritage "as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations"[89], "a mainspring of cultural diversity and a guarantee of sustainable development"[90].

In the context of the former, UNESCO acknowledges the importance of protecting the underwater cultural heritage of the world in view of the "public interest in and public appreciation of underwater cultural heritage" progressively growing in many areas of the globe, and, notably, in the name of the value of underwater cultural heritage in terms of public education, information and research. This,

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[83] Among others, see Wahid Ferchichi, 'La Convention de l'UNESCO concernant la protection du patrimoine mondial culturel et naturel', in Tullio Scovazzi and James A. R. Nazfiger, *The Cultural Heritage of Mankind – Le patrimoine culturel de l'humanité* (Brill Nijhoff, 2008), p. 455.

[84] See *infra*.

[85] Considering that, in view of the magnitude and gravity of the new dangers threatening them, it is incumbent on the international community to participate in the protection of the cultural and natural heritage of outstanding universal value, by the granting of collective assistance which, although not taking the place of action by the State concerned, will serve as an efficient complement thereto,". World Heritage Convention, preamble. On the obligations for States Parties set up by art. 4 and following of the WHC, see *infra*.

[86] Adopted in Paris, 2 November 2001.

[87] Adopted in Paris, 17 October 2003.

[88] "Realizing the need to codify and progressively develop rules relating to the protection and preservation of underwater cultural heritage in conformity with international law and practice, including […] the UNESCO Convention for the Protection of the World Cultural and Natural Heritage of 16 November 1972,"; UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage, preamble; "**Noting** the far-reaching impact of the activities of UNESCO in establishing normative instruments for the protection of the cultural heritage, in particular the Convention for the Protection of the World Cultural and Natural Heritage of 1972,"; UNESCO 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, preamble.

[89] UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage, preamble.

[90] This, notably, "as underscored in the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore of 1989, in the UNESCO Universal Declaration on Cultural Diversity of 2001, and in the Istanbul Declaration of 2002 adopted by the Third Round Table of Ministers of Culture,"; UNESCO 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, preamble.

notably, in the light of the crescent threats to underwater cultural goods and sites provoked by unauthorized or illicit activities as, in particular, massive or prohibited commercial exploitation, as well as in view of the availability of advanced technologies which enhance the discovery of and access to underwater cultural heritage. To this end, the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage stresses on the key importance of cooperation among States, international organizations, scientific institutions, professional organizations and other interested parties in the field of underwater cultural heritage protection, as a mean to improve the effectiveness of international, regional and national measures for the preservation *in situ* or, if necessary, the careful recovery of such underwater property.[91] In the aim of reaching such objective, art. 1 of the treaty defines "underwater cultural heritage", for the purposes of its application, as

"[…] (a) all *traces of human existence* having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as: (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character." [92].

Indeed, it appears how also in this case UNESCO, adopting the same approach as the one entailed in the World Heritage Convention, defines the elements of underwater cultural heritage considering both its material component of buildings, structures, and sites, as well as its symbolic dimension of "integral part of the cultural heritage of humanity" and "particularly important element in the history of peoples and nations". This, as in the case of the WHC, in the name of the value of such inheritance as a "common heritage" of the international community, and in reason of the growing public interest and appreciation towards its preservation as a key factor for research, information and education.[93]

[91] UNESCO 2001 Convention on the Protection of Underwater Cultural Heritage, preamble. For a study of the framework set up by the UNESCO 2001 Convention on the Protection of Underwater Cultural Heritage, see Tullio Scovazzi and Guido Camarda (ed. by), *The Protection of the Underwater Cultural Heritage. Legal Aspects. A Conference held in Palermo and Siracusa (8-10 March 2001)*, (Giuffré 2002). See also Patrick J. O' Keefe, 'Underwater Cultural Heritage', in Francesco Francioni and Ana Filipa Vrdoljak (ed. by), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press, 2020).

[92] "[…] pipelines and cabled placed on the seabed shall not be considered as underwater cultural heritage", neither have to "installations other than pipelines and cables, placed on the seabed and still in use". UNESCO 2001 Convention on the Protection of Underwater Cultural Heritage, art. 1, emphasis added. For an analysis of the definition of the concept of "underwater cultural heritage" provided by the treaty, see Tullio Scovazzi, 'Underwater Cultural Heritage' (2010), in Rudiger Wolfrum (ed. by), *Max Planck encyclopedia of public international law* (Oxford University Press).

[93] UNESCO 2001 Convention on the Protection of Underwater Cultural Heritage, preamble.

In the same way, an even more encompassing, 'symbolic-oriented' definition of the notion of cultural heritage has been adopted by UNESCO in the World Heritage Convention in the context of the UNESCO 2003 Convention for the Safeguarding of the Intangible Cultural Heritage.[94]

Identifying its forerunners in the UNESCO 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore,[95] the UNESCO 2001 Universal Declaration on Cultural Diversity[96] and the Istanbul Declaration adopted in 2002 by the Third Round Table of Ministers of Culture,[97] the UNESCO 2003 Convention on Intangible Heritage focuses on the safeguarding of those components of the cultural inheritance of mankind which, in reason of their intangible essence, are not included in the existing international framework for the protection of cultural goods and sites. Precisely, the preamble recalls the awareness of the international community is "of the universal will and the common concern to safeguard the intangible cultural heritage of humanity". This, even more, in view of the fat that "no binding multilateral instrument as yet exists for the safeguarding of the intangible cultural heritage," which might find itself at risk of deterioration, disappearance and destruction.[98] Nevertheless, the treaty acknowledges "the far-reaching impact of the activities of UNESCO" in establishing normative instruments for the protection of the tangible components of the worldwide cultural heritage, and it refers, in particular, to the pivotal role played by the World Heritage Convention in the identification and protection of the cultural elements of States Parties and its peoples. Without prejudice to that, the UNESCO 2003 Convention on Intangible Cultural Heritage aims at establishing a new normative instrument for the safeguard of the cultural heritage of peoples, considered, in this context, above all in its intangible component, in view of creating "greater awareness, especially among the younger generations, of the importance of the intangible cultural heritage and of its safeguarding"[99].

Drafted following the lead of the World Heritage Convention, the UNESCO 2003 Convention on Intangible Cultural Heritage defines "intangible cultural heritage" as it follows:

"For the purposes of this Convention, 1. The "intangible cultural heritage" means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts, and

[94] ("UNESCO 2003 Convention on Intangible Heritage") adopted in Paris, 17 October 2003.
[95] Adopted in Paris, 17 October 1989, available at http://www.un-documents.net/folklore.htm. Last access 26 September 2022.
[96] Adopted in Paris, 2 November 2001, available at https://unesdoc.unesco.org/ark:/48223/pf0000127162. Last access 26 September 2022.
[97] Adopted in Istanbul, 17 September 2002, available at https://ich.unesco.org/doc/src/00072-EN.pdf. Last access 26 September 2022.
[98] This, notably, in the light of the "processes of globalization and social transformation, [which] alongside the conditions they create for renewed dialogue among communities, also give rise, [to] the phenomenon of intolerance", as well as in reason of the lack of resources for safeguarding such heritage. UNESCO 2003 Convention on Intangible Heritage, preamble.
[99] UNESCO 2003 Convention on Intangible Heritage, preamble.

cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. […][100] 2. The "intangible cultural heritage", as defined in paragraph 1 above, is manifested inter alia in the following domains: (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals, and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship.".

Recalling the significant role played by intangible cultural heritage as a factor in strengthening the mutual understanding and cooperation among peoples, the UNESCO 2003 Convention on Intangible Cultural Heritage represents a rather significant step in the UNESCO path for the international definition of the concept of 'cultural heritage'.[101] Recalling the traditional definition of 'culture' resulting from anthropology studies, which refers to culture as the sum of total of all material and spiritual activities and products of a given social group,[102] the UNESCO 2003 Convention on Intangible Cultural Heritage presents a rather cutting-edge conception of cultural heritage compared with the international norm-set developed by UNESCO since the adoption of the 1954 Hague Convention. Although bearing in mind "the deep-seated interdependence between the intangible cultural heritage and the tangible cultural and natural heritage,"[103] in fact, the treaty dwells around the idea that the concept of 'cultural heritage' does not end at monuments, collections of objects and sites. On the contrary, it stresses the existence of an immaterial component entailed in the notion of 'cultural heritage', such as to shift the attribution of cultural significance from the material dimension of cultural property and sites to the symbolic value attached to these items and recognized by peoples as part of their identity. In this sense, the treaty recognizes the necessity of preserving the intangible component of worldwide cultural heritage even in the case it is not immediately related to a tangible

[100] "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, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development." UNESCO 2003 Convention on Intangible Heritage, art. 2.

[101] For an analysis of the provisions of the UNESCO Convention on Intangible Heritage, see Janet Blake, Lucas Lixinski (ed. by), *The 2003 UNESCO Intangible Heritage Convention. A Commentary* (Oxford University Press, 2020). See also Janet Blake, 'Safeguarding Intangible Cultural Heritage', in Francesco Francioni and Ana Filipa Vrdoljak (ed. by), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press, 2020).

[102] Rodolfo Stavenhagen, 'Cultural Rights: A Social Science Perspective', in Asbjorn Eide, Catarina Krause and Allan Rosas (ed. by) *Economic, Social and Cultural Rights*, (Brill Nijhoff, 2001), pp. 85-109.

[103] UNESCO 2003 Convention on Intangible Cultural Heritage, preamble.

cultural expression, in virtue of the unique and irreplaceable value of traditions, living expressions, oral traditions and rituals for the whole humanity.

Remarking how no treaty provision should be interpreted as "altering the status or diminishing the level of protection under the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage of World Heritage properties with which an item of the intangible cultural heritage is directly associated", the UNESCO 2003 Convention on Intangible Cultural Heritage appears as rather expanding the international framework for the protection of cultural heritage. Focusing on the necessity of considering it also with regard to its immaterial component, it stresses on the key role of intangible cultural expressions in intercultural dialogue and diversity, as well as a driver for mutual respect. This, in particular, in the hypothesis of the various communities and indigenous groups present on the globe, which recognize, notably, intangible cultural heritage a crucial factor for the maintenance of their identity, as well as for their survival over time and through generations.[104]

With regard to the prerogatives of such inheritance, the treaty defines intangible cultural heritage as "traditional, contemporary and living at the same time", "inclusive", "representative" and "community-based".[105] As for the implementation of such disposition, the UNESCO 2003 Convention on Intangible Cultural Heritage leaves to States Parties the competence to determine which national elements of historic, social and traditional significance can be considered as "intangible cultural heritage" pursuant to art. 2 of the treaty, in virtue of their primary awareness of the cultural manifestations and expressions situated on their territories.[106]

In the light of such development of the UNESCO norm-set for the identification of worldwide cultural heritage, it appears how an even more radical evolution of the concept of 'cultural heritage' as entailing, beyond its material dimension, an intangible essence linked to human identity, may be found in the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted by UNESCO in 2005.[107]

Entailed in the UNESCO framework since the adoption of its Constitution,[108] it is starting from the '90s that the notion of 'cultural diversity' has progressively gained importance in the United Nations

[104] See Dalee Sambo Dorough and Siegfried Wiessner, 'Indigenous Peoples and Cultural Heritage', in Francesco Francioni and Ana Filipa Vrdoljak (ed. by), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press, 2020).

[105] See *What Is Intangible Cultural Heritage?*, available at https://ich.unesco.org/en/what-is-intangible-heritage-00003. Last visit 26 September 2022.

[106] As in the case of the WHC, the UNESCO 2003 Convention on Intangible Cultural Heritage establishes a mechanism according to which the identification of the worldwide expressions of intangible cultural heritage pursuant to art. 2 of the treaty are identified by States Parties and by an ad hoc UNESCO Committee (art. 6).

[107] See *supra*, para 1.I.i.

[108] UNESCO Constitution, art. 1, para. 3.

framework and, notably, within the UNESCO norm-set.[109] In particular, such concept has been raised by the Organization in the light of the progressive spread of the phenomenon of globalization, which has been acknowledged as endangering the worldwide diversity through the progressive homologation of cultural models.[110] According to the idea of the political scientist Samuel P. Huntington, the international community found itself convening, in the aftermath of the Cold War, on the necessity of avoiding the risk of a "Clash of Civilizations", such as to entail the imposition of a determined cultural model – and notably, the western, Anglo-Saxon one – to all the populations of the world, thereby jeopardizing their cultural identity and traditions in the name of the mundialization of culture.[111]

Coming as the natural outgrowth of the UNESCO Universal Declaration on Cultural Diversity of 2001,[112] the UNESCO 2005 Convention on Cultural Diversity adopts a definition for 'cultural heritage' providing a recapitulation of all the previous evolutions of the UNESCO approaches towards the definition of cultural heritage. Recalling the idea of culture as "a source of exchange", such as to "take diverse forms across time and space" and to "embody the uniqueness and plurality of the identities of the groups and societies making up humankind" underpinning the UNESCO Universal Declaration on Cultural Diversity,[113] the UNESCO 2005 treaty refers to cultural heritage as

"the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.".[114]

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[109] On the notion of "cultural diversity" within the UNESCO framework, see Vittorio Mainetti, 'La diversité culturelle à l'UNESCO: ombres et lumières', in Marie Claire Foblets and Nadjima Yassari (ed. by) *Legal Approaches to Cultural Diversity/Approches juridiques de la diversité culturelle*, (Leiden/Boston, 2013), pp.59-107.

[110] See Vittorio Mainetti, Diversità Culturale e Cooperazione Culturale Internazionale alla Luce dell'Azione Normativa dell'UNESCO, in Giuseppe Cataldi e Valentina Grado (ed.by), *Diritto internazionale e pluralità delle culture. XVIII Convegno Napoli, 13-14 giugno 2013*, (Editoriale scientifica, 2014), pp. 421-434.

[111] Samuel P. Huntington, 'The Clash of Civilizations?' (1993), in *Foreign Affairs*, pp. 22–49. See also Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, (Simon & Schuster, 2011), Laurence E. Harrison and Samuel P. Huntington (ed. by), *Culture Matters: How Values Shape Human Progress*, (Basic Books, 2000); Lee Harris, *Civilization and Its Enemies: The Next Stage of History*, (Free Press, 2012). On the debate between universalism and cultural relativism, see Chapter II.

[112] "Affirming that respect for the diversity of cultures, tolerance, dialogue and cooperation, in a climate of mutual trust and understanding are among the best guarantees of international peace and security,"; "Aspiring to greater solidarity on the basis of recognition of cultural diversity, of awareness of the unity of humankind, and of the development of intercultural exchanges,"; UNESCO Universal Declaration on Cultural Diversity, preamble.

[113] UNESCO Universal Declaration on Cultural Diversity, preamble.

[114] UNESCO 2005 Convention on Cultural Diversity, art. 4 para. 1.

Recalling the conception of the cultural element as an indissoluble union of a material and a non-material element, the UNESCO 2005 Convention on Cultural Diversity appears as expressing the notion of cultural heritage and diversity in a rather expansive way. Starting from the assumption that culture may takes "diverse forms across time and space", all embodying "the uniqueness and plurality of the identities of the groups and societies making up humankind"[115], the treaty refers to "the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities", irrespective of the kind of activity or good it may come from and, notably, irrespective of the aesthetic, architectonic or scientific significance possibly attributable to it.[116] Saluted by part of the international community as a significative step in the progressive definition of the global action for the promotion of intercultural dialogue, the UNESCO 2005 Convention on Cultural Diversity has nevertheless raised several concerns from the part of the doctrine. In particular, some authors have expressed their doubts concerning the scope of application and the effectiveness of the treaty, whose provisions appear, in view of their lack of effective enforceability, rather "programmatic".[117] This, notably, also in reason of the wider and "all-inclusive" conception of cultural heritage and diversity adopted by the treaty. As a matter of fact the treaty, acknowledging the existence of a cultural interest only in the hypothesis of a subjective relationship between an individual or a group and a determined activity, expression or item, risks to hinder the scope of the effective protection of the UNESCO framework for cultural heritage. This, consequentially, leaving too open the door for the determination, within the territories of States, of which elements amount as expressions of cultural heritage and diversity and which do not.

Although saluted by the global community as a significative effort for rendering more inclusive the international framework for cultural heritage protection, the progressive expansion of the concept of 'cultural heritage' as entailed, notably, in the UNESCO 2003 Convention on Intangible Cultural Heritage and in the UNESCO 2005 Convention on Cultural Diversity has nevertheless raised important reflections in doctrine. In particular, several authors have remarked how, notwithstanding with the merit of providing a wider framework for the identification, protection and promotion of cultural heritage within the UNESCO norm set, such gradual extension of the notion of 'cultural heritage' entails an undeniable discharge in terms of the effectiveness of the international protection

[115] UNESCO Universal Declaration on Cultural Diversity, preamble.
[116] UNESCO 2005 Convention on Cultural Diversity, art. 4 para. 2.
[117] This, notably, in the light of the provision entailed in art. 5 of UNESCO 2005 Convention on Cultural Diversity, which not establish any international obligation pending on its States Parties towards the protection and safeguard of cultural diversity. Rather, it limits itself to affirm that the sovereignty on cultural policies lies in the hands of national authorities, which should adopt measures to protect and promote the diversity of cultural expressions, notably by strengthening international cooperation to achieve the purposes of the treaty. See Vittorio Mainetti, supra note 98. See also Marie Cornu, Le *droit culturel des biens. L'intérêt culturel juridiquement protegé* (Bruylant, 1996).

provided by the organization to these cultural items.[118] As a matter of fact, it has been noted, the necessity of finding an international definition for 'cultural heritage' such as to include, within its scope, *all* the traditions, expressions and manifestations of peoples possibly entailing a cultural component comes with the progressive dilution of the notion of cultural heritage at the international scope, which inevitably entails a less effective international protection.[119] Such issue has been tackled, notably, by Francesco Francioni who, reflecting on the evolution of international cultural heritage law – and, notably, on the gradual 'culturalization' of international law – highlights how, in spite of the undeniable advantages of a wider definition of 'cultural heritage' provided by the international community such as to allow, within its scope, the enhancement and protection of a wider range of cultural prerogatives, the progressive expansion of this concept risks to render the notion of cultural heritage too diluted and elusive.[120]

In other words, according to this author, the possibility of providing cultural heritage with a more inclusive definition entails in itself the risk of a less enforceable safeguard for such property, in reason of the absence of a certain definition of the object of the international protection as such.[121]

This, notably, also in view of the most recent evolutions of the UNESCO approach towards the concept of 'cultural heritage', which seems to be now considered by the organization also in context not traditionally linked to the protection of the cultural property of States as defined in the provisions of the Hague Convention.

As a matter of fact, it seems, within the latest decade UNESCO has turned its conception of 'cultural heritage' towards a more 'holistic' approach, focused in particular on the strict correlation between the notions of 'cultural heritage' and 'natural heritage' and on the conception of cultural goods and sites as part of the environment. This, in particular, in the light of the massive and reiterated climate disasters and accidents which have affected, within the last decade, the cultural and – even more – natural heritage of the world, leading to the irreversible destruction of expression of biodiversity and nature, which on the contrary deserve to be protected and to be transmitted intact to future

[118] See Francesco Francioni, 'Culture, Heritage and Human Rights: an Introduction', in Francesco Francioni and Martin Scheinin (ed. by), *Cultural human rights*, (Brill Nijhoff, 2008), p. 1-15.

[119] The necessity of outlining a worldwide definition for 'culture' and 'cultural heritage', notably in the context of racial discriminations, has been recently highlighted by the International Court of Justice in the case Armenia v. Azerbaijan (16 September 2021), see *infra*, Chapter III. On this point, see also Andrzej Jakubowski, 'Cultural Heritage and the Collective Dimension of Cultural Rights in the Jurisprudence of the European Court of Human Rights', in Andrzej Jakubowski (ed. by), *Cultural Rights as Collective Rights. An International Law Perspective* (Brill Nijhoff, 2016).

[120] Francesco Francioni, 'The Evolving Framework for the Protection of Cultural Heritage in International Law', in Silvia Borelli and Federico Lenzerini (ed.by), *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Martinus NIjhoff, 2012).

[121] Rosario Sapienza, I meccanismi e strumenti per l'esecuzione delle Convenzioni sulla tutela dei beni culturali e il ruolo dell'UNESCO, in Paolo Benvenuti and Rosario Sapienza (ed. by), *La Tutela Internazionale dei Beni Culturali nei Conflitti Armati* (Giuffré, 2007).

generations.[122] Based on such a premise, UNESCO appears indeed as evolving its international norm-set for the identification and promotion of cultural heritage towards the more encompassing goal of preventing the destruction or degradation of *all* the forms of heritage, both of 'anthropocentric' and 'natural' origins and nature, part of humanity and the globe.[123] This, as it has been raised in doctrine, leading to a less 'monumental', more 'naturalistic' approach to the notion of 'cultural heritage', including, on one side, the promotion and enhancement of elements and expressions not traditionally considered within the UNESCO framework, but entailing, on the other side, a rather less clear and effective definition of the concept of 'cultural heritage'.[124]

I.2 The evolution of the international framework for the worldwide protection of cultural heritage. The advancement of the UNESCO norm-set from the protection of endangered cultural property in the event of armed conflict to the promotion of the 'cultural heritage of mankind' as a common good

I.2.i. A necessary premise: the progressive evolution of the international norm-set for the protection of cultural property in war times

Together with the progressive expansion of the notion of 'cultural heritage', the UNESCO norm-set has experienced, within the decades, a significative evolution in terms of the definition of the international obligations pending on the international community towards the protection and promotion of worldwide cultural heritage. This, notably, also in the light of the pre-existing framework for the safeguard of the cultural goods and sites situated in the territories of nations set up throughout the centuries by the international community, to cope with the endangerment and destruction of the cultural heritage of peoples, notably, in the event of armed conflict. Regarded as a core issue of the worldwide community since Ancient times,[125] the international protection of the

[122] Ottavio Quirico, 'Key Issues in the Relationship between the World Heritage Convention and Climate Change Regulation' in Silvia Borelli and Federico Lenzerini (ed. by), *Cultural Heritage, Cultural Rights, Cultural Diversity. New Developments in International Law*, Nijhoff, 2012. See also Alessandro Chechi, 'The Cultural Dimension of Climate Change: Some Remarks on the Interface between Cultural Heritage and Climate Change Law' in Sabine von Schorlemer and Sylvia Maus (ed.by), *Climate Change as a Threat to Peace: Impact on Cultural Heritage and Cultural Diversity* (Peter Lang AG, 2014), Sylvia Maus, 'Hand in hand against climate change: cultural human rights and the protection of cultural heritage' (2014) 27 *Cambridge Review of Cultural Affairs* 4 and Ben Boer, The Environment and Cultural Heritage, in Francesco Francioni and Ana Filipa Vrdoljak (ed. by), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press, 2020).

[123] On the dynamic evolution of the concept of 'cultural heritage', see Francesco Francioni, 'A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage' in Abdulqawi Yusuf (ed. by), *Standard Setting in UNESCO Vol. I* (Martinus Nijhoff, 2007).

[124] James A. R. Nazfiger, *Frontiers of Cultural Heritage Law*, (Brill Nijhoff, 2021). See also Hee-Eun Kim, 'Changing Climate, Changing Culture: Adding the Climate Change Dimension to the Protection of Intangible Cultural Heritage' (2011) 18 *International Journal of Cultural Property* 259 and Pilar N. Ossorio, 'The Human Genome as Common Heritage: Common Sense or Legal Nonsense?' (2007), 35 *Journal of Law, Medicine and Ethics* 425.

[125] See Stanislaw E. Nahlik, 'La protection international des biens culturels en cas de conflit armé', in *Collected Courses of the Hague Academy in International Law*, vol. 120 (Brill Nijhoff, 1967).

cultural heritage of peoples in the event of armed conflict has always been considered, by the means of international law, as a significative aspect of the *ius in bello*.[126] Evidence of this connection between cultural heritage and the laws of war appears in the Renaissance, when the politician and philosopher Niccolò Machiavelli referred to the meaning of destroying conquered cities in its major work *Il Principe*[127], and, one century later, in the *ouvrage* of Albericus Gentili. Renowned as one of the fathers of the modern science of international law, he dedicated Chapter VI of its work *De Jure belli libri tres* to the analysis of the latin precept "*Victos praetera spoliare ornamentis licet*".[128] In the approximately half of the 18th century, the Swiss jurist Emmerich de Vattel dedicated a part of its international law studies to the issue of preserving monuments, sites and historic buildings from bombing and strikes in the event of armed conflicts, referring to those who intentionally destroy cultural heritage as "*enemies du genre humain*".[129] This shows how, in the traditional conception of international cultural heritage law, the protection of cultural goods and sites is considered above all with regard to the risk of attack carried out by States enemies in the context of war, in which the destruction of cultural heritage may amount as a warfare strategy.

In this perspective, the necessity of establishing an international protection for those elements of the cultural heritage of nations put at risk in the event of armed conflict has been strengthened by the international community in the second half of the 19th century and, in 1863, the general rule that

"property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character"

[126] On the relationship between cultural heritage and humanitarian law see, among others, Roger O' Keefe, 'Cultural Heritage and International Humanitarian Law' in Francesco Francioni and Ana Filipa Vrdoljak (ed. by), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press, 2020), and Francesco Elia, 'La protezione dei beni culturali nei conflitti armati', available at https://www.unife.it/giurisprudenza/giurisprudenza/studiare/diritti-umani-conflitti-armati/allegati/dudu-2014/elia-scaricabile/eliabeniculturali20141.pdf. Last visit 5 October 2022.

[127] Niccolò Machiavelli, *Il Principe*, Chapter V "*Quomodo administrandae sunt civitates vel principates, qui antequam occuparentur, suis legibus vivebant*" (reprint, Milan 1987).

[128] Albericus Gentili, *De Jure belli libri tres*, III, Chapter VI (1612).

[129] "*Pour quelque sujet que l'on ravage un pays on doit épargner les édifices qui font honneur à l'humanité, et qui ne contribuent point à rendre l'ennemi plus puissant; les temples, les tombaux, les batiments publics, tous les ouvrages respectables par leur beauté. Que gagnet-on à les détruire? C'est se declarer l'ennemi du genre humain, que de le priver de gaieté de Coeur, de ces monuments de l'art, de ces modèles de gout* […]" Emmerich de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduit & aux affaires des nations & des souverains* (London, 1758), t. III, vol. iii, Chapter IX, paras 168-169.

should not be destroyed in the event of armed conflict is included art. 34 of the Lieber Code. [130] A decade later, the same principle has been expressed by the Brussels Declaration of 1874, adopted by occasion of an intergovernmental conference promoted by Russia[131] which, even not of binding nature,[132] has been saluted as an important step in the progressive evolution of the international framework for the protection of cultural heritage in war time. In detail, art. 17 of the Brussels Declaration establishes the prohibition to belligerents from attacking and looting the property and buildings dedicated to religion, education, art and science, establishing that, in the event of sieges and bombardments,

"all necessary steps must be taken to spare, as far as possible, buildings dedicated to art, science, or charitable purposes, hospitals, and places where the sick and wounded are collected provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings by distinctive and visible signs to be communicated to the enemy beforehand.". [133]

In the same way, the same principle establishing the duty of preserving cultural, religious and historic monuments and sites in the event of hostilities is repeated in an almost literal manner in the Oxford Manual on Land Warfare, adopted in 1880 by the *Institut de droit international* to "codify the accepted ideas of our age so far as this has appeared allowable and practicable" with regard to international conflicts.[134] At its art. 34, the Oxford Manual recalls the necessity, in case of bombardments, of taking

[130] Lieber Code, art. 34. The "Lieber Instructions" ("Lieber Code", see *supra*) represent the first attempt to codify the laws of war. They were prepared during the American Civil War by Francis Lieber, then a professor of Columbia College in New York, revised by a board of officers and promulgated by President Lincoln. Although they were binding only on the forces of the United States, they correspond to a great extend to the laws and customs of war existing at that time. The Lieber Code has strongly influenced the further codification of the laws of war. In particular, it formed the origin of the project of an international convention on the laws of war presented to the Brussels Conference in 1874 and stimulated the adoption of the Hague Conventions on land warfare of 1899 and 1907.

[131] On the initiative of Czar Alexander II of Russia, the delegates of 15 European States met in Brussels on 27 July 1874 to examine the draft of an international agreement concerning the laws and customs of war submitted to them by the Russian Government.

[132] In the context of the negotiations, not all the governments were willing to accept it as a binding convention, so the Brussels Declaration has non-binding nature. Nevertheless, the project formed an important step in the movement for the codification of the laws of war.

[133] Brussels Declaration, art. 17. See also Brussels Declaration, art. 8, which establishes: "The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences even when State property, shall be treated as private property. All seizure or destruction of, or wilful damage to, institutions of this character, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities.".

[134] "A positive set of rules, on the contrary, if they are judicious, serves the interests of belligerents and is far from hindering them, since by preventing the unchaining of passion and savage instincts - which battle always awakens, as much as it awakens courage and manly virtues, - it strengthens the discipline which is the strength of armies; it also ennobles their patriotic mission in the eyes of the soldiers by keeping them within the limits of respect due to the rights of humanity.[…] It is essential, too, that they make these laws known among all people, so that when a war is declared,

"all necessary steps […] to spare, if it can be done, buildings dedicated to religion, art, science and charitable purposes, hospitals and places where the sick and wounded are gathered on the condition that they are not being utilized at the time, directly or indirectly, for defense. It is the duty of the besieged to indicate the presence of such buildings by visible signs notified to the assailant beforehand.".[135]

In the same way, as established by art. 53,

"The property of municipalities, and that of institutions devoted to religion, charity, education, art and science, cannot be seized. All destruction or wilful damage to institutions of this character, historic monuments, archives, works of art, or science, is formally forbidden, save when urgently demanded by military necessity.". [136]

Reiterated in the above-mentioned non-binding documents, such principle according to which, in the event of armed conflicts, belligerent parts have the obligation to safeguard the historic, artistic, and cultural elements at risk in the territories of the concerned States has been recognized as a binding rule in occasion of the Peace Conferences of 1899 and 1907. Precisely, a general rule concerning the protection of cultural items in the event of hostilities is established by art. 27 the Regulations annexed to the II Hague Convention on War on Land (1899), according to which

"In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes. The besieged should indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants.". [137]

The same principle is reiterated in art. 27 of the following Regulations annexed to the IV Hague Convention on War on Land (1907), [138] which recalls, at its art. 56, how

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the men called upon to take up arms to defend the causes of the belligerent States, may be thoroughly impregnated with the special rights and duties attached to the execution of such a command." Oxford Manual on Land Warfare ("Oxford Manual"), preface.

[135] Oxford Manual, art. 34.

[136] Oxford Manual, art. 53.

[137] Regulations annexed to the II Hague Convention on War on Land (adopted in The Hague, 1899), art. 27.

[138] "In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.
It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which

"All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings."

in reason of the fact that "The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.". [139]

In the same way, another relevant document adopted by the international community in the aim of safeguarding the cultural heritage possibly endangered in conflicts can be identified in the Roerich Pact, adopted in 1935 in the context of the Pan-American Union.[140] Set up with the objective of

"preserv[ing] in any time of danger all nationally and privately owned immovable monuments which form the cultural treasure of peoples, [and] in view and to the effect that the treasures of culture be respected and protected in time of war and in peace,", [141]

the treaty establishes a duty pending on its States Parties[142] to respect and protect, both in peace time and in war,

"The historic monuments, museums, scientific, artistic, educational and cultural institutions", as well as "the personnel of the institutions mentioned above", [143]

as long as these monuments and institutions are neutral to the conflict, being they susceptible "to cease to enjoy the privileges recognized in the present Treaty in case they are made use of for military purposes.". [144]

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shall be notified to the enemy beforehand." Regulations annexed to the IV Hague Convention on war on land (adopted in The Hague, 1907), art. 27.

[139] Regulations annexed to the IV Hague Convention on war on land (adopted in The Hague, 1907), art. 56.

[140] Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments ("Roerich Pact"). Adopted in Washington, 15 April 1935. For an analysis of the Roerich Pact, see K. Dormann, 'The Protection of Cultural Property as Laid Down in the Roerich Pact of 15 April 1935' (1993), in Humanitäres Völkerrecht, vol. 6.

[141] Roerich Pact, preamble.

[142] The States Parties and the States Signatories of the Roerich Pact are available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=EE57F295093E44A4C12563CD002D6A3F&action=openDocument. Last visit 4 October 2022.

[143] Roerich Pact, art. 1.

[144] Roerich Pact, art. 5.

As it has been remarked in doctrine, the central assumption underpinning these documents is the necessity of finding a balance between the doctrine of military necessity, core principle of international humanitarian law, and the duty of safeguarding the cultural property of nations put at risk by the hostilities.[145] At the heart of the afore-cited rules, such obligation of finding an adequate balance between cultural heritage protection and military necessity imperatives has emerged, from the practice, notably in the context of World War II. Remarkably, such concept has been recalled by the American General Dwight D. Eisenhower[146] in the Italian campaign, in the context of which he reminds his troops the duty of preserving cultural monuments and sites which "by their creation helped and now in their old age illustrate the growth of the civilization which is ours".[147] In the same way, the need to find a balance between cultural heritage protection and the conduct of military activities has been recognized by the English diplomat Sir Harold Nicholson,[148] known for his courageous and counter-current opinion on the issue. As it emerges from an article published in 1944, Sir Nicholson declares its disagreement to the majoritarian doctrine and practice about cultural heritage protection in the event of warfare, stating that in case of "works of major artistic value, […] it is absolutely desirable that such works should be preserved from destruction, even if their preservation entails the sacrifice of human lives".[149]

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[145] On the principle of military necessity in humanitarian law, see among others Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, 2004); Colonel G. I. A. D. Draper, 'Military Necessity and Humanitarian Imperatives' (1973), 129 *Military Law and Law of War Review* 51; Anthony Dworkin, 'Military Necessity and Due Process: The Place of Human Rights in the War on Terror' in David Wippman and Matthew Evangelista (ed. by), *New Wars, New Laws?*, (Transnational, 2004); Jean-Marie Henckaerts and Louise Doswald-Beck (ed. by), *Customary International Law*, vol. 1, *The Rules* (Cambridge University Press, 2005), part 1; International Criminal Tribunal for the Former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia* , 8 June 2000, available at https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal last visit 4 October 2022; Eric Jaworski, 'Military Necessity and Civilian Immunity: Where Is the Balance?' in Yee Sienho (ed. by), *International Crime and Punishment, Selected Issues* , vol. 2 (University Press of America, 2004); Hilaire Mac Coubrey, 'The Nature of the Modern Doctrine in Military Necessity' (1991), 251 *Military Law and Law of War Review* 52 and Frederic de Mulinen, *Handbook on the Law of War for Armed Forces* (ICRC, 1989).

[146] Denison, 1890 – Washington, 1969. On the principle of military necessity and cultural heritage law, see Berenika Drazewska, *Military Necessity in International Cultural Heritage Law* (Brill Nijhoff, 2022) and Gabriella Venturini, 'La necessità militare e la protezione dei beni culturali', in Paolo Benvenuti and Rosario Sapienza (ed. by), *La Tutela Internazionale dei Beni Culturali nei Conflitti Armati* (Giuffré, 2007).

[147] "Today we are fighting in a country which has contributed a great deal to our cultural inheritance, a country rich in monuments which by their creation helped and now in their old age illustrate the growth of the civilization which is ours. We are bound to respect those monuments as far as war allows. If we have to choose between destroying a famous building and sacrificing our own men, then our men's lives count infinitely more, and the buildings must go. But the choice is not always so clear-cut as that. In many cases monuments can be spared without any detriment to operational needs […]". This passage is mentioned in John Henry Merryman, 'Two Ways of Thinking about Cultural Property' (1986) *American Journal of International Law*, 839.

[148] Teheran, 1886 – Kent, 1968.

[149] "[…] My attitude would be governed by a principle which is surely incontrovertible. The irreplaceable is more important than the replaceable, and the loss of even the most valued human life is ultimately less disastrous than the loss of something which in no circumstances can ever be created again", Sir Harold Nicolson, 'Marginal Comments', *Spectator*, 25 February 1944. The passage is mentioned in John Henry Merryman, *supra*.

Progressively gaining relevance in the international practice, the existence of a general obligation of protecting the cultural property endangered in the territories of the States involved in the conflict has been reiterated by the international community in the aftermath of World War II. As for the expressions of such an acknowledgement, some authors have observed how the necessity of protecting worldwide cultural heritage in reason of the interconnection between cultural dialogue and peace underpins the provisions of the United Nations Charter. Likewise, appears as a confirmation of such an approach the inclusion of the necessity of protecting cultural heritage at risk within the scope of the 1949 Geneva Conventions[150] which represent, together with their two Additional Protocols,[151] the referential treaty of modern humanitarian law. Seeking the protection of people not taking part in the hostilities (civilians, health workers and aid workers) and those who are no longer participating in the hostilities, such as wounded, sick and shipwrecked soldiers and prisoners of war, precisely, the Conventions contain certain provisions dedicated to cultural heritage. In particular, art. 53 of Additional Protocol I specifies the prohibition of

"commit[ting] any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; [using] such objects in support of the military effort [or making them] the object of reprisals.".[152]

Likewise, art. 16 of Additional Protocol II establishes the prohibition of committing

"any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort".[153]

I.2.ii. The role of UNESCO in the international protection of cultural heritage in times of war and the UNESCO 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflicts

In view of the above-mentioned norm-set, it is indeed in this context that UNESCO, in the aftermath of the massive destruction of cultural property carried out in World War II takes its initiative,

[150] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Convention (III) relative to the Treatment of Prisoners of War, Convention (IV) relative to the Protection of Civilian Persons in Time of War ("Geneva Conventions"). Adopted in Geneva, 12 August 1949.
[151] Adopted in Geneva, 8 June 1977.
[152] Additional Protocol I, art. 53.
[153] Additional Protocol II, art. 16.

becoming the leading actor in the global action for the worldwide protection of cultural heritage in the event of armed conflict. As it has been recognized in doctrine, the adoption by the organization, since the early 1950s, of a series international conventions, recommendations, and declarations, has led to a significative development of the international law framework for the protection of cultural heritage and, notably, for its safeguard in the event of war.[154]

In particular, the referential UNESCO treaty for the international protection of the cultural heritage endangered by the consequences of war is the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict. Adopted in the Hague in 1954, the treaty entered into force two years later and it has been integrated with its two Additional Protocols of, respectively, 1954 and 1999.[155] Representing the first and only international treaty entirely dedicated to the protection of cultural heritage in the event of armed conflicts, the Hague Convention represents the highest expression of the common will of the international community of strengthening their cooperation towards the protection of the cultural heritage of States possibly put at risk by warfare scenarios. As it is stated in its preamble, the adoption of the Hague Convention finds its motivation in the recognition of the grave damages suffered by cultural goods and sites and sites in the event of recent armed conflicts which, as it comes clear from the experience of World War II, may provoke massive destruction of these items. On this basis, States Parties acknowledge that the necessity of preserving cultural heritage in the event of war counts as a matter of collective interest for the international community,[156] being a damage to cultural property belonging to any people whatsoever [a] damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world". For this reason, guided by the international pre-existing framework concerning the protection of cultural heritage during armed conflict as referred to in the previous paragraph, States declare themselves "determined to take all possible steps to protect cultural property", being convinced that "the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection".[157]

Saluted by part of the doctrine as a relevant example of 'cultural internationalism',[158] the Hague Convention represents the first significative UNESCO document establishing the existence on an

[154] Francesco Francioni, *supra* p. 9. See also Rosario Sapienza, 'I meccanismi e strumenti per l'esecuzione delle Convenzioni sulla tutela dei beni culturali e il ruolo dell'UNESCO', in Paolo Benvenuti and Rosario Sapienza (ed. by), *La Tutela Internazionale dei Beni Culturali nei Conflitti Armati* (Giuffré, 2007).

[155] Adopted in The Hague, 14 May 1954, and entered into force on 7 August 1956, ("Hague Convention"). The Hague Convention has been integrated with the adoption of two Additional Protocols. Respectively, Protocol Additional to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict ("Additional Protocol I"), adopted in The Hague, 14 May 1954, and Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict ("Additional Protocol II"), adopted in The Hague, 26 March 1999.

[156] See *infra*.

[157] Hague Convention, preamble.

[158] See John Henry Merryman, *supra*.

obligation pending on its States Parties towards the preservation of the cultural heritage of peoples which, in the event of armed conflict, might be jeopardized by the consequences of the developments in warfare techniques and strategies.[159] In this sense, the treaty represents one of the first significant expressions of the existence of a collective interest shared among UNESCO towards the protection of the cultural heritage of States Parties, such as to lead national authorities to undertake, under the aegis of the organization, all the necessary duties to the protection of such property. This, consequentially, arguably restricting, for the scope of these obligations, their sovereignty in the cultural field.[160] As it is stated in the preamble, the Hague Convention finds its justification in the collective awareness shared by States Parties that, in case of armed conflict, the national protection ensured to cultural heritage in times of peace is not enough to face the jeopardization of such property. For this reason, the treaty acknowledges the necessity of establishing an international mechanism for the protection of cultural goods endangered in warfare, in the name of the importance of these items for the whole humanity.

With regard to the scope of such international protection, art. 2 of the Hague Convention specifies that, for the purposes of the treaty, the protection of cultural heritage shall be intended as comprising both "the safeguard" and "the respect" of such cultural items.[161] Concerning the former, the treaty requires its contracting Parties "to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict", by taking all the measures they consider appropriate.[162] With regard to the latter, art. 4 para. 1 of the Hague Convention establishes that

"The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property.".[163]

Furthermore, in a rather inter-State oriented perspective, art. 4 requires States Parties to prohibit, prevent and contrast any form of theft, pillage, misappropriation, and vandalism directed against the

[159] "Recognizing that cultural property has suffered grave damage during recent armed conflicts and that, by reason of the developments in the technique of warfare, it is in increasing danger of destruction;" Hague Convention, preamble.
[160] See Tullio Scovazzi, 'Considérations préliminaires. I. La notion de patrimoine culturel de l'humanité en tant qu'expression d'un intérêt collectif des États', in Tullio Scovazzi, *supra*.
[161] Hague Convention, art. 2.
[162] Hague Convention, art. 3.
[163] Hague Convention, art. 4 para. 1.

cultural heritage in question, and it asks them to refrain from any requisition or reprisals directed against movable cultural property situated in the territory of other States Parties.[164]

The general obligation of respecting and safeguarding endangered cultural heritage such as it is expressed in art. 4 of the Hague Convention is indeed enriched by other disposition of the treaty. Precisely, art. 7 and art. 8 of Additional Protocol II oblige States Parties to take all feasible precautions to avoid and minimize incidental damages to cultural heritage (art. 7), notably by refraining to locate military objectives near cultural property (art. 8).[165] In addition to that, the Hague Convention foresees, notably at its art. 5, at art. 4 of Additional Protocol I and at art. 9 of Additional Protocol II, some rules concerning the protection of the cultural heritage situated in the occupied territory, specifying how such property needs to be protected also by the means of the international cooperation among belligerents.[166]

Saluted by the international community as one of the corner stones of the international norm-set for the global protection of cultural heritage, the Hague Convention has been appraised, notably, for its capacity to determine a certain balance between the necessity of protecting endangered cultural heritage in the event of armed conflict and the imperative of military necessity.[167] As it has been stated above, art. 4 of the treaty establishes the duty pending on States Parties towards the respect of the cultural property situated in their territories, and towards the refrain from misuse, abuse or hostility directed against such property. Nevertheless, para. 2 of the article specifies that such duties apply only in those cases in which military necessity does not imperatively require a waiver of such obligation.[168] In addition to that, the Hague Convention fixes two other limits to the application of the principle of military necessity at art. 6 of its Additional Protocol II, which specifies how States may waive from their general duty of protecting endangered cultural property on the basis of imperative military necessity, pursuant to art. 4 para. 2 of the Hague Convention, only in the hypothesis in which "i) that cultural property has, by its function, been made into a military objective; and ii) there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective;" and, in any case, "as long as no choice is

[164] Hague Convention, art. 4 paras 3 and 4.
[165] Additional Protocol II, arts. 7 and 8.
[166] "1. Any High Contracting Party in occupation of the whole or part of the territory of another High Contracting Party shall as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property. 2. Should it prove necessary to take measures to preserve cultural property situated in occupied territory and damaged by military operations, and should the competent national authorities be unable to take such measures, the Occupying Power shall, as far as possible, and in close co-operation with such authorities, take the most necessary measures of preservation […]" Hague Convention, art. 5.
[167] Tullio Scovazzi, 'La protection des biens culturels en cas de conflit armé', in Tullio Scovazzi, *Le patrimoine culturel de l'humanité*, Centre d'étude et de recherche de droit international et de relations internationales, Académie de droit international de La Haye, 2005.
[168] "The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver." Hague Convention, art. 4 para. 2.

possible between such use of the cultural property and another feasible method for obtaining [the necessary] military advantage".[169] Likewise, the Hague Convention precises that, in the hypothesis of "cultural heritage of the greatest importance for humanity"[170], the threshold of applicability for the principle of military necessity is raised from "imperative" to "ineluctable", as established by art. 11 of the Hague Convention and art. 13 of Additional Protocol II.[171]

I.2.iii. The customary nature of the prohibition of destroying the cultural heritage of States in the event of armed conflict and the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court

Welcomed by the international community as the first and most significant UNESCO tool to strengthen the cooperation among States towards the protection of cultural heritage in times of war, the provisions of Hague Convention have been acknowledged, since their adoption, as norms of customary nature. As it has been remarked in doctrine,[172] this, precisely, in reason of the highest number of ratifications obtained by the Hague Convention and by its Additional Protocol I, [173] as well as of the reference to its provisions contained within the Additional Protocols to the Geneva Conventions – which represent, in the field of modern international humanitarian law, the referential norm-set.[174]

Precisely, at its art. 53 Additional Protocol I to the Geneva Convention[175] establishes, "Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954", the prohibition of committing acts of hostility directed

[169] Additional Protocol II, art. 6.
[170] Additional Protocol II, art. 10.
[171] "1. Cultural property under enhanced protection shall only lose such protection […] if, and for as long as, the property has, by its use, become a military objective." In these circumstances, "such property may only be the object of attack if: a. the attack is the only feasible means of terminating the use of the property [as military objective]; b. all feasible precautions are taken in the choice of means and methods of attack, with a view to terminating such use and avoiding, or in any event minimising, damage to the cultural property; c. unless circumstances do not permit, due to requirements of immediate self-defence: i. the attack is ordered at the highest operational level of command; ii. effective advance warning is issued to the opposing forces requiring the termination of the use [as military objective]; and iii. reasonable time is given to the opposing forces to redress the situation." Additional Protocol II, art. 13.
[172] See Tullio Scovazzi, *supra*.
[173] At October 2022, the Hague Convention counts 133 States Parties, Additional Protocol I counts 101 States Parties and Additional Protocol II counts 86 States Parties. As they are not voting members of UNESCO, the Holy See, Liechtenstein, Israel and the United States are not included in the list of the States Parties, even if they all have acceded to the Hague Convention, the Holy See, Liechtenstein and Israel have accessed to Additional Protocol I and Liechtenstein has acceded to Additional Protocol II. See https://en.unesco.org/protecting-heritage/convention-and-protocols/states-parties, last access 7 October 2022.
[174] See Francesco Francioni, 'The Evolving Framework for the Protection of Cultural Heritage in International Law', in Silvia Borelli and Federico Lenzerini (ed. by), *Cultural Heritage, Cultural Rights, Cultural Diversity* (Brill Nijhoff, 2012), p. 8.
[175] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts ("Additional Protocol I to the Geneva Conventions"). Adopted in Geneva, 8 June 1977.

against the historic monuments and works of art constituting "the cultural or spiritual heritage of peoples", as well as of using such objects in support of the military effort or as object of reprisals.[176] In the same way, the customary nature of the Hague Convention provisions has been recalled by the International Criminal Tribunal for the Former Yugoslavia[177] in the case *Prosecutor v. Tadič.*[178] In detail, at its paragraph 98, the judgment recalls how

"the emergence of international rules governing strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallized, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This […] also applies to art. 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954[179] […]".[180]

In the light of the above, it is important to remark the significant role played by the international criminal tribunals and notably by the ICTY in the process of crystallization of the customary norms regarding the protection of cultural heritage in the event of armed conflict as also entailed in the dispositions of the Hague Convention.[181]

Established in 1993 with the objective of investing, prosecuting, and punishing the responsible for the reiterated violations of international law carried out in the context of the Balkan conflict, the ICTY had the occasion to express itself also on the acts of damage and destruction committed against the cultural heritage of the concerned populations during the conflict. This, notably, in the light of the provisions of the Hague Convention, as well as of the current international framework for the protection of cultural heritage endangered in the event of warfare. In particular, the ICTY considered the issue of the destruction of cultural heritage in the event of armed conflict in the cases *Blaskič*,[182]

[176] Additional Protocol I to the Geneva Conventions, art. 53.
[177] UN. Doc. S/RES/827 (1993), 25 May 1993. ("ICTY"). On the ICTY, see among others Giuseppe Nesi, 'Consiglio di Sicurezza e Giustizia Penale Internazionale', in occasion of 'Diritto Internazionale e Valori Umanitari: Giornata di Studio in Onore di Paolo Benvenuti', University of Roma Tre, 19 December 2017.
[178] ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1, Trial Chamber I, 9 October 1995.
[179] "In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as, a minimum, the provisions of the present Convention which relate to respect for cultural property" Art. 29 para. 1, Hague Convention.
[180] ICTY, *Prosecutor v. Tadic*, para. 98.
[181] See Micaela Frulli, 'The Criminalization of Offenses against Cultural Heritage in Times of Armed Conflict: the Quest for Consistency' (2011), 22 The European Journal of International Law 1; see also Lea Brilmayer and Geoffrey Chepiga, 'Ownership of Use? Civilian Property Interests in International Humanitarian Law' (2008) 49 Harvard International Law Journal 2.
[182] ICTY, *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Trial Chamber I, 3 March 2000.

Kordič and Cerkez,[183] and *Jokič and Strugar.*[184] In this context, the judges had to consider the destruction of the *Viječnica*, the Old City Hall of Sarajevo built in in 1896, and the bombing and pillage of the Old City of Dubrovnik,[185] as well as the cultural cleansing strategy put in place by the responsible of those acts with the objective of annihilating the subjected population.

This, notably, in the light of art. 3 lett. d) and art. 5 of the ICTY Statute[186] which establish that the "seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science" may amount, in the event of armed conflict, both as a war crime[187] and as a crime against humanity[188], depending on the circumstances in which they are carried out and on the *mens rea* of the perpetrator.

About the classification of the attacks against cultural property as war crime or crimes against humanity, many words have been spent in doctrine in the aim of finding out a clear line of demarcation to classify the acts committed against the cultural heritage of peoples, in the event of an armed conflict. This, in particular, with regard to the warfare circumstances affecting the Balkans in the 1990s, in the context of which the massive destruction of goods and sites with a cultural value for the concerned populations have been recognized by the ICTY as part of the warfare strategies of the belligerents. In particular, several debates have been raised by doctrine notably about the qualification of the individual responsibility of the perpetrators of such acts. Acknowledged as acts of "willful damage done to [historic monuments and institutions]", those actions have been recognized as amounting as war crimes pursuant to art. 3 lett. d) of the ICTY Statute. Furthermore, as it has been suggested by some authors and confirmed by the ICTY notably in the *Tadič* case, in several circumstances the intentional destruction of cultural heritage *in situ* has been carried out, in the warfare scenario of the Balkans, as part of a "widespread and systematic attack directed against any civilian population", consequentially amounting as a crime against humanity pursuant to art. 5 of the ICTY Statute.[189] As it has been suggested by some authors, in fact, the intentional destruction of cultural heritage carried out, in the context of warfare, with the specific intent of annihilating the

[183] ICTY, *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-A, Appeals Chamber, 17 December 2004.
[184] ICTY, *Prosecutor v. Jokic and Strugar*, Case No. IT-01-42-1, Trial Chamber I, 18 March 2004.
[185] See Marc Balcells, 'Left Behind? Cultural Destruction, the Role of the International Criminal Tribunal for the Former Yugoslavia in Deterring it and Cultural Heritage Prevention Policies in Aftermath of the Balkan Wars' (2015) 21 *European Journal of Criminal Policy and Research* 1.
[186] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, as amended 7 July 2009. UN. Doc. S/RES/1877(2009).
[187] ICTY Statute, art.3 lett. d).
[188] ICTY Statute, art. 5.
[189] See, among others, Mauro Politi, 'La Responsabilità Penale Individuale per Violazione degli Obblighi Posti a Tutela dei Beni Culturali in Tempo di Conflitto Armato' in Paolo Benvenuti and Rosario Sapienza (ed. by), *La Tutela Internazionale dei Beni Culturali nei Conflitti Armati* (Giuffré, 2007); Micaela Frulli, 'Advancing the Protection of Cultural Property through the Implementation of Individual Criminal Responsibility: the Case-Law of the International Criminal Tribunal for the Former Yugoslavia' (2005) 15 *Italian Yearbook of International Law.*

concerned population by the complete eradication of its cultural tradition present some prerogatives such as to amount as a "crime against humanity", as established by art. 5 of the ICTY Statute.

In this context, several authors have suggested how, when carried out with persecutory intent, these acts may amount as expressions of 'cultural genocide' to be punished by the means of international law. However, such suggestion has not been completely recognized by the international community which, even contemplating the possible presence of a series of genocidal circumstances including the affection of the cultural component of the concerned population, appears as rather cautious in recognizing the existence of such classification.[190]

Likewise, the customary nature of the norms contained in the Hague Convention and the amount of the attacks carried out against cultural heritage during conflicts as was crimes has been acknowledged by the International Criminal Court ("ICC")[191], notably, in the recent *Al Mahdi* case[192]. Competent to judge the intentional attacks carried out against 10 buildings of historical and religious character in Timbuktu[193] in the context of the wider subjugation campaign carried out by the terrorist group Ansar Dine in Mali,[194] the ICC has condemned the attacks carried out against such cultural heritage as war crimes. This, pursuant to art. 8 paragraph 2 lett. e (iv) of the ICC Statute, which establishes that, for the purpose of the statute, "[intentional] attacks against buildings dedicated to religion, education, art, science or […] historic monuments" may amount as a war crime, if committed in the wider context of an armed conflict[195]. Also in this context, the ICC judges had the occasion to stress on the

[190] It is important to note that neither the ICTY Statute neither the ICTY has never mentioned the notion of 'cultural genocide'. Nevertheless, some authors have suggested how there might be situations in which the systematic and widespread intentional destruction of cultural heritage, expressions and diversity may be carried out with a genocidaire intent. On this point, see Micaela Frulli, 'Distruzione dei Beni Culturali e Crimine di Genocidio: l'Evoluzione della Giurisprudenza del Tribunale Penale Internazionale per la ex Jugoslavia', Paolo Benvenuti and Rosario Sapienza (ed. by), *La Tutela Internazionale dei Beni Culturali nei Conflitti Armati* (Giuffré, 2007); Flavia Lattanzi, 'Alcune Riflessioni in merito alle Sentenze nei Casi Karadžić e Mladić', in occasion of 'Diritto Internazionale e Valori Umanitari: Giornata di Studio in Onore di Paolo Benvenuti', University of Roma Tre, 19 December 2017, and Micaela 'Are Crimes Against Humanity More Serious than War Crimes?' (2001) 12 *European Journal of International Law* 2.

[191] Rome Statute of the International Criminal Court ("Rome Statute"). Adopted in Rome, 17 July 1998, entered into force 1 July 2002.

[192] ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, Trial Chamber VIII, 27 September 2016.

[193] The attacks have been carried out between 30 June and 11 July 2012.

[194] The terrorist group of Ansar Dine represents an extremist fringe of the AQIM – Al Qaeda in Maghreb – armed group. On the Al Mahdi case, see among others Federica Mucci, 'Short and Quickly Delivered, yet Quite Full of Meaning: the International Criminal Court Judgment about the Intentional Destruction of Cultural Heritage in Timbuktu' (2016) 8 *Italian Journal of Public Law* 2; Ida Caracciolo, 'Il Caso Al Mahdi: Responsabilità Penale Internazionale per Crimini di Guerra e Distruzione Intenzionale del Patrimonio Culturale' in Ennio Triggiani, Francesco Cherubini, Ivan Ingravallo (ed. by), *Dialoghi con Ugo Villani* (Cacucci editore, 2017); Tullio Scovazzi, 'La Prima Sentenza della Corte Penale Internazionale in tema di Distruzione di Beni Culturali' (2017) 11 *Diritti Umani e Diritto Internazionale* 1; Pierfrancesco Rossi, 'The Al-Mahdi Trial before the International Criminal Court: Attacks on Cultural Heritage between War Crimes and Crimes against Humanity' (2017) 11 *Diritti Umani e Diritto Internazionale* 1 and Paige Casaly, 'Al Mahdi before the ICC. Cultural Property and World Heritage in International Criminal Law' (2016), 14 *Journal of International Criminal Justice*.

[195] ICC Statute, art. 8. See *Referral letter of the Malian Minister of Justice to the ICC Prosecutor*, available at www.icc-cpi.int/nr/rdonlyres/a245a47f-bfd1-45b6-891c- 3bcb5b173f57/0/referrallettermali130712.pdf. Last access 31 October 2022.

customary nature of the norm ruling the international protection of cultural heritage in the event of armed conflict, specifying how the destruction of monuments, historic buildings and pieces of art is prohibited by the means of general international law since the XX century and how such prohibition is entailed, notably, in the dispositions of the Hague Convention and its Additional Protocols.[196]
Although not exempted from some criticisms raised by part of the doctrine, notably, in reason of its rather unclear definitory criteria for 'cultural property'[197] and for its 'multi-nuanced' protection mechanism for the protection of the cultural heritage of States Parties[198], the Hague Convention has been acknowledged by the international community as a rather significative tool in the UNESCO norm-set for the protection of cultural heritage of peoples.

I.2.iv. The international protection of cultural heritage in times of peace. The UNESCO World Heritage Convention and the safeguard and conservation of "the cultural heritage of mankind"

As it has emerged from the above paragraphs, the international community has progressively recognized, between the decades, the existence of an international obligation, pending on States, to protect and safeguard all the cultural heritage of peoples involved in the event of an armed conflict. Established, notably, by the UNESCO Hague Convention and its Additional Protocols, such norm has been recognized by the international jurisprudence of the ICTY and the ICC, and it is nowadays accepted as an international obligation of customary nature.
For what it concerns, contrarily, the worldwide protection of cultural heritage in times of peace, it appears how the awareness on the matter has raised rather later in the international community. As it has been anticipated before, in fact, the traditional global framework for the protection of cultural heritage used to recognize, as major causes of decay, the consequences of warfare and criminal conducts of individuals or groups. Conversely, rather less importance was conferred to the protection of the cultural heritage of States in peace time, in the context of which, traditionally, the primary

[196] ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, para. 14.
[197] See supra paragraph II.
[198] As highlighted in doctrine, art. 4 of the Hague Convention confers an 'ordinary' protection to the cultural heritage situated in the territories of States Parties, while art. 8 and art. 10 of Additional Protocol II reinforce the international protection for selected items of cultural property conferring, respectively, a 'special protection' and an 'enhanced protection' to those items – inscribed in an ad hoc list by a specific Committee elected pursuant to art. 24 and following of Additional Protocol II. For an insight of the 'ordinary' and 'special' protection mechanisms of cultural heritage established by the Hague Convention and Additional Protocol II, see among others Edoardo Greppi, *supra*, Andrea Gioia, 'La protezione speciale e rafforzata dei beni culturali nei conflitti armati: dalla Convenzione del 1954 al Protocollo del 1999', Vittorio Mainetti, 'Violazioni gravi e obbligo di "ingerenza culturale". Brevi osservazioni intorno all'art. 31 del Secondo Protocollo', Roberto Belilelli, 'L'attuazione degli obblighi previsti dal Secondo Protocollo del 1999 nella legislazione italiana' and Luigi Condorelli, 'Conclusioni generali' in Paolo Benvenuti and Rosario Sapienza (ed. by), *La Tutela Internazionale dei Beni Culturali nei Conflitti Armati* (Giuffré, 2007). See also Kevin Chamberlain, *War and Cultural Heritage: An Analysis of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and Its Two Protocols* (Leicester, 2004).

competence on monuments and sites *in situ* was conferred to national authorities, entitled to determine their fate upon their own discretion and in virtue of their acknowledged primary interest on such cultural goods.

In this context, as exposed in the previous paragraphs, the first UNESCO instrument showing the progressive acknowledgement of the necessity, recognized by States Parties, to preserve their cultural items from looting and theft – this, even, by waiving part of their sovereignty in the field – is the UNESCO 1970 Convention on the prohibition of illicit trafficking. Recalling the importance of strengthening the cooperation among States Parties towards the fighting against the illicit import and export of cultural goods, the treaty and, notably, its art. 5 and followings, establish a series of obligations pending on States towards the protection of their cultural goods, with the aim of ensuring to these items effective international protection. In this sense, States acknowledge the necessity of becoming "increasingly alive to the moral obligation" towards the protection of their national cultural property from theft, clandestine excavation, and illicit export, and undertake to set up within their territories a series of measures, "as appropriate for each country", for the protection of cultural goods.[199]

Two years later, a corresponding necessity of protecting worldwide cultural heritage, even in the absence of armed conflicts, by global phenomena possibly affecting its conservation, has been reiterated by UNESCO. This, notably, with the adoption in 1972 of the World Heritage Convention, which consists, as it has been anticipated, the UNESCO referential norm-set for the protection of the cultural heritage of the peoples of all over the world. Conceived in the context of the safeguarding campaign launched by UNESCO to preserve the Abu Simbel temple from the construction of the Aswan High Dam in Egypt, the World Heritage Convention counts, at the current time, the highest number of ratifications within the international community. For this reason, it is considered the core of the global framework for cultural heritage preservation in times of peace.[200]

With regard to its objective, the World Heritage Convention states in its preamble the necessity of "establishing an effective system of collective protection of the cultural and natural heritage […] organized on a permanent basis and in accordance with modern scientific methods", notably in the light of the core provisions of the UNESCO Constitution.[201] This, considering how the protection of cultural heritage at the national level often remains incomplete because of the insufficient economic,

[199] UNESCO 1970 Convention, preamble and art. 55 and followings. A further analysis of the regime established by the UNESCO 1970 Convention goes beyond the scope of the present research.

[200] As of October 2020, the World Heritage Convention counts 194 ratifications. The list of States Parties to the World Heritage Convention is available at https://whc.unesco.org/en/statesparties/. Last visit 10 October 2022.

[201] "Recalling that the Constitution of the Organization provides that it will maintain, increase, and diffuse knowledge by assuring the conservation and protection of the world's heritage and recommending to the nations concerned the necessary international conventions", World Heritage Convention, preamble.

scientific, and technological resources of the country where this property is situated, and in the light of the new threats to cultural heritage coming as a consequence of the evolving social and economic conditions of the world. As it has been recalled by UNESCO Former General-Director in occasion of the 40th anniversary of the Convention, indeed, the World Heritage Convention arises from the necessity to strengthen the international cooperation towards the protection of cultural property in face of worldwide phenomena like globalization, mundialization and, notably, cultural homologation.[202]

In this sense, the World Heritage Convention has been conceived by UNESCO as a global tool for the protection of the cultural and natural heritage of the world, by the granting of collective assistance to those concerned States which might find their cultural heritage endangered, even in absence of war, by several causes of decay.[203]

Grounded on such premise, the World Heritage Convention establishes an international framework for the protection and safeguard of the cultural heritage of its States Parties, and it dedicates to such norm-set the dispositions of its Chapter II. Applicable both to the national and international protection of cultural and natural goods and sites, Chapter II refers directly to States Parties, identified as the primary responsible for the conservation and safeguard of the cultural and natural heritage situated on their territory. Such assumption has an important role in terms of implementation of the treaty. As it has been highlighted in doctrine, in fact, Chapter II represents the core of the World Heritage Convention from both a legal and policy-making perspective, as it embodies in legal provisions what the drafters of the treaty felt the proper legal consequences of the specific scope and objective of the World Heritage Convention should be.

About the structure of the treaty, the first duties pending on States Parties are specified in art. 4, which establishes that

"Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory,[204] belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with

[202] See the Report Celebrating the 40 years of the World Heritage Convention, Proceedings, Closing event of the celebration of the 40th anniversary, Japan, November 2012. See also Lynn Meskell, 'UNESCO's World Heritage Convention at 40. Challenging the Economic and Political Order of International Heritage Conservation' (2013) 54 *Current Anthropology* 4.

[203] "Considering that the existing international conventions, recommendations and resolutions concerning cultural and natural property demonstrate the importance, for all the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong," World Heritage Convention, preamble.

[204] See *supra*, paragraph I.1.

any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain."[205]

As a remark to such provision, it is important to note that, concerning the effective implementation of the obligations pending on States Parties, the World Heritage Convention does not provide, in itself,[206] further clarifications concerning the modalities that States Parties need to adapt to carry them out. On the contrary, some authors have highlighted how States are left free to determine by themselves the pace of achievement for the identification, protection, conservation and transmission to future generations of their national cultural heritage, depending on the several economic, geographic, demographic and historic characteristics of the given territory.[207] Conversely, it is worth noting how a limit to such autonomy of States Parties is established by the WHC at its art. 5, which establishes a set of minimal basic actions and measures that each State shall endeavor to take to ensure the protection, conservation and presentation of the cultural and natural heritage on its territory. In detail, this norm establishes that each State Party to the World Heritage Convention shall adopt general policies aiming at giving cultural and natural heritage a central and integrated function in the life of the communities. To this end, States shall set-up specific services for the protection, conservation, and presentation of heritage, and adopt *ad hoc* scientific, technical, and operating methods – as well as legal, administrative and financial measures – for the identification, protection, conservation, presentation and rehabilitation of national heritage.[208]

[205] World Heritage Convention, art. 4. On the applicability of this provision, some authors have remarked that, in the hypothesis in which duties similar to the ones established under art. 4 of the treaty are already part of the domestic legislations of the concerned States, art. 4 would apply to heritage as defined in the World Heritage Convention (pursuant to arts. 1 and 2), while the pre-existing legislation would remain generally applicable to other heritage, not qualified as of "outstanding universal value" (see *infra*, Chapter II). Guido Carducci, Articles 4-7, National and International Protection of the Cultural and Natural Heritage, in Francesco Francioni with Federico Lenzerini (ed.by), *The 1972 World Heritage Convention. A Commentary*, Oxford Commentaries on International Law 2008, p. 101 ff.

[206] Some clarifications concerning how to implement the protection, conservation, and management of the World Cultural Heritage in the territories of States Parties are contained in the Operational Guidelines, at para. 96 and following.

[207] Guido Carducci, Articles 4-7, National and International Protection of the Cultural and Natural Heritage, in Francesco Francioni with Federico Lenzerini (ed.by), *The 1972 World Heritage Convention. A Commentary*, Oxford Commentaries on International Law 2008, p. 101 ff.

[208] "To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavor, in so far as possible, and as appropriate for each country: (a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes; (b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions; (c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage; (d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and (e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field." World Heritage Convention, art. 5.

Proceeding with the identification of the international obligations pending on States Parties pursuant to the World Heritage Convention, art. 6 of the treaty establishes that, "Whilst fully respecting the sovereignty of the States on whose territory the cultural […] heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property right provided by national legislation," the international community recognizes its duty of cooperating for the protection of such heritage which constitutes, other than a national treasure, an element of the world heritage of humanity as a whole. In this sense, the WHC requires States Parties to undertake, in accordance with its provisions, to provide their help in the identification, protection, conservation and presentation of this cultural heritage. This, even in the case it is situated on the territory of another State Party, if the latter so request, and in any case avoiding taking any deliberate measures which might damage such cultural heritage directly or indirectly.[209] As a result of such cooperation, art. 7 of the treaty establish that, for the purpose of the WHC, the international protection of the world cultural heritage "shall be understood to mean 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."[210]

About the reaction provoked by the WHC provisions within the international community, several authors have noted how the obligations pending on States Parties pursuant to Chapter II of the World Heritage Convention characterize themselves for their manifold nature. As a matter of fact, they appear as counting, firstly, as political duties, when they refer to the necessity of including cultural heritage management in their domestic programs and policies. Beyond that, these duties may count as legal obligations, when requiring the adoption of specific regulations for cultural heritage protection within their domestic jurisdiction, such as to ensure an adequate and effective protection to their national treasures. Furthermore, the same duties may count as scientific standards, notably with regard to the request of carrying out of studies and research devoted to cultural heritage protection within the territories of States. Eventually, in the end, the provisions established by the WHC may count as institutional measures, in the context in which they deal with the set-up of national or regional formation centers in the field of cultural heritage to be placed in the territories of States Parties.[211]

Recognized as the pivotal tool of the UNESCO norm-set for the protection of cultural heritage, the World Heritage Convention has been acknowledged as a significant contribution to the international framework for the safeguard and promotion of all the elements and expressions belonging to the cultural traditions of the people of the world.

[209] World Heritage Convention, art.6.
[210] World Heritage Convention, art.7.
[211] Wahid Ferchichi, 'La Convention de l'UNESCO concernant la protection du patrimoine mondial culturel et naturel' in James A. Nazfiger and Tullio Scovazzi (ed. by), *The cultural heritage of mankind*, Nijhoff, 2008.

As for the reasons of such an importance, the fact that, unlike most of the previous UNESCO treaty – and, notably, of the UNESCO 1970 Convention – the World Heritage Convention stresses, both in the preamble and in its dispositions, on the existence of a *collective interest* of the global community in the protection of heritage, such as to justify, both at the national and international scope,[212] the imposition of duties and limitations of sovereignty on its States Parties. Recalling in its preamble how "the existing international conventions, recommendations and resolutions concerning cultural and natural property demonstrate the importance, for all the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong", the World Heritage Convention seeks to the establishment of a *collective action* for the protection of cultural heritage worldwide. This, notably, for the common interest of States Parties, as well as for the relevance of the cultural heritage of humankind for worldwide communities, groups, and other relevant stakeholders.

Without prejudice to the above-mentioned merits attributed to the treaty by the international community, it is important to note how, neither in this case, the adoption of the UNESCO World Heritage Convention has not been exempted by a series of criticisms. This, notably, with regard to the scope of the international protection established for cultural heritage by the means of its Chapter II.[213]

Although recalling since its preamble the necessity of establishing a duty of protecting "any item of the cultural of natural heritage" of the world, in fact, it appears how the World Heritage Convention has not been intended as to entail, as it has been drafted in 1970s, the existence of *any* kind of general obligation pending on States Parties towards the protection and safeguard of *all* the cultural heritage situated on their territories. As a matter of fact, and unlike the Hague Convention which establishes, as it has been exposed, a general duty pending on States Parties towards the protection of all the elements of cultural heritage put at risk by warfare, the World Heritage Convention appears as conferring, exclusively, the international protection established by the means of its Chapter II *only* to a determined category of cultural items. Precisely, the World Heritage Convention refers, as it has been anticipated, to the importance and necessity of protecting those elements of worldwide cultural and natural heritage considered as such pursuant to art. 1 of the treaty. This, notably, in the name of the "outstanding universal value" attributed to these elements by the *ad hoc* appointed UNESCO committee, and in virtue of their inscription in the *ad hoc* "World Heritage List" established pursuant to Chapter III of the treaty.

[212] On the duty of cooperation of the international community, see World Heritage Convention, arts. 6 and 7.

[213] Francesco Francioni and Federico Lenzerini, 'The Future of the World Heritage Convention: Problems and Prospects', in Francesco Francioni with Federico Lenzerini (ed.by), *The 1972 World Heritage Convention. A Commentary*, Oxford Commentaries on International Law 2008.

Precisely, the World Heritage Convention foresees, at its art. 8, that States Parties shall elect, an "Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value", appointed also as "World Heritage Committee", composed of 21 States members to the WHC on an equitable representation-basis and competent to coordinate the action of States Parties as well as to supervise the effective implementation of the treaty.[214] Among the functions of such organ, notably, the inscription of some selected cultural elements situated in the territories of the States Parties in the so-called "World Heritage List", which consists in the "official" UNESCO inventory of the world's cultural heritage established by the World Heritage Committee together with States Parties pursuant to the mechanisms of art. 11. [215]

Conversely, according to the World Heritage Convention, *any* kind of international protection seems to be conferred to all those elements of historic, artistic, and archaeological value which, situated on the territories of States Parties – and, even, recognized as elements of cultural interest by the concerned communities and groups – *have not been inscribed*, pursuant to the above-mentioned mechanisms, in the World Heritage List. In other words, as it has been raised by some authors, the inclusion of the cultural heritage of States in such UNESCO inventory appears as representing the *conditio sine qua* non for the conferral of the international protection ensured by the World Heritage Convention, conversely leaving the competence on the 'non-inscribed' cultural goods and sites, entirely, to the discretionary power of national authorities in which hands seem to rely, in the absence of armed conflicts, the complete jurisdiction on such items.[216]

As for the reasons of such an assumption, the fact that none of the obligations pending on States Parties pursuant to art. 4 and followings of the World Heritage Convention seems currently to apply to the protection and safeguard of national cultural elements and sites not inscribed in the World Heritage List, nor such property appears as included within the scope of the cultural heritage monitoring mechanism set up by the *Operational Guidelines* for the implementation of the World

[214] "An Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value, called "the World Heritage Committee", is hereby established within the United Nations Educational, Scientific and Cultural Organization. It shall be composed of 15 States Parties to the Convention, elected by States Parties to the Convention meeting in general assembly during the ordinary session of the General Conference of the United Nations Educational, Scientific and Cultural Organization. The number of States members of the Committee shall be increased to 21 as from the date of the ordinary session of the General Conference following the entry into force of this Convention for at least 40 States." World Heritage Convention, art. 8 para. 1.

[215] "On the basis of the inventories submitted by States in accordance with paragraph 1, the Committee shall establish, keep up to date and publish, under the title of "World Heritage List," a list of properties forming part of the cultural heritage and natural heritage, as defined in Articles 1 and 2 of this Convention, which it considers as having outstanding universal value in terms of such criteria as it shall have established. An updated list shall be distributed at least every two years" World Heritage Convention, art. 11 para. 2. On the mechanisms of cultural heritage inclusion in the World Heritage List and on the role of the ad hoc World Heritage Committee, see *infra*, Chapter II.

[216] Francesco Francioni and Federico Lenzerini, 'The Future of the World Heritage Convention: Problems and Prospects', in Francesco Francioni with Federico Lenzerini (ed.by), *The 1972 World Heritage Convention. A Commentary*, Oxford Commentaries on International Law 2008.

Heritage Convention – nor in their periodically revisions carried out by the Committee since their establishment in 1977.[217]

In the light of the above, it appears how, notwithstanding with its great visibility and influence in the international framework for the protection of cultural heritage, the UNESCO World Heritage Convention may not have reached the objective of establishing a general obligation, in virtue of the importance of conserving "any item of the cultural [..] heritage […] of the world", such as to impose to States Parties and relevant stakeholders the duty of protecting and preserving the elements part of the cultural heritage of the whole humankind, or to prohibit their destruction and deterioration in times of peace. On the contrary, it seems, the adoption of the World Heritage Convention has led UNESCO to the rather more limited objective of ensuring international safeguard only to a selected list of monuments, sites and cultural goods, leaving the competence on all the others as falling apart from the scope of its framework.

I.3. The threats against cultural heritage in the absence of armed conflict occurring in times of peace and the intentional destruction of cultural heritage. A void in the UNESCO framework for the international protection of the cultural heritage of humankind?

I.3.i. Introduction to Chapter II and III: the current UNESCO framework for the international protection of cultural heritage in times of peace. Which room for the 'lawfulness' of destroying monuments and sites in the territories of States?

As it emerges from the above considerations, therefore, the international community appears, in the light of the current global framework for the protection of the world cultural heritage – and, in particular, of the World Heritage Convention – still not bound at to any kind of general obligation towards the preservation of cultural heritage in the event of peace time, nor in the absence of armed conflicts.

On the contrary, and apart from the duties towards the identification and conservation of the cultural heritage of States recognized as part of the common heritage of mankind in the name of the "outstanding universal value" attributed to it pursuant to arts. 1, 2 and 11 of the World Heritage Convention, it has been shown how States appear rather free to manage the cultural heritage situated within their territories, also by determining their fate of the upon their own discretion. This because, as it has been exposed, the current international norm-set for the protection of cultural heritage put in place notably by UNESCO confers, in the absence of armed conflict, exclusive jurisdiction upon their

[217] WHC *Operational Guidelines for the Implementation of the World Heritage Convention*, WHC.21/01, 31 July 2021.

national heritage to its States Parties, leaving them legitimate to regulate the administration of such goods and sites as an act of domestic jurisdiction.

As it appears from the above exposed framework, arguably, this also in the hypothesis in which, for reasons falling within the discretion of national sovereignty, State authorities may decide to opt for, or not to prevent, the damage, the deterioration, or, even, the complete destruction, of those "non-inscribed" cultural goods and sites situated in their territories. Being not included in the World Heritage List, and therefore excluded by the international protection framework established by the WHC, those goods may therefore fall under the entire competence of national authorities, irrespectively of their eventual cultural, historic or artistic value for the international community. [218] Concerning the reflection of such a scenario within the practice of States, some authors have remarked how, within the decades, the action of 'lawfully destroying cultural heritage during peacetime' has been carried out by national authorities, notably, in two specific circumstances.[219] First of all, the occurrence in which, in absence of war, the cultural heritage of determined States may be put at risk of damage, deterioration or destruction has been experience, in the last decades, in the context of the set-up of national infrastructural policies and development strategies carried out by States for political, social and economic reasons. As it has been remarked in doctrine, in fact, it is since the outbreak of the industrial revolution that, as a consequence of the massive development and urbanization affecting worldwide countries, the monuments and relics situated in the territories of States are compromised and endangered by industrialization processes. As an example of such phenomenon, the massive destruction of cultural relics experienced during the industrialization process by Germany, which now counts less than eight percent of the monuments recorded since 1830 in reason of the massive urbanization of more than 102 hectares of land per day for a period of twenty years.[220] This is also the case, some decades later, of the threat to Romania's architectural heritage provoked by the systemization policy program carried out by the Romanian Communist government led by Nicolae Ceausescu.[221] Aiming at the collectivization of farms and the redesign of communal living space in view of implementing Marxist principles, such industrial policy has been renowned for the damages and destruction provoked to the detriment of numerous Romanian villages, which have been razed to the ground together with their numerous buildings of cultural and historic merit, including churches and homes reflecting a mix of architectural styles.[222]

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[218] Or, even, not yet. See *infra*.

[219] See Kangchana Wangkeo, 'Monumental Challenges: The Lawfulness of Destroying Cultural Heritage during Peacetime' (2003) 28 *The Yale Journal of International Law* 183.

[220] Joachim Reichstein, 'Chapter 4: Federal Republic of Germany', in Henry Cleere (ed. by) *Approaches to the Archaeological Heritage* (Cambridge University Press, 2009) p. 38.

[221] Ceausescu's systemization program has been carried out from 1979 to 1989.

[222] On the systemization program carried out by Ceausescu, see Sherri Poradzisz, 'The Society and Its Environment', in *Romania: A Country Study*, available at https://fieldsupport.dliflc.edu/products/cip/romania/romania.pdf.

Likewise, a similar episode of deterioration and destruction of national cultural heritage 'lawfully' carried out by competent authorities in the context of wider infrastructural policy programs has occurred, in the 2000s, in the Anatolian part of Turkey. To cope with the geographical and hydrogeological difficulties affecting the area thereby leading it to its economic development, the Turkish authorities put in place the 'Southeast Anatolia Project' (GAP)[223] which, although having brought to the modernization of the area and the creation of over three million job places, has been acknowledged for the irreversible damages provoked to the cultural heritage of the affected zones. This, in particular, in the context of the construction of the Ilisu Dam, the second largest dam in the GAP which, although having been saluted by Turkish authorities as a major benefit for the country for its energy needs supply and job creation features,[224] has been acknowledged by the international community for its massive negative impact on the cultural and natural environment of the region. As it will be further exposed in Chapter III, the construction of the Ilisu Dam in the Anatolian area and, notably, in the city of Batman entailed severe consequences on the preservation and conservation of the historical site of Hasankeyf. Although recognized by Turkish authorities as a protected cultural site, this 10.000-year-old town symbol of the Turkish civilization has been severely damaged by the construction of the Ilisu Dam, until being irreversibly deteriorated and destroyed in some of its monuments and sites.[225]

Secondly, the intentional destruction of the cultural heritage of peoples carried out, in the absence of an armed conflict, within the territories of States may occur in the context of the adoption and implementation, by national authorities, of political programs, policies of propaganda entailing a component of cultural 'revolution' or annihilation, as in the context of the 'cultural cleansing' campaign carried out, during the Chinese Revolution, by the Government Chairman Mao Tse-Dong or, decades later, in the context of the iconoclastic propaganda put in place by the Taliban, in Afghanistan, in the aftermath of their political raise.

Last access 12 October 2022. See also Nils Homer, '"Beloved Leader" Allows No Dissent: A Plan to Destroy Half of Country's 13,000 Villages', Toronto Star, 26 November 1988.

[223] A regional development plan aimed at achieving sustainable development in the Tigris-Euphrates basin and the Upper Mesopotamia plains. Originally conceived in 1920s-1930s, the GAP was initially only concerned with increasing irrigation and energy. Subsequently, it has evolved into a multi-sector development approach, encompassing agriculture, infrastructure, transportation, industry, education, health, housing, tourism, and investment. See http://www.gap.gov.tr/en/what-s-gap-page-1.html. Last access 12 October 2022.

[224] According to Turkish authorities, the Ilisu Dam project had the capacity of creating more than three million job places, thereby triplicating the income of the region. See 'Ilisu Dam Threat to Cultural Heritage', Turkish Daily News, 4 December 2001, available at http://www.turkishdailynews.coiold editions/12 04_01/feature.htm. Last access 13 October 2022; Juliet Nicholson, 'Would We Let a Foreign Government Do This to Oxford?', Daily Telegraph (London), 14 July 2001 and Nadire Mater, Culture-Turkey: Ancient Metropolis to Be Flooded, Inter-Press Service, 11 August 1999, LEXIS, Nexis Library, News Group File.

[225] See *infra*, Chapter II.

It is in this latter context, in particular, that the non-exhaustiveness of the international protection provided to the cultural heritage of peoples pursuant to the framework of the WHC has emerged at the international scope – and this issue will be the object of the analysis carried out in Chapter II.

Chapter II. The intrinsic limitations of the current international public law framework for the protection of cultural diversity and the necessity of a multidisciplinary approach to the study of 'culture'. The ongoing debate concerning universalism cultural relativism applied to international organizations and the UNESCO conception of cultural heritage of "Outstanding Universal Value"

II.1 The limits of a merely international public law perspective in the context of the enhancement and regulation of cultural matters within the UNESCO framework and the necessity of a multidisciplinary approach

II.1.i Enhancing an interdisciplinary perspective: the intrinsic limitations of the traditional legal discourse when dealing with 'subjective' issues and the importance of an integrated approach. The relevance of anthropology for cultural studies

In light of all the considerations carried out in Chapter I, it appears that the current UNESCO norm-set for the international protection of cultural heritage may present, at the current time, several lights and shades. As a matter of fact, although UNESCO appears, since its foundation in 1954, as having planned and implemented a rather vast body of work concerning the enhancement of 'culture' in a wide sense, in fact, it cannot be denied that, notwithstanding with its merits, it has entailed a series of shortcomings in terms of global action for the international protection of cultural heritage. As it has been anticipated in Chapter I paragraph I.2, this happens with reference to the international framework set up by UNESCO for the global safeguard and conservation of the cultural heritage of peoples in times of peace. As a matter of fact, if the above paragraphs have outlined how, in the event of war, a general protection of cultural heritage appears as conferred by the UNESCO 1954 Hague Convention, any kind of equivalent obligation seems to bind the international community according to the framework of the UNESCO 1972 World Heritage Convention which, representing the pivotal international instrument applicable to the conservation of worldwide heritage in peacetime, appears as not conceiving any general duty towards the universal protection of the cultural heritage of peoples – rather, it focuses on the celebration and safeguard of some selected elements of the *ensemble* of worldwide cultural goods.[226]

[226] See *supra*, Chapter I.See also *infra*.

In the light of such assumptions, part of the doctrine has suggested how the intrinsic limits of such an approach may be identified in the purely legal-oriented approach adopted by UNESCO and, in general, the international community when dealing with the worldwide protection of culture.[227]

This because, in reason of its intrinsic nature, the concept of "culture", conceived as a prerogative of human condition which is acquired, enriched, and transmitted through generations since the birth of humanity, entails an unavoidably 'critical' component. Indeed, it is such a 'critical' component which appears as having become elusive when submitted to legal inquiries, therefore requiring a more integrated approach, considering not only the positive definition possibly provided for the concept of 'culture' but also, and in particular, the 'subjective' prerogatives intrinsically entailed in such definition.[228]

It is for this reason that, in the light of the current limitations intrinsic within the international public law framework for the global protection of culture – and, in particular, the UNESCO norm set elaborated by the organization for the conservation of cultural heritage – part of the doctrine has suggested how the issues concerning the identification, and the consequential worldwide protection, of 'culture' appears, at the current time, as necessitating to be integrated and to be approached in a more inclusive and effective way, with the contributions of methodologies and knowledge lying outside the rather formal and restrictive scope of merely international law studies – and, in general, of the legal discourse.

In this view, all the above considerations carried out in the present research have outlined how, if the legal sphere – and, in particular, international public law – undoubtedly has the merit of having given human society the opportunity to establish precise and certain frameworks and standards to be applicable to the worldwide context for the universal protection and conservation of common values and resources – as, notably, cultural heritage and culture –, the application of a merely legal-oriented approach to such matter has nevertheless led to a series of shortcomings. As for the reasons of such limitations, we may point to the poor capacity of law studies to approach and dwell the observation and study of particularly 'critical' issues representing core 'subjective' features of the essence of human beings, and therefore difficultly amenable in the context of pre-established and descriptive legal schemes.

It is in this sense, then, that the present research suggests how it may be the case, in the context of the analysis and study of the international community's global action for the enhancement and protection

[227] "Human language is so rich that in most cases it is possible to express a concept through using many different formulations, all of them having an equivalent meaning and being equally valid. This is all the more true when it comes to concepts which are in some way fluctuant and erratic, as in the case of culture." Federico Lenzerini, *The Culturalization of Human Rights Law* (Oxford University Press, 2014).

[228] On the notion of "culture" from the point of view of international public law see *supra*, Chapter I. On the conception of "culture" elaborated by anthropological studies, see *infra*.

of cultural heritage, to place at the side of international law studies the perspective of social sciences which, in reason of their capacity of embracing a full study and comprehension of the human being, may offer more exhaustive answers in terms of the effective protection of cultural identity and diversity in the context of different communities.

In this view, the present research asserts that this may be true, in particular, with reference to the contribution possibly provided by anthropological studies. Consisting in the study of the past and the present of the human race, together with its culture, its society and its physical development, anthropology approaches the investigation about the determining of the human nature and evolution through the application of a both subjective and objective oriented perspective, such as to merge, in the aim of having the most complete picture, the observation of both the formal, 'legal-oriented' institutions, and the rather more intimate, 'sensitive' features characterizing individuals and groups of peoples.

In this sense, it comes clear how, in order to achieve its ambitious aims, anthropology needs to adopt methods and modalities of investigation which differ in a remarkable way from the traditional canons of the purely legal research, such as to entail within the scope of their analysis also the *effective understanding* of those human features which, in reason of their very nature, risk to be overpassed by the formal criteria of legal standards and norm sets. In particular, two appear, in view of the above considerations, as the branches of which may be of interest for the present research, dealing with the complex relationship between international law and the protection of cultural heritage. It is the case, namely, of *legal anthropology* and *cultural anthropology*.

About the scope of such disciplines, these two fields of anthropological studies focus, respectively, on the legal and the cultural phenomena in a rather more integrated perspective with respect to traditional law studies. In detail, these disciplines concentrate their focus on the investigation of human behavior as a social phenomenon experienced by worldwide societies in all their diversity. In addition to that, they attempt to explain how, if the true meaning of law and institutions appears as elusive when submitted to a purely legal, positivist-oriented analysis, a cross-cultural, integrated approach to such studies may lead to more effective and satisfying results in terms of observation and understanding, other than "the very idea of law", the true essence of cultural matters and worldwide diversity.[229]

In view of such premise, before dwelling more in depth in the study of the significance of the contribution of the anthropologist perspective within the analysis and interpretation of the UNESCO

[229] Norbert Rouland, *Legal Anthropology*, The Athlone Press, 1994. See also Leopold J. Pospisil, A*nthropology and Law: A Comparative Theory of Law*, Harper and Row, 1971; Gabriella Mondardini Morelli, *Norme e controllo sociale. Introduzione antropologica allo studio delle norme*, Sassari – Iniziative culturali, 1980; Francesco Remotti, *Temi di antropologia giuridica*, Giappichelli 1982; René David, *Les grands systèmes de droit contemporains*, Paris Dalloz, 1974.

framework, it appears how it seems necessary to proceed with a synthetic overview of the history, and methodology, characterizing these two branches of anthropology, explaining the related theories and schools of thought which have developed by observers and scholars through the decades and going through an analysis of the fields of analysis of such integrated disciplines which may be of major significance for the scope of the present research.

II.1.ii A methodological premise: the significance of the anthropological perspective adopted to the study of law and culture. The risks of ethnocentrism and of the adoption of a 'universalist' point of view

Before dwelling in the analysis of, respectively, legal and cultural anthropology, as well as of the possible contribution that these two sciences may provide to the study of cultural matters from the perspective of international law, it seems the case to approach the issue through a methodological premise concerning the scope and the features of anthropological studies.

Concentrating on human behaviors as experienced by human society in all their diversity, in the above lines the present research has outlined how anthropology seems as approaching the investigation on societies in a rather integrated perspective, possibly leading to more inclusive and effective results, in the field of cultural enhancement, when compared to international public law and, in general, law. Such assumption may be true, notably, as it has been raised by several authors dealing with the methodological aspects of such a discipline, because anthropology appears as approaching the study of the societal element by a wider, 'contextualized' perspective with regard to the point of view proper of the analysis of a merely positivist – and, notably, law-oriented - point of view.

Nevertheless, apart from such considerations, and notwithstanding with such inclusive, and more integrated perspective – notably, as argued, if seen in comparison with the merely legal-inquiry oriented point of view – it is necessary to highlight how also the adoption of a purely anthropological approach to the study of cultural matters may, as well, entails some difficulties, notably in the hypothesis in which these studies are not approached in the light of those necessary *methodological premises* which need to be carried out in the context of social sciences when dealing with the 'critical' features and aspects mostly inherent to the very nature of human beings.

Born and developed, as the next paragraphs will show, mainly within the context of the Western society, the disciplines of both legal and cultural anthropology – as well as, in general, the whole asset of anthropological studies – have to be considered carefully when it comes to the conception of their methodological approach – and in particular when applied in the context of investigations concerning the study of societies which are not part of the Euro-American part of human society. This

is true, in particular, with regard to the unavoidable issue concerning the *intrinsic bias* possibly entailed within the point the view adopted by the observer – representing this latter as a rather significative, and the first, element within the whole process of analysis and elaboration of further conclusions and theories.

Defined as the study of the origin and development of human societies and cultures,[230] anthropology investigates the characteristics of past and present human communities through a variety of techniques. In doing so, it observes and describes, through the lens of the observer, how different peoples of our world lived throughout history, and it investigates, in the different contexts, the interaction and customs which characterize human societies differing in time and space.

In doing this, anthropology focuses on the direct observation, and the *a posteriori* analysis, of the interactions, the customs, the institutions, and the practices of human societies, with the aim of understanding the object of its analysis in the clearest and most unbiased way.

Nevertheless, as in the case of every social science dedicated to the analysis and understanding of 'sensitive' phenomena – and, notably, on 'human factors' – it appears how such activity might entail a sort of intrinsic risk in terms of bias of the research. Indeed, such risk might appear as unavoidably imbued, because of the intrinsic nature of anthropological studies, within the *point of view* and the perspective of the observer.

As for the reasons of the risk of such bias, there is the fact that, as next paragraphs will expose, anthropological research was originally conceived, since its foundation as a social science, as a tool to understand, and analyze, those societies perceived as rather *distant* from the point the view of the observer, or, even, considered as entailing a sort of 'exotic' trait.[231]

Such assumption is true, in particular, if we consider the fact that anthropology was developed as a social science notably in the context of European and North American States where scholars have aimed at finding out new tools for analyzing the global phenomena occurring around the globe, in the aim of reaching a deeper level of understanding of the different communities coexisting worldwide. For this reason, since its very first appearances in the work of Montesquieu, the evolution of anthropological studies has always been characterized by the application of a determining Western-oriented perspective to anthropological studies, to evolve in a more inclusive, diversity-oriented, and cross-cultural perspective, only decades later.[232]

[230] Conceived, these latter, as the learned behaviors of people, including their languages, belief systems, social structures, institutions, and material goods. On the study of culture by the means of anthropology and, notably, on the field of cultural anthropology, see *infra*.

[231] On this point see, among others, Byron J. Adams and Fons J. R. van der Vijven (ed. by), *Non-Western Identity*, Springer, 2022.

[232] See *infra* .

In particular, such risk of limiting the scope of the analysis of anthropological studies in reason of the intrinsic *a priori* application of the observer's perspective – notably in the context of the analysis of non-Western societies – has been analyzed by several scholars motivated to cope with such intrinsic limitation. Such analysis has led to the definition of the concept of "*ethnocentrism*", a core notion for anthropological studies which gains even more importance when dealing with the fields of, respectively, legal anthropology and cultural anthropology.

Coined in 1960 by the conservative sociologist and thinker William Graham Sumner (1840-1910) in its work *Folkways*,[233] the notion of 'ethnocentrism' can be defined as a methodological approach to anthropological studies which compares other cultures by using a group's specific culture as the basis of that comparison, believing theirs to be superior and the standard to be used in comparison to other cultures. Grounding its convictions in its Social Darwinist approach to social sciences,[234] Graham Sumner defines ethnocentrism the tendency to look at the world primarily from the perspective of one's own culture, in the belief that one's own race, ethnic or cultural group represents the most effective, referential, point of view to analyze and take in considerations some or all the aspects of cultures possibly differing from the one of the observer – which are perceived, in this sense, as 'distant' and, even, 'inferior'. Indeed, the notion of ethnocentrism as it has been conceived by its founder and its supporters entails an ethic, 'judgmental' point of view with regard to the analysis and study of different societies: as it has been expressed, such concept is grounded on the belief that the norms, values, ideology, customs, and traditions of the observer's own culture or subculture are superior to those characterizing other cultural settings. In other words, the ethnocentric attitude conceives the observer's culture and perspective as superior to the others based on a different race, ethnicity, or nationality. This is even more relevant with regard to culture: as a matter of fact, one who is ethnocentric will believe that their culture holds the standards upon which other cultures should be measured, whether that be specific practices, beliefs, or attitudes about particular subject matters.[235]

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[233] William Graham Sumner, *Folkways. A Study of the Sociological Importance of Usages, Manners, Customs, Mores, and Morals*, Perlego 2008 (edition unavailable)

[234] Criticized and, mostly, rejected by modern and contemporary anthropology schools of thought, the notion of "Social Darwinism" consists in the study and implementation of various theories and societal practices that purport to apply biological concepts of natural selection and survival of the fittest to sociology, economics and politics. Such approach to social sciences has been developed in the studies of scholars in Western Europe and North America in the 1870s. On this concept, see among others Lester F. Ward, 1907, "Social Darwinism" 15 *American Journal of Sociology* 5 pp. 709–710*; see also* Gregory *Claeys, 2000, "The "Survival of the Fittest" and the Origins of Social Darwinism" 61 Journal of the History of Ideas 2. See also* Norbert Rouland, *Legal Anthropology*, The Athlone Press, 1994, part I.

[235] On ethnocentrism, see also Tracy Evans "Ethnocentrism and Cultural Relativism" Lumen Cultural Anthropology, 2021, available at https://cldv100.commons.gc.cuny.edu/wp-content/blogs.dir/16021/files/2018/10/Alcazar-A.pdf. Last visit 8th March 2023.

Elaborated as such by the doctrine, the concept of ethnocentrism gains particular significance, within the context of the present research, when considered in relation to another notion elaborated by anthropological studies concerning the worldwide perception of each other's society, tradition and culture, and, namely, with the concept of "*universalism*". Grounded in the philosophical and theological concept that some ideas and values have universal application, the principle of universalism, when applied to anthropology, refers to the existence of some unavoidable truths, applicable to human behaviors, beliefs, and societies, which should be considered 'universal', fundamental for the whole humanity, and more far-reaching than the national, cultural, or religious boundaries or interpretations of that one truth.

Also defined, by some anthropologists, as an expression of 'cultural absolutism', universalism consists of the perspective according to which the values, the concepts and the behaviors characteristic of diverse cultures can be viewed, understood, and judged according to *universal parameters*. In this sense, from a rather 'moral-oriented' point of view, such doctrine might be applied to establish concrete and objective touchstones applicable to judge what is right and what is wrong, even posing a set of clear and determinate instructions, principles – and, even, commands – to be applicable to the behavior of worldwide individuals and members of groups. According to the supporters of universalism, indeed, those concrete touchstones of human behavior and belief are said to be objective, in the sense that their requirements (and, in particular, the values, the obligations, the duties, the rights and the prohibitions they vehiculate) are, and have always been, binding on the whole humanity, without exception, in a universal perspective. Consequentially, such assumption may be valid, in this perspective, regardless of peoples' subjective or conventional acceptances, actual social and cultural practices, or historical circumstances.[236]

Rejected by the rather vast majority of contemporary anthropologists, the adoption of an ethnocentric perspective – and, consequentially, the 'universalist-oriented' point of view – appears as entailing, in itself, a series of important problematics when applied to the anthropological analysis of worldwide societies. First of all, the adoption of an ethnocentric and universalist-oriented point of view risks to promote an approach of one other's society, legal system, and cultural tradition, in a *contrast-oriented* perspective, which may lead to the perception that societal systems differing from historical and geographical reasons from the one of the observers might be considered as less developed, flawed,

[236] On the notion of 'universalism' see, among others, Emily A. Schultz and Robert H. Lavenda, *Antropologia culturale*, Zanichelli, 2010 and Marvin Harris, *Antropologia culturale*, Zanichelli, 1990. See also Richard A. Shweder *Relativism and Universalism: A Companion to Moral Anthropology*, Didier Fassin (ed. by), 2012; Usha Menon and Julia L. Cassaniti 'Universalism without Uniformity', in Julia L. Cassaniti, and Usha Menon (ed. by), *Universalism without Uniformity: Explorations in Mind and Culture* (Chicago, IL, 2017; online ed., Chicago Scholarship Online, 24 May 2018); Williams J. Vernon, 2003 'Between Universalism and Particularism: Historiographical Concerns in the History of Anthropology' in 7 *Journal of African American Studies* 2, pp. 61-68.

or, even, *savage*. In the same view, such misconception of diversity might also entail the risk, in reason of its rather objective approach to anthropological studies, of leading to a sort of 'dehumanization' of anthropological studies and, consequentially, of the conception of human society. This, as it has been raised by some authors, notably with reference to the risk of adopting a sort of Darwinian, 'natural-science-oriented', perspective, such as to classify human societies as no more than a sort of natural phenomenon not differing, in their very essence, from animals' behaviors or environmental issues.[237]

In view of the above considerations, in the aim of trying to cope with such intrinsic limits possibly entailed in anthropological studies – and, notably, with ethnocentrism and universalism – part of the doctrine has elaborated through the decades a series of *methodological tools* which, when applied to anthropological studies, may allow researchers to avoid the risk of ethnocentrism and intrinsic bias, rather leading to a more objective-oriented and unbiased analysis and comprehension of worldwide societies. This is the case, in detail, of *ethnographic studies* and *participant observation*.[238]

Without dwelling in the specific investigation and analysis of these two methodological features, which may lie outside the scope of the present research, it is important to recall how, with regard to the first, ethnography may be defined as the *qualitative* research method entailing the direct observation of peoples in their own environment, on a day-by-day basis, to obtain a better understanding of their experiences, perspectives and everyday practices. In this context, participant observation may be conceived as a specific methodology consisting in the *direct participation* of the observer in the everyday life of the subjects of the study, perceived in their own context. This, in the aim of reaching a close and intimate familiarity with a given group of individuals (such as a religious, occupational, youth group, or a particular community) and their practices through an intensive involvement with people in their cultural environment, usually over an extended period of time, with the final objective of gaining a better understanding of their way of life. This happens notably through the means of the adoption of an *emic*, rather than *ethic*, perspective. As a matter of fact, the primary object of ethnography is to explore cultural phenomena from the point of view of the subject of the study, examining the behavior of the participants in a given social situation and understanding the group members' own interpretation of such behavior.[239]

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[237] See Steve J. Shone, 2004, 'Cultural Relativism and the Savage: The Alleged Inconsistency of William Graham Sumner' 63 *The American Journal of Economics and Sociology* 3, pp. 697–715.

[238] In anthropology, ethnography can also be defined as "the process to describe interactions and customs of a determined society after a period of study and direct observation". On the methodology of ethnographic studies and on the practice of participant observation see among others Emily A. Schultz and Robert H. Lavenda, *Antropologia culturale*, Zanichelli, 2010. See also Giampietro Gobo and Lukas T. Marciniak, 'What is Ethnography?', in David Silverman, *Doing Qualitative Research*, Sage Publications, 2005.

[239] On the distinction between the 'emic' and the 'ethic' perspective in anthropological studies, see among others Emily A. Schultz and Robert H. Lavenda, *Antropologia culturale*, Zanichelli, 2010.

Having become core methodological elements in the context of several disciplines and, among others, European ethnology, sociology, communication studies, human geography and psychology, the practices of ethnographic studies and participant observation have been integrated, notably, in the two branches of anthropological studies which, as it has been presented, may provide a contribution to the present research and, namely, legal, and cultural anthropology.

II.1.iii. The contribution of legal anthropology to the present research. The importance of understanding the legal discourse dedicated to cultural matters

With regard to the first, legal anthropology has been identified as a rather consistent lens through which analyze the issue of the defining the notions of 'culture' and 'cultural heritage' when applied to the legal discourse, to ensure such elements a more effective and inclusive worldwide recognition, notably in comparison with the one provided by the international public law framework.

As it has been suggested by several scholars, in fact, legal anthropology appears as more apt, when compared to purely legal studies, to approach the analysis and the study of 'critical' issues like, as in the present case, the notion and regulation of 'culture', because of the fact that the methodology of traditional legal science seems not to be appropriate, for its intrinsic biases – and, notably, for its ethnocentrism[240] – to be applied to intercultural contexts.[241] This because, as it has been highlighted by the anthropologist Norbert Rouland, the traditional legal discourse carried out, within the decades, by worldwide law scholars – and, also, in the field of international law – may lead, in reason of the intrinsic positivism entailed in its legal rigor, to the perception of the authoritative centrality of legal systems as an illusion, often resulted in violation of Karl Popper's principle of *refutability*, which is the essential criterion of scientific knowledge.[242] In other terms, as Rouland assumes by citing the words of the XX century politician Jacques Chevallier, "the reference to formal logic is a myth which conveniently equips the legal order with unchallengeable assumptions, whilst avoiding the discussion on the validity of its prescriptions."[243]

In the same way, the corresponding limitations intrinsic within the legal discourse when it comes to the description and regulation of concrete, socio-political phenomena – and, in general, of the aspects

[240] On the notion of ethnocentrism, see *infra*.

[241] See Norbert Rouland, Legal Anthropology, The Athlone Press, 1994. See also A. J. Arnaud (ed. by), *Dictionnaire encyclopédique the théorie et de sociologie du droit*, Paris LGDJ, 1988 and J. J. Honigmann (ed. by), *Handbook of Social and Cultural Anthropology*, Chicago Rand McNally, 1973.

[242] In Popper's view, a scientist tests his or her theory by subjecting it to attempts to refute it. If the theory stands the test - is not refuted - it can be provisionally accepted; the more so if the test is difficult. See Karl Popper, *Conjectures and Refutations*, Routledge, 2002.

[243] Jacques Chevallier, 'L'ordre juridique' in *Le droit en procès* Jacques Chevallier and Daniele Loschak (ed. by), Paris Puf, 1984, p 13.

of human society – have been highlighted by the anthropologist and sociologist Pierre Bourdieu who, studying the mechanisms through which law achieves its regulatory function, identifies a twofold process according to which norms are conceived and approached by human society.[244] According to Bourdieu, two are the actions characterizing the traditional legal parlance, and, namely, on one side, the *neutralization* of the specific effects of norms achieved through the use of passive tense and impersonal turn of phrase, which gives the legal rule and appearance of impartiality, and, on the other side, the adoption of a *universalist* approach to concept definitions, in view of establishing abstract concepts and standards possibly applicable in all human societies – as, for example, the notion of '*bon père de famille*'.[245] As highlighted by Bordieu, the traditional legal discourse seems as drawing much of its strength from its supposedly perfect form from underpinning the universal and general values and concepts which it articulates, leaving small side to the concrete and subjective features indissolubly linked to law and norms.

It is for this reason, hence, that, as it appears from the above considerations the merely-law-oriented approach to the study of norms, legal institutions and regulations and, in general, the whole traditional legal discourse, may seem as not apt to be applied, as the *only perspective* applicable in the field, to the study and regulation of 'culture'. In this sense, as the point has been raised, also, by the aforementioned scholars, it is necessary to enlarge the perspective of study and the analysis of the notion of 'culture', and its consequential regulation and protection by the international community, from an *integrated perspective* entailing, other than the traditional law approach, the lens of the legal anthropologist vision. This notably because, as it has been highlighted in doctrine, this branch of anthropology grounds its perspective on a more integrated conception of the concept of 'intellectual rigor', which consists, according to its parameters, in "understanding that reality is concealed from view, inciting us to evolve different ways of apprehending it".[246]

Defined as the subfield of anthropology focusing on the study of law and the existing legal systems from a socio-cultural perspective, legal anthropology is a social science focusing on the study of how law is created and what role does it play in human societies. In detail, legal anthropology analyzes the processes of construction of the norms together with their theoretical conception, as well as the consequences of such norms when implemented in the concerned societies and, specifically, their effective capacity and attitude to create a social order in a social and global scale – together with the

[244] Denguin, 1930 – Paris, 2002.

[245] On the adoption of a universalist perspective in the context of international law, see *infra*. Pierre Bourdieu, *La noblesse d'État. Grandes écoles et esprit de corps*, Paris, Minuit, 1989; Pierre Bourdieu, 1986 'La force du droit. Éléments pour une sociologie du champ juridique ', 64 *Actes de la recherche en sciences sociales* 1; see among others Mauricio Garcìa Villegas, 2004 'On Pierre Bourdieu's Legal Thought', 1 *Droit et societé* 57.

[246] Norbert Rouland, *Legal Anthropology*, The Athlone Press, 1994.

related consequences of such processes.[247] In other words, legal anthropology consists in the study of the social meaning and of the importance of law and legal institutions, dealing with how they are created, how they sustain and change through their interaction with the other co-existing social institutions, and of the consequences of such elements in structuring social behaviors. At the same time, legal anthropology raises the question of how law and legal institutions themselves are socially constructed by societies, in a global, comparative and multidimensional perspective. In detail, legal anthropology studies the evolution of worldwide legal systems, focusing on the description and the analysis of such frameworks, conceived as socially produced and acquired traditions – in some cases, inherited from past to present. In this sense, legal anthropology has the aim of achieving general classifications of human society in the field of law by comparing the legal systems of all the societies which can be observed.

In this sense, such branch of anthropology concentrates on the *legal behavior* as experienced by human societies in all their diversity, attempting to explain how its three main areas of analysis and discourse – and, namely, behavior, value systems and beliefs – influence and determine the conception and the shape of legal systems and institutions.

II.1.iii.a The history of legal anthropology from the thought of Montesquieu to contemporary legal theories. The evolution of the concepts of 'cultural relativism' and 'legal pluralism'

Identifying its forerunner in the French philosopher Montesquieu, who defines law as one of the components of human society most closely involved in its functioning, legal anthropology finds its foundation in the schools of thought established by several anthropologists in the XIX century.[248]

As a matter of fact, it is in this period that, in the field of anthropology, several scholars start to focus their analysis on specific fields related to the perception of the legal system – therefore giving rise to a series of new branches of legal studies and anthropology, such as comparative jurisprudence, legal paleontology, legal archeology and legal ethnology.[249]

With regard to the raise of legal anthropology, some scholars have identified in 1861 its year of appearance. Indeed, it is during this period that two works defined as of paramount importance for

[247] See Bronislaw Malinowski, *Crime and Custom in Savage Society*, Routledge, 1926. For a more in-depth analysis of the thought of Malinowski, see *infra*.

[248] Charles-Louis de Secondat, barone di La Brède e di *Montesquieu (La Brède, 1689 – Paris, 1755). In the view of Montesquieu, law could be conceived as a changeable entity, varying according to society and to time*. *For the French philosopher, "developments in legal systems are not marked by historical milestones, indicating the march of progress, but depend on much more prosaic agencies, such as the climatic conditions, topography, demography etc., of a particular society".* Norbert Rouland, *Legal Anthropology*, The Athlone Press, 1994, p. 20.

[249] In detail, the term "legal ethnology" appeared for the first time in the work of the jurist and sociologist Albert Hermann Post, *Grundriss der ethnologischen jurisprudenz*, published in 1890.

such discipline appeared in Germany and in the United Kingdom. It is the case, namely, of the *ouvrage Das Mutterrecht*, published in 1861 by the anthropologist Johann Jakob Bachofen, and of the work of Sir Henry James Sumner Maine, *Ancient Law* (1861), dedicated to the study of the internal developments of human societies and completed in its reasonings by the two following works *The Early History of Institutions* (1875) and *On Early Law and Custom* (1883). Saluted by part of the doctrine as the first, most significant, studies of legal anthropology capable of "transcending the limits of the written word" when dealing with the understanding and description of social and legal phenomena, thereby "demonstra[ing] the simultaneity of customs with connections, not only over a long-time span, but within the special distributions of legal systems",[250] these works are conceived as the first 'bridge' between legal anthropology and social anthropology, and give rise to the theoretical constructs of legal anthropology as well as to the wide range of legal theories which have developed through decades by scholars investigating the essence and contributions of legal anthropology in human society.

After such premise, it is the case to turn to the analysis of the first theories developed in the field of legal anthropology, as well as their primary characteristics and their evolution. In this sense, the XIX century has been characterized by the raise of popularity and scope of anthropological studies – this, notably, within the Western context – and, consequentially, by the spread of new theories. This is true, in particular, with regard to the theory of evolutionism. Grounded on the principle of the changeable nature of the legal process, the evolutionist school of legal anthropology thought considers that all human societies pass through identical stages in their economic, social, and legal development, leading to a progressively increased complexity in their relevant institutions. In this sense, the philosopher Herbert Spencer defines evolution as "the passage from a relatively well-defined and coherent homogeneous state, through successive stages of differentiation and integration". In particular, Spencer's model distinguishes between traditional and modern societies, the former characterized by a high degree of integration of the individual within the group and between groups – this notably through the convergence of political, religious and legal organization as well as by mechanical integration – and the latter being marked by social divisions, and integration and reflection of such division, the State itself being "an institutional manifestation of social division".[251] Having obtained significant success in the context of the several European and American anthropology schools of thought, such assumptions have given raise, through the decades of the XIX century, to a series of so-called "unilinear" theories of evolutions. As for the element in common of such schools of thought, the idea of conceiving human societies as a coherent and unified whole,

[250] See the declarations of David J. Costa in Norbert Rouland, *Legal Anthropology*, The Athlone Press, 1994, p. 22.
[251] Herbert Spencer, *A System of Synthetic Philosophy*, 1862.

subject to *global and universal* laws, through which societies must pass in phases, identical in type and in order of succession, dovetailing exactly with each other's. Popular since the XVIII century among the thought of European philosophers and scholars,[252] these ideas have converged, as the major attempt at synthesis in evolutionist theories of law, in the work of Albert Herman Post, *Ethnologische Jurisprudenz*, published in 1893 and resuming the principles of evolutionism by the means of a systematic analysis of worldwide existing legal systems.

Recognized as the first school of thought applicable to the study of legal anthropology, evolutionism has been influential also in the development of subsequent legal theories. This comes clear, notably, in the context of the analysis of the legal anthropology theories which have been adopted and elaborated by some scholars in the XX century. In particular, during the second half of the 1990s, a series of 'new evolutionist' theories have been developed, among others, by the anthropologists Raoul Naroll and Robert L. Carneiro, who introduced the concept of differential evolution stating, on one side, that each society facilitates the evolution of the elements making up their cultural systems, and, on the other side, that each evolutionary process is grounded, and should be measured, through the application of precise indicators of cultural change.[253]

On the other side, however, it is from the end of the XIX century that evolutionism begins to be criticized and progressively abandoned by scholars of legal anthropology. In particular, the evolutionist school of thought has been object of two main critiques. As for the first, the rigidity and uniformity of unilinear evolutionism has been criticized by the work of Fritz Graebner, who, from 1911, elaborated the theory of "diffusionism", based on the idea that identical cultural complexes coexisting in different parts of the world may stem from a common origin ('*Kulturkreis*'), but they diffuse around the globe borrowing through other cultures through their process of diffusion.[254]

With regard to the second critique, the limits intrinsic within such traditional vision elaborated by the so-called 'armchair anthropologists' and the omissions contained in their historical reconstructions, full of comparative rigor but lacking in actual observation of societies, have been raised by the American anthropologist Franz Boas.[255] Considering humanity as in essence diverse, depending its developments around the world from the specific social and physical environments characterizing every society, Franz Boas can be considered the father of *cultural relativism*. Criticizing the Eurocentric perspective entailed in the legal anthropology studies carried out in the previous centuries

[252] See *inter alia* the work of Giambattista Vico, *La scienza nuova*, 1975, and of Adam Ferguson, *The History of Civil Society*, 1767.

[253] In 1956 Naroll developed an 'index of social development' and in 1963 Carneiro created an 'index of cultural accumulation'.

[254] Fritz Graebner, *Methode der Ethnologie*. Winter, Heidelberg 1911; Fritz Graebner, 'Kulturkreise und Kulturgeschichten in Ozeanien', 1905, 28 *Zeitschrift für Ethnologie* 37, 1905; Fritz Graebner, *Das Weltbild der Primitiven*. Ernst Reinhardt, 1924.

[255] Minden, 1858 – New York, 1942. On the thought of Franz Boas and his conception of cultural relativism, see *infra*.

– and, notably, in evolutionism – which appears as trying to reconduct the developments and paths followed by worldwide societies to the Western model, Boas tries to apply new standards in the analysis of past and contemporary societies. In his idea, societies needed to be considered in their intrinsic and unavoidable diversity, as equally expressing systems of beliefs, customs and values expressed, from the legal point of view, in their law and institutions. In this sense, Franz Boas starts from the consideration that nobody, not even anthropologists, comes from a neutral position when it comes to the study and the 'evaluation' of a determined human society together with its legal system. In this sense, the aim of anthropology, to deal with its own assumptions, may be acknowledging the intrinsic differences entailed in every social group, thereby using the awareness of the point of view of the observer to come to conclusions. In this sense, from a remarkably *emic* – rather than ethic – perspective.[256]

From the methodological point of view, Boas refers mainly to two principles consisting, namely, in *neutralism* and *contextualism*. As for the first, methodological neutralism asserts that to understand other cultures social scientists must suppress as much as possible their own moral convictions and immediate moral reactions when studying those cultures. In this sense, secondly, methodological contextualism asserts that every custom, belief or action must be studied in the context of its history and traditions, problems and opportunities, and total body of customs of the culture in which it is found; otherwise, we can gain little insight into other cultures.[257] In the context of the present research, it appears how the thought, the ideas and the methodology elaborated and promoted by Franz Boas may have a central role. As a matter of fact, the adoption of a relativist-oriented perspective to cultural studies and, in particular, the school of thought of cultural relativism, seems to be a rather significant tool when it comes to the study, understanding and analysis of the qualitative and 'critical' features of a determined society, especially in the case in which, for the structural reasons connected with the entailment itself of human societies, these elements – and, in particular, culture – need to be regulated and approached in a more 'institutional' way – and, notably, by the means of law.

II.1.iii.b The evolution of legal anthropology in XIX century and the two schools of thought of functionalism and legal pluralism. A non-Western contribution to legal anthropology: the thought of Masaji Chiba

Having recognized and criticized the shortcomings inherent to the evolutionist legal thought, the legal anthropology doctrine sees in the XIX century a rather fruitful moment in terms of development and

[256] On the definition of 'emic' and 'ethic' perspective in anthropological studies, see *supra*.
[257] See among others Franz Boas, Boas, *Race, Language, and Culture*, New York, 1944 and Franz Boas, *Race and Democratic Society*, New York, 1945.

evolution of thought. As a matter of fact, in the aim of passing over the intrinsic limitation of evolutionism, as well as of the Western-oriented bias intrinsic in those legal anthropology studies identifying in the European and North American institutions and principles a sort of 'universal norm-set' successfully applied to each society in the world, several new, innovative theories have been elaborated through these decades by legal anthropology. As for the aim of such evolution, the view to achieving a more encompassing approach to the study of legal theories such as considering, within the scope of its analysis, also an objective, non-biased reflection on the reality of the concerned societies and group of individuals. This is the case, in particular, of the raise of the two theories of functionalism and legal pluralism.

With regard to the first theory, the functionalist school of thought recognizes as its core objective the identification of the law, by the means of processual and normative analysis, and it sees the light, notably, in the work of Bronislaw Malinowski. Born in Cracow in 1884, Malinowski approaches the study of society as an inquiry into a specific cultural system, in which parts have to be considered as strictly interconnected. In particular, two aspects characterize the functionalist approach to legal anthropology elaborated by Malinowski. On the first side, the author insists on the importance of study in the field, which is fundamental to bring law closer to real world; in the thought of Malinowski, norms and legal institutions do not exist solely in codes and abstract principles of jurisprudence, but, also, and even more in concrete phenomena – which may be understood through the means of *direct observation*. On the other side, Malinowski sees society as a nucleus in which the existence of law is strictly interdependent from the other elements and factors characterizing the social system, both biological and cultural. In view of that, a series of parameters should be developed to approach the investigation of legal systems. In this sense, the functionalist legal theory identifies as fundamental tools of legal anthropologists the processes of normative analysis and processual analysis.[258]

As in the case of functionalism, also the pluralist legal theory has as its final objective the identification of the law applicable in worldwide societies but, as for the methodology and the principles underpinning such theory, from a rather different perspective than the functionalist one.

Raising at the turn of legal anthropology and legal sociology, this second theory stresses the necessity of confuting the traditional proposition according to which only official law appears as to exist – and, notably, the 'law of the State' – rather posing more emphasis on the identification and analysis of the one or more hidden dimensions of law possibly entailed in worldwide legal systems, notably in the

[258] Bronislaw Malinowski, *Magic, science and religion, and other essays*, New York Doubleday, 1948; Bronislaw Malinowski, *A scientific theory of culture and other essays*, Oxford University Press, 1944. See also Kegan Paul and Raymond Firth, *Man and culture: An evaluation of the work of Bronislaw Malinowski*. London: Routledge 1957, Michael W. Young, *Malinowski: Odyssey of an anthropologist*, 1884–1920, Yale Univ. Press, 2004.

light of the high level of complexity and interrelation of modern societies. Identifying its precursors in the two thinkers Marcel Mauss and Bronislaw Malinowski,[259] who first advanced the notion that several legal systems could interact within a single society, legal pluralism has been defined in a rather incisive way by the anthropologist and ethnographer Jacques Vanderlinden, who states that legal pluralism consists in "the existence, within a given society, of different legal mechanisms applied to identical cases".[260] In other words, legal pluralism consists of a legal theory investigating the notion of 'pluralism' as "a characteristic, or a set of social characteristics, of several social and/or cultural groups, coexisting with the same organized society". In detail, these groups are interdependent, since they share the same economic system, but they maintain a varying degree of autonomy, as they possess a body of distinct institutional structures in other spheres of social life – and, notably, in the areas of family, leisure activities and religion.[261]

In this sense, John Griffiths develops the concept of "semi-autonomous legal fields", which, stemming from the social anthropology conception of "sociological pluralism" refers to the multiplicity of forms that law may assume within a specific social concept, from time to time varying depending on the *in concreto* circumstances.[262] In the same way, the idea that every society consists of a body of hierarchically arranged subgroups, each subgroups possessing its own legal systems, has been developed by Leopold Pospisil who, introducing the concept of "levels of law", assumes that there is no qualitative difference between the law of the State and the other, co-habiting, forms of legal institutions and structures which develop at the horizontal level of civil society. As a matter of fact, according to Pospisil, every society in the world is stratified in subgroups, each subgroup possessing its own legal system.[263] Criticized by several jurists – and, among others, by Jean Carbonnier – for committing the error of "overemphasizing certain phenomena which exist on the fringes of the law", as these phenomena "actually part of the prevailing legal system [being] the distinction […] illusory",[264] the notion of legal pluralism, together with its cultural relativist approach toward the analysis and the study of legal and social institutions, has been handed down through the

[259] See *supra*.

[260] Jacques Vanderlinden, *Le pluralisme juridique*, Bruylant, 2013 (XIII ed). According to the vision of Vanderlinden, examples of legal pluralism may include patrician and plebian marriages in ancient Rome; commercial contracts where trader and private citizens sell goods according to different conditions; diplomatic immunity; the distinction, during the colonial period, between private indigenous law and the law of the European colonizers installed in the concerned theory.

[261] On this, see the thought of the anthropologist Pierre L. Van den Berghe, and in particular Pierre L. Van den Berghe, *Man in Society: A Biosocial View*. New York: Elsevier, 1975; Pierre L. Van den Berghe, *Age and Sex in Human Societies: A Biosocial Perspective*. Belmont, Calif: Wadsworth Pub. Co, 1973; Pierre L. Van den Berghe, *Intergroup Relations: Sociological Perspectives*. New York: Basic Books, 1972.

[262] John Griffiths, 'What is Legal Pluralism?', 1986, 18 *The Journal of Legal Pluralism and Unofficial Law* 24, pp.1-55.

[263] Leopold J. Pospisil, *Anthropology of Law: A Comparative Theory*, Harper and Row, 1971.

[264] According to Carbonnier, the limit of legal pluralism is recognizing the existence of different expressions of law in situations in which, actually, instead of contrasting ruling there exist several different applications of one particular rule. For an exposure and a critique of Carbonnier's conclusions about legal pluralism, see Norbert Rouland, *Legal Anthropology*, The Athlone Press, 1994, p. 59.

decades within legal anthropologists' theories, re-elaborated from time to time according to the prerogatives and characteristics of the society in object of study.

Apart from the innovative scope entailed within the concepts and principles promoted by these two theories, a rather significant aspect of such evolution of legal anthropology consists in the progressive shift, through the decades and the development of the various school of thought, from the rather Western-oriented, 'universalist', perspective grounding the whole asset of the evolutionist theories, to a significantly more pluralist, 'cultural-relativism-oriented', point of view, such as to include within the scope of legal anthropology studies also the adoption of a non-Western perspective. In this sense, a particularly interesting development of the legal pluralist theory has been elaborated by a Japanese law scholar, who approached the issue of the diversity and stratification of law in a rather cultural relativist perspective. Specializing in the study of non-Western legal systems, the jurist Masaji Chiba focuses on the idea that, in every society, there coexist several levels of law, interacting among others depending on the circumstances *in concreto* and not necessarily conflicting the ones with the others. Having a view of the legal pluralist theories elaborated by the European school of legal anthropology, Chiba discusses the arbitrary distinction between "official" and "non-official" highlighted by Western anthropologist, opting for a rather blended and integrated approach to the matter. According to Chiba, indeed, such distinction is often cursory: this, first because official law cannot always be reduced to the law of the State, and second because not only does the interaction between institutional and non-institutional legal structures take the form of conflict, rather they may also be complementary. Identifying these different levels of law, Chiba states that they do not need to form a hierarchy; rather, their interaction varies from society to society and, remarkably, from east to west. As a matter of fact, Chiba argues, the West is identified with a unitary system in which law is to a considerable degree responsible for controlling social interactions; also, the official law is preeminent – when not exclusive. On the contrary, the East has never conferred such status to law, having autonomous legal postulates often having an impact on official law, even, also, modifying it and resisting its domination.

II.1.iv. The contribution of cultural anthropology to the present research. The definition of 'culture' proposed by Marvin Harris

Apart from the experience of legal anthropology, it appears how, in the context of the present research, a remarkably significant support may be provided to the scope of the analysis – and, notably, to the identification and enhancement of the concept of 'culture' in worldwide societies – by the discipline of cultural anthropology.

Focusing on the study of culture conceived as the analysis of the traditions acquired in the thoughts and behaviors of human beings, cultural anthropology can be defined as a study of the human race, in both its experience and its way of living, and, in particular, of the conception of 'culture' adopted by societies worldwide.

For this reason, before dwelling on the study of the features and prerogatives of cultural anthropology, it seems necessary to proceed with a premise concerning the scope of the notion of 'culture' in anthropological studies.

As in the context of international law, it is important to remark that, notwithstanding its rather 'subjective-oriented' approach to the study of human beings, neither anthropology refers to a unique and generally accepted as the official definition of 'culture'.

On the contrary, several definitions have been developed, through the decades, by scholars and researchers, highlighting one or other aspects of the human race depending on the circumstances and the scope of the analysis in object.

Nevertheless, on several occasion part of the doctrine has raised the point of the necessity of finding out a unique definition for such a core concept, to enhance the understanding of social behaviors and cultural traditions in a more clear and effective way. In particular, a significant contribution to such debate concerning the research of a common definition for 'culture' such as to be applicable to the whole asset of anthropological studies has been provided by some cultural anthropology scholars. As a matter of fact, these authors have identified as a possibly referential definition for such notion the conceptualization of it elaborated in the XIX century by the anthropologist Sir Edward Tylor,[265] who defines, in his book *Primitive Culture* published in 1871, culture as "that complex whole which includes knowledge, belief, art, law, morals, custom, and any other capabilities and habits acquired by man as a member of society.".[266] In the same way, the two cultural anthropology scholars Emily A. Schultz and Robert L. Lavenda define, in their *ouvrage Cultural Anthropology: A Perspective on the Human Condition*, culture as "a prerogative of the human condition", or "the ensemble of the modalities, the behaviors, the ideas acquired by humans as components of society".[267] In this context, the two authors recall the strict interconnection existing between the notion of culture and the Latin concept of *habitus*, "habit". In this sense, they identify culture in the existence and reiterated *repetition of those behavioral and ideological patterns* reiterated in the different areas of social life by human beings. According to Schultz and Lavenda, indeed, it is such *habitus* which allows

[265] London, 1832 – Wellington, 1917.

[266] Edward Tylor, *Primitive Culture: Researches into the Development of Mythology, Philosophy, Religion, Art, and Custom* (Cambridge University Press, 2012).

[267] Emily A. Schultz and Robert H. Lavenda, *Cultural Anthropology: A Perspective on the Human Condition*, Oxford University Press, 2017.

anthropologists to distinguish the different cultural traditions coexisting worldwide,[268] thereby providing culture with its *symbolic* character. This, significantly, also represents the most significant element of distinction between human beings and the other existing forms of life. In this idea, the two authors refer to the definition of 'culture' proposed by Richard Potts, who identifies culture as "the evolutionary bridge between human beings and animals, representing continuity".[269] In particular, Schultz and Lavenda refer to the five elements representing the preconditions for the existence of a "human symbolic culture", which consist, namely, in the transmission of cultural patterns – or emulative behaviors based on observance and instruction –, the individual and collective memory of such structures, the reiteration of such behaviors intended as "the attitude to reproduce or emulate behaviors and information", the attitude to create new behaviors – "innovation" – and the process of selection, conceived as the inclination to discriminate among innovations thereby maintaining some of them and excluding others.[270]

About the features entailed with such concept of culture, several scholars of cultural anthropology have outlined, within the decades, those which can be defined the essential prerogatives of such a core notion – and, among others, the anthropologist Marvin Harris.[271] Playing an influential role in the development of the anthropology currents of thought of cultural materialism and environmental determinism, Marvin Harris is inspired, in its identification of culture, by the work of Karl Marx and Thomas Malthus.[272] Conceiving culture as a social infrastructure which needs to be approached with both an ethic approach, deriving from the point of view of the observer, and an emic approach, focused on the observed society's perspective, Harris considers cultures as *the union of mental beliefs and repetitions of behavioral patterns* which characterizes a group of individuals.

Representing just one of the various and diverse definitions of culture provided by anthropological studies, and, notably, by cultural anthropology, the present one seems particularly accurate when it comes to its application to the present research.

Entailed as an inter-disciplinary analysis aiming at investigating the notion of culture, and cultural heritage, as well as the worldwide mechanisms and institutions for its protection, in fact, such research has the objective of dwelling in the supranational framework for the protection of cultural heritage

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[268] See *infra*.

[269] Richard Potts, *Humanity's Descent: The Consequences of Ecological Instability*, Avan Books, 1997. See Emily A. Schultz and Robert H. Lavenda, *Cultural Anthropology: A Perspective on the Human Condition*, Oxford University Press, 2017.

[270] See Emily A. Schultz and Robert H. Lavenda, *Cultural Anthropology: A Perspective on the Human Condition*, Oxford University Press, 2017. See also A. Schultz and Robert H. Lavenda, *Core Concepts in Cultural Anthropology*, Oxford University Press, 2019.

[271] Brooklyn 1927 – Brooklyn 2001.

[272] For an insight of the thought of Marvin Harris, see Marvin Harris, C*ulture, People, and Nature: An Introduction to General Anthropology*, New York, 1971, 7th edition; Marvin Harris, *Cows, Pigs, Wars, and Witches: The Riddles of Culture*, New York, 1974, Marvin Harris, *Cultural Materialism: The Struggle for a Science of Culture*, New York, 1979 and Marvin Harris and Orna Johnson, Cultural Anthropology, 1983.

established by the international community – and, notably, by UNESCO – in the light of the concepts related to the notion of culture seen with the lens of social sciences, and, notably, of anthropology. In this sense, trying to achieve such an objective, it tries to find out and investigate all the possible interactions, similarities, and interconnections existing between these two subjects, in an integrated perspective.

In the light of such considerations, indeed, it seems important to highlight how, with its intrinsic dichotomy between a subjective and objective element, the definition of culture proposed by Harris as the *ensemble* of a psychological, 'subtle' element and the repetition of a determined behavior present remarkable similarities with the traditional notion of 'customary law' elaborated by international public law as an unwritten legal rule, which derives from the combination of a general, uniform and constant pattern of behavior, established in a determined amount of time and considered in the same way as binding law from the concerned community.

Turning back to the anthropological perspective, Harris identifies as a turning element in the formation and definition of culture its transmission process, conceived as the conscious and unconscious learning experience which makes cultural traditions to be transmitted from generation to generation. As a matter of fact, according to Harris, it is in such continuity process which has to be identified the real, effective reason of the existence of cultural diversity and of the maintenance of different cultural models in the world. In the same way, Harris highlights how such a conception of culture as a dynamic, evolutive and continuous interaction between a rather subjective, 'psychological' element, and an objective, factual repetition of a determined behavior, has led – and continuously leads – to the progressive and continuous establishment of so-called 'universal cultural models', which can be defined as those macro-structures which, being present in all the cultures existing worldwide, allow the researcher to approach the study of different cultures, customs and traditions in a rather objective-oriented way. In particular, Harris identifies as its tools of analysis the models of "infrastructures", "structures" and "substructures" which might be applicable to cultural studies, to better explain and compare the diversities and similarities coexisting in the cultural traditions of the world – conceived, in such a theoretical framework, in a rather cultural-relativist perspective.

II.1.iv.a. The notion of 'art' in cultural anthropology and the issue of its cross-cultural applicability

Among all the macro-structures worldwide characterizing the diversity of cultural expressions, Harris identifies a rather relevant element for the study, analysis, and comprehension of human societies – and, in particular, of their cultural features – in the notion of "art". Conceiving art as all the forms of

thought and behavior connected with the creation of painting, music, poetry, sculpture, dance and "all the other elements and means of expression and communication which may consist in an artistic creation", Harris refers to the artistic phenomenon as a global, ethic expression of thinking and behavior, playing a central role in the socio-cultural system in which is inserted, and therefore representing one of the most crucial objects of study and observation in the scope of cultural anthropology's analysis.[273]

As in the case of 'culture' which has been exposed in the above paragraphs, neither the notion of 'art' comes in cultural anthropology with a unique, cross-cultural definition. Such assumption is true, as it has been remarked by Harris, also if some significant insights concerning the identification of such complex concept seem to appear, since the last decades of the XX century, in the work of several scholars dedicated to the study of the matter, which appear as conceiving art in a rather exhaustive way. In particular, a valuable definition of the notion of 'art' has been provided, in the '70s, by the activist and cultural anthropologist Alexander Alland. Inspired by the studies of Franz Boas – who, representing one of the pioneers of modern anthropology has provided significant contributions in the field of art and cultural anthropology in his book *Primitive Art* (1927)[274] – in his *ouvrage The Artistic Animal*, the author defines art as "a manifestation of form producing some aesthetically successful transformation-representation", existing, in worldwide societies, as a cultural category. [275] About its constitutive elements, as it emerges from its definition, the notion of "manifestation", representing the auto-gratifying and pleasing aspect of the activity in question, the "form" as the *ensemble* of rules to be observed, the "aesthetic" attitude, consisting in the human capacity to provide an answer full of emotional content – expressing appreciation when the artistic activity is satisfying –, and the two-folded concept of "transformation-representation", regarding the communicational aspect of the cultural element. In this context, Allan states that artistic manifestations may represent forms of explorative behavior such as to allow human being to experiment new, and potentially useful, answers in the context in which they conduct their everyday life. In this sense, art is meant to reproduce preexisting socio-cultural models, realized by the artist through original and pleasing combinations of sounds, colors, lines, forms, and movements. In particular, two relevant art prerogatives are identified in the notions of "vivacity" and "creativity", which represent pivotal

[273] On the concept of 'art' in cultural anthropology studies, see Marvin Harris, *Antropologia culturale*, Zanichelli, 1990, Chapter 13.

[274] In this book, Boas summarizes his main insights into so-called 'primitive' art forms, with a detailed case study on the arts of the Northwest Pacific Coast. On the work of Franz Boas and its contributions, notably, in the field of legal anthropology, see *supra*. The studies of Franz Boas in the field of art and cultural anthropology have been further developed by the anthropologist Claude Lévi-Strauss, starts from Boas' analysis to explore it further in his book *The Way of the Masks* (1975) where he traced changes in the plastic form of Northwest Pacific masks to patterns of intercultural interaction among the indigenous peoples of the coast.

[275] Alexander Alland, *The Artistic Animal: An Inquiry to the Biological Roots of Art*, New York, 1977.

features in the communication of the transformation-representation process.[276] In other words, according to such construction of the concept of 'art', the artistic production is conceived to reproduce preexisting socio-cultural models, thereby reinventing them adding elements of vivacity and creativity. For this reason, reproducing traditional and familiar elements for the concerned societies, art satisfies psychological needs of human beings, vehiculating feelings and emotions and, also, expressing values and shared beliefs. In reason of its adaptive function, linked to its capacity to follow the creative mutation which verifies in the other sectors of human life, art appears as consolidating itself through the repetition of some 'artistic' and 'cultural' patterns which seem, to the eye of the observer aiming at investigating the progressive evolution of art through the decades, as being repeated in time. In other words, and although maintaining originality and creativity as its constitutive elements, forms and expressions of worldwide art seem as establishing themselves as cultural categories in the concerned societies by the means of their reiteration of determined artistic, symbolic and aesthetic features, which are perceived as characterizing the concerned groups of individuals and societies, thereby representing and accompanying their evolution through decades – and centuries.

As it has been highlighted by several scholars, it is though the means of such transmission process that art assumes, depending on the context, different expressions all over the world. As remarked by Harris, it is this transgenerational transmission of artistic features which creates different forms of art. According to the author, in fact, it is when taking in consideration all the coexisting expressions of artistic value for individuals and societies, that it appears clearly how it is impossible to distinguish, at the universal level, an emic or ethic distinction between 'art' and 'non-art'. On the contrary, the extreme variety of cultural forms, shared and recognized in the various part of the world, appear as forming a remarkably complex picture of diversity and multiformity, representing from time to time the specific cultural features of a determined community.[277] As for the scope of such diversification of forms of art, it has been highlighted, notably the 'polarization' between, on one side, the artistic expressions representing determined emic categories of modern Euro-American society, and, on the other side, the manifestations on forms of art and practices attributable to non-Western communities, which appear as perceiving and realizing art from a rather different perspective with respect to the first one.[278]

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[276] On the construction of the concept of 'art', see also Robert Layton, Robert, *The Anthropology of Art*, Cambridge University Press, 1981; Jeremy Coote Anthony Shelton (ed. by), *Anthropology Art and Aesthetics*, Oxford, 1992; Evelyn Payne Hatcher, *Art As Culture: An Introduction to the Anthropology of Art*, Lanham University Press of America, 1985; Howard Morphy and Morgan Perkins, (ed.by), *The Anthropology of Art: A Reader*, Malden, 2006.

[277] See Marvin Harris, *Antropologia culturale*, Zanichelli, 1990, Chapter 13.

[278] With regard to the definition of the concept of 'art' and about its manifestations in modern societies, an innovative theory has been elaborated in the 2000s by the anthropologist Alfred Gell. On this point, see Alfred Gell, *Art and Agency: An Anthropological Theory of Art*, Oxford University Press, 1998; Bowden Ross, 2008, 'A Critique of Alfred Gell' on 74 *Art and Agency Oceania 1;* Robert H. Layton, 2003, 'Art and Agency: A reassessment' in 9 *Journal of the Royal*

As a matter of fact, as it has been highlighted by several scholars, if it can be assumed that all humans enjoy aesthetic forms, it can be affirmed that the visual, aural, tactile, olfactory, and sensory perception of such expressions remarkably varies from place to place and over time, thereby leading to the impossibility of establishing a cross-cultural definition, or any criteria, to establish what is culture and what is not. In this sense, if it is sometimes possible – this, notably, even more in the contemporary context for the effect of international trade and globalization – to find out common cultural forms and practices such as painting, sculpture, and dance, which may entail a form of cross-cultural significance, it remains true that the perception of culture, art and cultural heritage of every society unavoidably varies depending from the historic moment, the geographical conditions, and, in general, all the factors *in concreto* influencing its individuals and institutions.

In particular, the doctrine has remarked how, among all the differences existing between notably Western and non-Western forms of art, one of the most significative concerns the *function* attributed to the artistic element from the concerned societies. As it has been highlighted by Harris, in fact, at the basis of the modern Western conception of art lies the distinction between merely aesthetic manifestations, conceived as forms of art, and objects having practical implications for everyday use, therefore excluded from the category. On the contrary, an equivalent distinction seems not to appear in the context of non-Western societies. As a matter of fact, the anthropological studies carried out in the context of non-Western societies have shown how in that context several artistic works are conceived and realized in complete harmony with their 'utilitarian' scope, not considering the existence of a merely aesthetic value a necessary condition for defining the existence of a form of art. For this reason, several categories of craftworks, handicrafts and practices are considered as artistic expressions in most non-Western contexts, being rather classified as purely technical activities in the countries of Europe and North America.

As for the reasons underpinning the existence of such diversification between the conception of forms and expressions of art in worldwide countries – and, in particular, within the Western and non-Western hemispheres –, two main factors have been identified by the doctrine as responsible of such dichotomy.

As for the first element, anthropologists have found out how, when examining the perception of art, a central role is played by the meaning attributed to such art by the concerned community, in terms of psychological and psychoanalytic aspects. Associating to pieces of art a specific meaning and an

Anthropological Institute and Howard Morphy, 2009, 'Art as a Mode of Action: Some Problems with Gell's Art and Agency' in 14 *Journal of Material Culture* 1.

emotional power, each community experiences artistic expressions and work according to its proper subjective attitude, thereby leading to the differentiation of artistic identification all over the world.

With regard to the second reason of such artistic diversification, authors have highlighted the so-called 'institutionalization' of the artistic process identified by several authors, notably, in the context of Western societies. As it has been highlighted by the doctrine, since the raise of the very first cultural expressions within European and North American countries the definition and conception of art has come with the progressive affirmation of a sort of 'cultural establishment' composed by authorities and cultural experts uncharged by the concerned societies, in formal or informal ways, for the definition of what is to be considered a form of art and what is not in the context of a determined social group.

In particular, Schultz and Lavenda have recalled how, in Western societies, a particular expression is defined 'artistic' or not from a precise group of individuals to which it is conferred the authority to shape a judgment in this field, and, notably, from the experts working in museums, institutions, organizations, media and academia dealing with culture, art and cultural heritage and therefore perceived by the concerned society as competent for a critical evaluations of form of art.[279] Such prerogative – which assumes, for the scope of the present research, a particular relevance when applied in the field of cultural heritage and international organizations –[280] is not equally identifiable in the context of non-Western societies. Conceiving the definition of 'form of art' in a rather more evolutive, subjective-oriented and 'horizontal' perspective, in fact, non-Western countries appear as having developed a rather less 'establishment-led' conception of their cultural heritage, which is considered in such contexts as a remarkably identarian element connected to the history and traditions of the concerned community.

In the light of these considerations, it becomes clear how such latter issue of the 'institutionalization' of the idea art – and, notably, of its strict relationship with Western cultures – has particular significance in the context of the present research. Such assumption may be true, in particular, with regard to the international dimension possibly entailed in such institutionalization process which, when possibly carried out in the context of global organizations characterized by the proximity to Western cultural traditions – and, notably, the United Nations and UNESCO – may lead to the adoption of a univocal conception of the notion of 'art' rather applicable within the global scope of action of the whole organization. This is the case, as it will be exposed in the next paragraph, of the progressive crystallization of the definition of 'cultural heritage' adopted by the UNESCO framework, and, in particular, of the elaboration of the concept of 'cultural elements of outstanding

[279] Emily A. Schultz and Robert H. Lavenda, *Antropologia culturale*, Zanichelli, 2010.

[280] On the Western-oriented conception of culture, art and cultural heritage entailed in worldwide international organizations and, in particular, in the UNESCO framework, see *infra* .

universal value' at the core of the UNESCO 1972 World Heritage Convention. Indeed, it will be on these topics that the present research will focus on the next paragraphs, before having dwelled, in the aim of leading to the most effective understanding of the concept of 'art' as a worldwide, cross-cultural phenomenon, in the analysis of the theories that anthropologists have, through the decades, elaborated the aim of providing an answer to the issues presented above.

II.1.iv.b. The evolution of cultural anthropology from the notion of 'evolutionism' to the thought of Franz Boas and Bronislaw Malinowski

As in the case of legal anthropology, the first systematic attempt, in the field of anthropological studies, to explain the under a scientific profile the various cultural differences coexisting all around the globe, has appeared, in in the years of the Enlightenment, in the context of European countries. Identifying in the idea of 'progress' the pivotal element of their research, several authors of those years – and, in particular, Adam Smith, Adam Ferguson, Jean Turgot and Denis Diderot – have shared, in those years, the idea that, from the cultural point of view, worldwide societies were differing the ones from the others in reason, more than of intrinsic differences connected with the human capacities and preferences of the concerned individuals, of the different level of knowledge and, indeed, *progress* reached by these societies. According to such idea, every society is destinated to evolve from a very initial stage, defined as "state of nature", to a condition of progressively "enlightened society" – cultural differences representing no more than the different degrees of progress reached by worldwide societies from time to time.

In the same, rather, universalist perspective, the idea of the existence of a sort of 'cultural progress' characterizing the degree of development of different societies is at the core of another significant theory developed in the field of cultural anthropology, some decades after the Enlightenment period. Elaborated in the XIX century, notably, by Auguste Comte and Georg Wilhelm Friedrich Hegel, the theory of *evolutionism* has been applied, in the context of philosophical studies, with regard to several aspects of cultural anthropology. According to such theory, societies are conceived to evolve in the sense of enhancing the conditions of the concerned individuals and groups, notably by the means of acquisition of freedom and establishment of social contracts. In particular, such idea has been developed by the American anthropologist Lewis Henry Morgan who, in its work *Ancient Society* (1877), divides the evolution of societies in three phases – and, namely, the "savage", the "barbarian", and the "civilized" one – to be equally passed through by every group of individuals characterized by a cultural tradition. Also in this case, the author suggests a rather universalist-oriented vision of the evolution and development of worldwide societies, thereby proposing as unique and universal cultural

and social standards the ones linked, unavoidably, with its personal experience as a Western scholar of social sciences.

Linked to such ideas of "evolution" and "progress", another significant school of thought which spread significantly in the XIX century consists in the so-called "Marxist evolutionism". Wrongly compared with the idea of "social Darwinism" elaborated in the same years[281], also the Marxist evolutionist school of thought finds its theoretical groundings in Morgan's *Ancient Society*, and it identifies in the path of every society the succession of different phases. In this case, the analysis of such recurring periods is characterized by the adoption of a rather socio-economic oriented perspective: precisely, in this context, the distinct stages identified by Marxist evolutionism's authors consist in "primitive communism", "slavery", "feudalism", "capitalism" and "communism". Apart from such prerogative, however, also according to this school of thought the final aim of each society consists in the evolution towards the most advanced status, and the differences coexisting among societies in the globe regard the different degree of awareness about the reach of the 'communist phase'.

Having arguably obtained a rather vast success in the context of traditional cultural anthropology studies, the evolutionist school of thought has not come without issues or critiques. This is true, in particular, with reference to the several theories of cultural anthropology which have been developed, both in Europe and in the United States, since the beginning of the XX century, which may represent, in view of their core principles and beliefs, a veritable reaction against such spread of evolutionist theories. In this context, a remarkably significative critique to the traditional principles of evolutionism appears as having emerged, in the United States, in the work of Franz Boas and, notably, in the theory of *cultural particularism*.

Elaborated by Boas together with his disciples, the theory of cultural particularism is grounded on the idea that cultures and societies should be understood and described *in their own proper terms*, rather than being fitted into some evolutionary, universalist, schemes in the context of which some cultures are considered more advanced than others according to specific parameters established *a priori* by the observer – and, notably, with reference to the European and North American cultural tradition. In this sense, and as in the case of evolutionist theories, the aim of the cultural anthropology researcher consists in shedding a light on the origins of determined cultural traditions and on the study of how such cultures influence individuals and societies through the decades. However, from the perspective of historical particularism, cultures and individuals are not conceived, as in the case of evolutionism,

[281] Social Darwinism is a term scholars use to describe the practice of misapplying the biological evolutionary language of Charles Darwin to politics, the economy, and society. For a critique of this school of thought, see among others Marvin Harris, *Antropologia culturale*, Zanichelli, 1990, pp. 403-404.

as merely expressions of a kind of 'unidirectional' and 'functional' evolution. On the contrary, each society comes with a wide background entailing individuals' traditions, beliefs, circumstances, social relationships etc., which need to be taken into account on a case-by-case basis when it comes to the study and observation of a determined society. In this sense, according to Boas, the proper role which has to be recognized to cultural anthropology – and, in general, to the whole asset of anthropological studies –is a descriptive one. Therefore, anthropologists should focus on describing cultures rather than evaluating them. In other words, Boas starts from the assumption that a fundamental problem with these unilinear models of cultural development, and, in particular, of cultural evolutionist theories, consists in their inherent assumption that Western European society represents the end product of the so-defined "evolutionist sequence" and its highest attainable level of development, and that the societies that possibly do not fit into that models are substantially less developed or, even, 'savage'.

To contrast such historicist-oriented perspective, Boas enhances the methodology of ethnography studies as an effective tool to cope with the universalist bias intrinsically entailed in the evolutionist perspective – and, notably, of the Western-led point of view – by the means of its emic approach to the observation and reconstruction of different societies and practices.[282] Persuaded of the truth that every culture has its own history with its prerogatives and features, and that there is no hierarchy among cultures, Franz Boas approaches the study of worldwide societies, as it has been anticipated above, in a rather cultural relativist perspective. According to his thought, all cultures have their own historic trajectory and each culture develops according to this history and to its own cultural and environmental context, with no possibility of identifying, by the means of anthropology, any kind of universal law such as to establish the different level of 'development' or 'advancement' possibly attributably to different societies.[283]

In this sense, the considerations carried out by Boas have been elaborated, within the European context, by a remarkable number of anthropologists, notably from Great Britain. In particular, the necessity of detaching anthropologic studies from critical evaluations of concerned societies has been investigated, in the light of Boas's studies, by the scholar Bronislaw Malinowski who, having agreed on the necessity of the adoption of a rather more 'cultural-relativist-oriented' perspective in the field of anthropological studies, identifies as the final aim of cultural anthropology the *description* of the functions attributed and recurring by the different societies to custom and institutions, rather than the explanation and investigation of the analogies and the differences unavoidably occurring in

[282] On the function of ethnographic studies and the notion of universalism, see *supra* .

[283] See among others Franz Boas 1920 "The Methods of Ethnography" in 22 *American Anthropologist* 4; Marvin Harris, *The Rise of Anthropological Theory: A History of Theories of Culture*, New York: Thomas Y. Crowell Company, 1968. (Reissued 2001).

worldwide societies. In this view, which takes on the name of "structural functionalism", there is no place of ethics evaluations or judgments in the context of worldwide societies' observation.[284] On the contrary, human beings and societies are observed and described with their set of biological needs, and the various customs and institutions that they have developed are conceived as necessary to fulfill those needs. In particular, according to Malinowski, the culture of every society needs to be observed and studied as "a need of surveying system", such as to satisfy essential human needs such as food, reproduction, security, health and protection.[285]

II.2. The debate between universalism and cultural relativism and its consequences on the international public law framework. Which protection for cultural heritage of "Non-Outstanding Universal Value" falling out from the scope of the UNESCO 1972 World Heritage Convention?

II.2.i. The notions of 'universalism' and 'cultural relativism' among anthropology, history and politics: the evolution of the debate from Ancient Times to World War II

Having dedicated the above paragraphs to an overview of the most significant aspects, with regard to the present research, elaborated by anthropological studies with respect to the notions of culture and law, as well as to their complex relationship and their various expressions in the context of worldwide human societies, it seems now the moment to dwell into the study of how the assumptions and theories presented above have influenced the field of international public law dedicated to the protection of culture and cultural heritage.

In particular it is important, for the scope of the present analysis, to try to understand how the notions of anthropology presented in the above paragraphs may be applied, in an *integrated* perspective, to the investigation of the complex relationship among international public law, global organizations and the protection of worldwide cultural heritage – relationship which, as it has been stated in the introduction, needs to be approached with a rather wide perspective than the one provided by merely international law studies.

This is true, in particular, with regard to the analysis of the international framework put in place by the United Nations, and, notably, by UNESCO, for the worldwide protection of the cultural heritage of people, which may be explored through the lens of both international law and anthropological studies in the aim of achieving a more integrated vision of its actual status. This, notably, in the light

[284] On the thought of Malinowski, see inter alia Bronislaw Malinowski, *Argonauts of the Western Pacific: An account of native enterprise and adventure in the Archipelagoes of Melanesian New Guinea, Routledge and Kegan Paul re-edited 2013; Bronislaw Malinowski, Freedom & Civilization. London 1947.*

[285] *Bronislaw Malinowski, A Scientific Theory of Culture and Other Essays Chapel Hill, N. Carolina: The University of North Carolina Press, 1944.*

of the intrinsic current limitations entailed within such norm-set which, although having been established for enhancing the worldwide protection of cultural heritage, appears, as exposed in the above paragraphs, as presenting several limitations – in particular with regard to the scope of the World Heritage Convention for the protection of cultural heritage in times of peace.

As it has been exposed, in fact, the current framework established by such UNESCO tool appears as possibly presenting a series of shortcomings in terms of the effectiveness of the universal protection conferred by the treaty – which seems, on the contrary, to confer such protection only to a selected list of cultural goods.

In this sense, and in the light of the above, the idea underpinning the present research refers to the opportunity of investigating the possible causes of such limitations with an eye on the hints provided by those social sciences which appear as having gained a deeper awareness about the concept of 'culture' and its relationship with the legal and social discourse – and, notably, anthropology. This, notably, with reference to the two complex concepts, other than the one of 'culture'[286], of '*universalism'* and '*relativism'* when applied in the field of cultural studies, and, in particular, in the context of the international institutional and legal framework for the global protection of cultural heritage.

In accordance with such idea and turning back to the perspective of legal studies – and, in particular, international public law, several jurists have tried to investigate the current limitations of the UNESCO framework in the light of the notions of universalism and cultural relativism as it has been entailed in anthropological studies, but applied, in such context, in the field of the law of global organizations. In particular, the scope of these scholars' analysis regards how the reasons intrinsic in the *aporia*s entailed in the UNESCO framework for the worldwide protection of heritage – and, notably, in the World Heritage Convention – might be imbued in the organization's conception itself of cultural heritage as a common resource of *universal* value, such as to express values and aesthetic parameters which are shared by the whole humanity, with no distinction about spatial and temporal circumstances – and without reference to the notion of cultural diversity.

Object of the studies of several anthropologists of the XIX century[287], the debate between the two concepts of 'universalism' and 'cultural relativism' grounds its roots in very ancient times, and, in particular, in the thoughts of philosophers, historians and politicians.

In detail, the first theoretical elaborations carried out around the idea of 'universalism' have been reported by scholars as originated in Ancient Greece, in the context of which philosophers rejected the view that severe offences to human dignity – and, in particular, slavery – were inherent to all

[286] See *supra*.
[287] See *supra*.

human beings. According to Socrates, Plato and, in particularly, Aristotle, all men are born in the same condition, and some core values like equity, freedom and human dignity have not been established by society, but by their intrinsic nature. As a consequence, all human beings are perceived as allowed to soar 'into the infinite' on an equivalent basis, and therefore they are placed, for what it concerns the recognition of some core *universal* values applicable to all humankind, in a condition of equality.[288] Likewise, the idea that there are some core, absolute values – like, for example, freedom – which are a prerogative enjoyed by all the human beings is reflected in the Confucian though, according to which all men are born naturally free,[289] and in the beliefs of Roman philosophers. According to Cicero, all human beings are born "independent, and indeed free and wild, […] accompanied by all the host of heaven",[290] and, as it has been exposed by Seneca, humankind founds itself on the principles of dignity, freedom and equality, which are inherent to human beings and therefore shared as universal. In the same idea, such universal dimension of the core values and principles recognized from and inherent to all humankind is at the core of the philosophical thought of 17th century philosophers Thomas Hobbes and John Locke,[291] to the extent that freedom is a condition innate in the human being, as a core right shared *universally*.[292] As for the reason of such conception, according to these authors, the ultimate origin of such principle in moral nature or, from a philosophy of law perspective, in the notion of *natural law* which, already developed by classical Greek philosophers in the concept of "ικαιον φυσικον", has been elaborated by Thomas Aquinas's *Summa Theologiae* as

"[man's] inclination to good, according to the nature of his reason, which nature is proper to him: thus man has a natural inclination to know the truth about God, and to live in society: and in this respect, whatever pertains to this inclination belongs to the natural law; for instance, to shun ignorance, to avoid offending those among whom one has to live, and other such things regarding the above inclination".[293]

In the same way, an analogous conception of a core of universal principles shared by humanity as an expression of natural law is entailed in the Kantian philosophy which, recognizing the existence of a

[288] See Federico Lenzerini, 'The Debate on 'Universalism' and 'Cultural Relativism' in International Human Rights Law, in Federico Lenzerini, *The Culturalization of Human Rights Law* (Oxford University Press, 2014).
[289] See Wei-Bin Zhang, *American Civilization Portrayed in Ancient Confucianism* (Algora Publishing, 2003).
[290] See Marco Tullio Cicero, *De re publica* (55-51 b. C.) and *De legibus* (circa 52 b. C.).
[291] See Thomas Hobbes, *Leviathan* (1651), reprinted by John C. A. Gaskin (ed. by), (Oxford University Press, 2008), and John Locke, *Second Treatise of Government* (1689), reprinted by Crawford Brough Macpherson (ed. by), (Hackett Publishing, 1980).
[292] See also John Finnis, *Natural Law and Natural Rights*, second edition (Oxford University Press, 2011).
[293] Thomas Aquinas, *Summa Theologiae* (1265 – 1274).

series of immutable prerogatives inextricably linked to the dignity inherent in every man, refers to human being as

"a person, that is, as the subject of morally practical reason [who] possesses a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world. He can measure himself with every other being of this kind and value himself on a footing of equality with them".[294]

On the other side, according to a pure relativist conception, there is no moral judgment which can be considered as universally valid – meaning valid for all cultures. Instead, in view of all the existing differences entailed in the traditions and societies of worldwide peoples coexisting in the worldwide scenario, every moral judgment has to be considered as "*culturally relative*".[295] In this sense, local cultural traditions have to be considered as "properly determin[ing] the existence and scope of […] rights enjoyed by individuals in a given society, [and] no transboundary legal or moral standard […] may be judged acceptable or inacceptable".[296] In the same way, several criticisms have been raised about universalist theories by the 18th century politician Edmund Burke who, criticizing the principles arising from the French Revolution, concluded that

"the restraints on men, as well as their liberties, are to be reckoned among their rights. But as the liberties and restrictions vary with times and circumstances, and admit of infinite modifications, they cannot be settled upon any abstract rule; and nothing is so foolish as to discuss them on that principle".[297]

Likewise, the perspective according to which there exist some core principles and moral judgments to be considered as universally valid has been criticized by the 20th century philosopher Isaiah Berlin who, investigating the notion of *value pluralism*, asserts how basic human values have to be considered as "irreducibly multiple", and, therefore, possibly "conflicting and incommensurable",

[294] Immanuel Kant, *The Metaphisics of Morals* (1797), (ed. by Mary Gregor, 1996).
[295] Merrilee H. Salmon, 'Ethical Considerations in Anthropology and Archaeology, or Relativism and Justice for All' (1997), 53 *Journal of Anthropological Research* 47.
[296] Fernando R. Tesòn, 'International Human Rights and Cultural Relativism' (1985), 25 *Virginia Journal of International Law* 689. See also Tracy Higgins, 'Anti-Essentialism, Relativism and Human Rights' (1996), 19 *Harvard Women's Law Journal* 89, referring as the main shortcoming of universalism the fact that it fails to respect the existence of cross-cultural differences, since claims arising from such theory is "substantially independent of history, individual choices and human experience".
[297] Edmund Burke, *Reflections on the Revolution in France* (1790), (Raleigh N.C.: Alex Catalogue, 1998).

thereby leaving free human beings to determine the core values and principles applicable in civil society throughout their free choices among different options – in a pluralism-oriented perspective.[298] As for the main reason of concern raised by the supporters of cultural relativist theories with regard to the universalist standpoint, notably, it is possible to identify the perceived strict and inextricable interconnection between the so-defined 'universal' values and the traditional Western philosophy. As it has been raised by several scholars, indeed, it would be due to Western philosophers the conception of the whole discourse about the existence of universal core principles inherent to all human beings and therefore applicable to the whole humanity, together with the "work of expression concerning the idea, the project of its formulation, explanation, analysis of its presuppositions and consequences and, in short, the draft of [its] philosophy".[299] In other words, part of the doctrine understood universalist principles as a uniquely Western idea, notably derived from Enlightenment conceptions of the Rights of Man emerged in the late 18th century and revolving around the neglected idea that some cultures are more sophisticated than others, being the latter perceived as "primitive" and "childlike" in a dichotomist perspective referring to the old German distinction between *Kultur* and *Zivilisation*.[300] In this sense, several scholars of anthropology – and, among others, Melville Jean Herskovitz[301] – identified in ethnocentrism and universalism their theoretical major enemies, identifying in "the point of view that one's own way of life is to be preferred to all others", along with

[298] See George Crowder, Isaiah Berlin: Liberty, Pluralism and Liberalism (Key contemporary thinkers ed., 2004), and Robert Nichols, 'The World of Negative Liberty. Reading Isaiah Berlin through Weak Ontology' in Bruce Baum and Robert Nichols (ed. by), *Isaiah Berlin and the Politics of Freedom. 'Two Concepts of Liberty' 50 Years Later* (Routledge, 2015). See also Brooke Ackerly, *Universal Human Rights in a World of Difference* (Cambridge University Press, 2008) and Claudio Corradetti, *Relativism and Human Rights: A Theory of Pluralistic Universalism* (Springer, 2009).

[299] See Adamantia Pollis and Peter Schwab, 'Human Rights: A Western Construct with Limited Applicability', in Adamantia Pollis and Peter Schwab (ed. by), *Human Rights: Cultural and Ideological Perspectives*, (New York: Praeger, 1979). As it has been remarked in doctrine, the first criticisms towards the universalist conception of human dignity have been raised by a series of eminent authors of the past decades. In particular, some heavy concerns on the point have been raised by the 18th century philosopher Jeremy Bentham, according to who universalism and natural rights are "simply nonsense: […] laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poison [are] imaginary right, a bastard brood of monsters, gorgons and chimeras dire" (see Jeremy Bentham, 'Anarchical Fallacies: Being an Examination of the Declaration of Rights Issues During the French Revolution' in The Works of Jeremy Bentham, published under the superintendence of his executor, John Bowring, vol. II (Edimburgh: William Tate, 1838 – 1843). In the same way, the 19th philosopher Norberto Bobbio defines, in its book *L'età dei diritti* (2005), universal values and, notably, human rights as individualistic conceptions of society originated in the social conflicts from time to time arising in specific circumstances – as an example, as a result of a religious war. In the same century, the philosopher Ronald Dworkin expresses himself in the field in object in its *ouvrage Sovereign Virtue: The Theory and Practice of Equality* (2000), noting that it would be "foolish to expect [any philosophical theory] to provide answers that everyone in the relevant community would accept". On this analysis, see Federico Lenzerini, *The Culturalization of Human Rights Law* (Oxford University Press, 2014), *supra*.

[300] See Thomas Eriksen, 'Between universalism and relativism: a critique of the UNESCO concept of culture' in Jane K. Cowan, Marie-Bénédicte Dembour and Richard A. Wilson (ed. by), *Culture and Rights. Anthropological Perspectives*, (Cambridge University Press, 2012), p. 137. See also Ernst Laclau, 'Universalism, Particularism and the Question of Identity' in John Rachtmann (ed. by), *The Identity in Question* (Routledge, 1995).

[301] Bellefontaine 1895 (Ohio, US.) – Evanston (Illinois, US.) 1923.

the impact of this position on global programmes of action carried out by international actors at the global level, an exceptionable detriment for civil societies and humanity.[302]

Indeed, it is with reference to this last specific point concerning the unavoidable shortcomings coming as a consequence of a universalist approach carried out in the global context and, notably, in the area of international relations, that the doctrinal debate between universalism and cultural relativism, traditionally carried out in the field of anthropology and philosophy studies, has progressively gained the attention of practitioners and scholars of international public law.[303]

II.2.ii. The discussion about the contrast between universalism and cultural relativism in the field of international public law. The consequences of the debate on the 1945 UN Charter and the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights and the 1966 International Covenant on Economic, Social and Cultural Rights

Tackled, among others, in the major body of work of the former diplomat, lawyer and international law scholar Martti Koskenniemi – notably, in its *The Gentle Civilizer of Nations*[304] – the issue of a universalist approach applied to the international community's global agenda has gradually gained importance in the studies of international public law's scholars. This assumption is true, as highlighted by Koskenniemi, in particular with reference to the period that goes from the 1870s to the 1960s and which may be defined, in reason of the historical and political events occurred within these decades, "the century of raise (and fall?) of international public law". [305]

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[302] Melville J. Herskovitz, *Cultural Relativism: Perspectives in Cultural Pluralism* (F. Herskovitz ed., New York Random House, 1972). See also Sally Engle Merry, 'Changing rights, changing culture', in Jane K. Cowan, Marie-Bénédicte Dembour and Richard A. Wilson (ed. by), *Culture and Rights. Anthropological Perspectives*, (Cambridge University Press, 2012), pp. 31-51. On the debate between universalism and cultural relativism from the perspective of anthropology studies carried out see, among others, Claude Lévi-Strauss, *Race et histoire* (Paris: Denoel, 1952); Charles Taylor and others, *Multiculturalism and the 'Politics of Recognition'* (Princeton University Press, 1992); Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon, 1989). As well, see the significant development in this field occurring in the 90s and among others Richard A. Wilson, Human Rights, *Culture and Context: Anthropological Perspectives* (London: Pluto, 1997); Susan Wright, 'The Politicization of Culture' (1998) in 14 *Anthropology Today* 1; Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (University of Minnesota Press, 1996); Norbert Elias, *The Civilizing Process: The History of Manners and State Formation and Civilization* (Oxford Blackwell, 1994); Ellen Messer, 'Anthropology and Human Rights' (1993) in 22 *Annual Review of Anthropology*; Robert Brightman 'Forget Culture: Replacement, Transcendence, Relexification' (1995) in 10 *Cultural Anthropology* 4; Mike Featherstone, *Global Culture: Nationalism, Globalization and Modernity* (London: Stage, 1990); Ralph Grillo, *Pluralism and the Politics of Difference: State, Culture and Ethnicity in Comparative Perspective* (Oxford Clarendon Press, 1998) and Elvin Hatch, 'The Good Side of Relativism' (1997) in 53 *Journal of Anthropological Research*.

[303] See Jean Cohen, "Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization" (2008) 36 *Political Theory* 578; Ronald Cohen, "Human Rights and Cultural Relativism: The Need for a New Approach" (1989) 91 *American Anthropologist* 1014.

[304] Martti Koskenniemi, *The Gentle Civilizer of Nations. The Raise and Fall of International Law 1870-1960* (Cambridge University Press, 2019).

[305] For a further investigation on Martti Koskenniemi's though and its criticism towards the universalist approach applied to international relations and global governance, see also Martti Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Cambridge University Press, 2006) and Martti Koskenniemi, *The Politics of International*

Renamed "the crisis of mid-twentieth century" by the historian Mark Mazower, such historical period has been the object of the studies of international law scholars notably with reference to the events occurred in the global scenario in the aftermath of World War II, and to the international instruments adopted by the international community in this occasion – notably, in the field of human rights.[306]

Entering the third year of the worldwide conflict, on 1 January 1942, Britain, the United States, and the Soviet Union, along with twenty other States, adopted the Declaration by the United Nations, a statement of war aims committing all the allies to preserve "human rights and justice in their own lands as well as in other lands".[307] Not entailing within its disposition any further definition or explanation for the meaning and content of the words "justice" and "human rights", the Declaration by the United Nations have been marked by part of the doctrine as the starting point of universalism in human rights law. This because, within the scope of the document, there is no real reference as to why "human rights" and "justice" should be observed, respected, and applied in all the territories of States. On the contrary, the assumption the above-mentioned concepts would apply everywhere as part of a new international order established in the aftermath of the allies' victory is simply taken as given, as if the drafters' conception of human rights and justice ought to apply to everyone, regardless of the country in which they live, represents a non-disputable principle of international law.

Likewise, the same universalist approach towards international law and, precisely, the same ambition of establishing a series of pre-fixed universal principles, standards and values such as to be applicable, without distinction, in every State of the international community has been found out in the provisions of the other many summits and instruments adopted, in the aftermath of World War II, at the global scope and, in particular, in the conference of the United Nations in May 1945, which opened the UN Charter for signature on 26 June 1945. [308]

Stating the necessity for States Parties to cooperate for the maintenance of international peace through the respect of the principles of justice, human rights and fundamental freedoms, [309] the UN Charter

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Law (Hart, 2011). For the most recent developments of his though, see Martti Koskenniemi and Sarah M. H. Nouwen, 'The Politics of Global Lawmaking: A Conversation' (2021) 32 *European Journal of International Law* 4; Martti Koskenniemi, 'Speaking the language of international law and politics: or, of ducks, rabbits and then some, in Jeff Handmaker and Karin Arts (ed. by), *Mobilizing International Law for 'Global Justice'* (Cambridge University Press, 2018), and Martti Koskenniemi, 'Imagining the Rule of Law: Rereading the Grotian 'Tradition' (2019) 30 *European Journal of International Law* 1. The list of M. Koskenniemi's selected publication is available at https://researchportal.helsinki.fi/en/persons/martti-koskenniemi/publications/. Last access 24 November 2022.

[306] Mark Mazower, 'An International Civilization? Empire, Internationalism and the Crisis of the Mid-Twentieth Century' (2006) 82 *International Affairs* 553.

[307] Declaration by the United Nations, adopted on 1 January 1942, Washington D.C.. Full text available at https://avalon.law.yale.edu/20th_century/decade03.asp. Last access 24 November 2022.

[308] See 'Preparatory Years: the UN Charter History' available at https://www.un.org/en/about-us/history-of-the-un/preparatory-years. Last access 24 November 2022.

[309] "The purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, […] in conformity with the principles of justice and international law […]; 3. To achieve international cooperation […] in promoting and encouraging respect

may represent, in view of its objective of "reaffirm[ing] faith in fundamental human rights, in the dignity and worth of the human person" as well as of "promoting social progress and better standards of life"[310], a tentative of a structural reimagination of the international order, such as to create institutions which would be in charge of establishing, for the whole global community, a common set of values and principles worldwide applicable – in other words, establishing universality in international law.

Likewise, according to part of the doctrine,[311] the same universal, "imperial-colonial" assumption concerning the existence of a "one-size-fits-all" conception of justice and rule of law may emerge from the provisions of the Nuremberg International Military Tribunal which, established "for the prosecution and punishment of the major war criminals of the European Axis",[312] was intended to assume universal jurisdiction over war crimes committed by the Nazis.[313]

Even more, the adoption of a rather universal conception of international law and global values has been remarked, by part of the doctrine, with regard to the Universal Declaration of Human Rights.[314] Defined as one of international law's history's 'turning points' – notably along with the Peace of Westphalia (1648) and the Congress of Vienna (1815) –,[315] the UDHR has been adopted by the United Nations in the aftermath of World War II, with the aim of establishing common standards for all nations in the field of human rights and fundamental freedoms, to be applicable on a permanent basis and at global and regional levels. As it is stated in its preamble, the document has the objective to reaffirm the faith of the "peoples of the United Nations" in fundamental human rights, and "promote social progress and better standards of life in larger freedom".[316] In particular, such aim applies in view of the "barbarous act which have outraged the conscience of mankind, and in the advent of a world in which […] Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of *universal* respect for and observance of human rights and

for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;" art. 1, paragraphs 1 and 3, UN Charter.

[310] UN Charter, preamble.

[311] For a further analysis on this point, and, in particular, on the notion of "defensive relativism", see Frederick Cowell, *Defensive Relativism: The Use of Cultural Relativism in International Legal Practice* (University of Pennsylvania Press, JSTOR 2023).

[312] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal ("Nuremberg International Military Tribunal Statute"). Adopted in London, 8 August 1945.

[313] In the same way, the adoption of a rather universalist-oriented approach in the decisions of judges has been highlighted by part of the doctrine with reference to the international tribunals established by the Security Council in the 1990s and, notably, with regard to the International Criminal Tribunal for Rwanda. On this issue, see Ida Bostian, 'Cultural relativism in international war crimes prosecutions: The International Criminal Tribunal for Rwanda' (2005) 12 *ILSA Journal of International and Comparative Law* 1.

[314] General Assembly, Universal Declaration of Human Rights ('UDHR'), RES 217/A (Paris, 10 December 1948).

[315] See Frederick Cowell, *Defensive Relativism: The Use of Cultural Relativism in International Legal Practice* (University of Pennsylvania Press, JSTOR 2023).

[316] UDHR, preamble.

fundamental freedoms".[317] In particular, it is in virtue of the "common understanding of these rights and freedoms of the greatest importance" acknowledged by the States Parties of the United Nations, as well as of the shared idea that the human rights stated in the UDHR, that "a common standard of achievement for all peoples and nations" shall be strived and promoted by every individual and every organ of society by the means of progressive national and international measures, such as "to secure their *universal* and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.".[318]

At the center of the international debate since its drafting process, the adoption of the UDHR has raised some criticisms, in 1947, from the part of the Soviet delegate to the drafting convention. Criticizing, notably, the role carried out in the negotiations from the United States and the United Kingdom delegates, the Soviets highlighted the rather universalist approach emerging from the provisions of the document. To motivate their assumptions, they refer to the existence of a link between an unrestrained application of Western values – and, notably, abuse of democracy – and the raise of fascism and Nazism. In addition, they draw attention the Western's powers hypocrisy in relation to colonialism and human rights, highlighting how Western States appear as seeking the recognition of rights and freedoms in international law while denying them to colonial territories.[319]

Having raised the attention of several scholars of law and anthropology, such Soviet attitude towards the adoption of the United Nations UDHR has been analyzed through the lens of history and social science. Centered around the contradictions attributed to the Western powers attitude towards racism and colonialism, on one side, the advancement of an antidiscrimination and self-determination-oriented global agenda, on the other side, the Soviet contestation of the universalist Western discourse has been acknowledged of a reflection of the political context of the time.[320] As it has been argued by Samuel P. Huntington in its *Clash of Civilizations*,[321] in fact, it is with the re-establishment of a new global order in the aftermath of World War II and, notably, with the advent of the Cold War era, that

[317] UDHR, preamble, emphasis added.
[318] UDHR, preamble, emphasis added.
[319] On the drafting process of the UDHR see, among others, Åshild Samnøy. "Human Rights as International Consensus: The Making of the Universal Declaration of Human Rights 1945–1948" (1993), Chr. Michelsen Institute (CMI Report R 1993:4).
[320] See among others Andrew Moravcsik, "Explaining International Human Rights Regimes: Liberal Theory and Western Europe" (1995) 1 *European Journal of International Relations* 157 and Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe" (2000) 54 *International Organization* 217; José-Manuel Barreto, 'Imperialism and Decolonization as Scenarios of Human Rights History,' in José- Manuel Barreto (ed. by) *Human Rights from a Third World Perspective: Critique, History and International Law* (Cambridge Scholars Publishing, 2013); Brett Bowden, 'The Colonial Origins of International Law: European Expansion and the Classical Standard of Civilization' (2005) 7 *Journal of the History of International Law / Revue d'histoire du droit international* 1571.
[321] See Chapter I. Samuel P. Huntington, 'The Clash of Civilizations?' (1993), in *Foreign Affairs*, pp. 22–49. See also Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, (Simon & Schuster, 2011), Laurence E. Harrison and Samuel P. Huntington (ed. by), *Culture Matters: How Values Shape Human Progress*, (Basic Books, 2000); Lee Harris, *Civilization and Its Enemies: The Next Stage of History*, (Free Press, 2012).

the Soviet discourse advancing a critique towards the Western's own version of universality became relevant at the global scope, notably questioning the conception and role of democracy as understood by European societies.[322]

In this sense, it is through the same lens that several authors have interpreted the adoption, on 16 December 1966, of the International Covenant on Civil and Political Rights ("ICCPR")[323] and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[324] Adopted by the United Nations General Assembly in its resolution 2200 A (XXI), the two treaties aim at establishing an international human rights and fundamental freedoms framework grounded on the principles of equality and human dignity and applicable to every human being placed under the aegis of the United Nations[325]. Coming as the result of intense rounds of negotiations among UN States Parties, the two treaties appear as reflecting the dichotomy existing between, on one side, the Western-European set of values grounded on the principle on the universality of human rights, and, on the other side, the Soviet relativist-oriented perspective, grounded on a Marxist teleology and focused on the importance of economic rights.[326]

As it has been raised by many authors, in fact, despite their final objective of enhancing a worldwide global norm-set of human rights as *universal*, indivisible, and interdependent,[327] the two treaties appear as promoting two rather different conceptions of human rights and fundamental freedoms. As a matter of fact, if ICCPR focuses on the importance of fostering the so-called human rights "of first generation", inherent to human dignity and physical and civil security and peacefully recognized by all the UN States Parties, ICESCR is dedicated to the so-defined human rights "of second generation", based on establishing equal conditions and sometimes resisted by Western nations as perceived as "socialist notions".[328] As a consequence of such distinction, the different scope of the international obligations pending on States Parties pursuant to the two treaties. Indeed, if the former establishes a

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[322] See Antony Anghie, 'Colonial Origins of International Law' in Laws of the Postcolonial', in Eve Darian-Smith and Peter Fitzpatrick (ed. by) *Laws of the Postcolonial* (University of Michigan Press, 1999), and Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004).

[323] Adopted on 16 December 1966, entered into force on 23 March 1976, 999 UNTS 171.

[324] Adopted on 16 December 1966, entered into force on 3 January 1978, 993 UNTS 3.

[325] On the human rights framework established by the two treaties with regard, notably, to their conception of the human right to culture see *infra*, Chapter III.

[326] On this dichotomy see among others Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34 *NYU Journal of International Law and Policy* 513.

[327] "Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, […]" ICCPR, preamble.

[328] The classification of human rights in human rights of first, second and third generation has been initially proposed in 1979 by the Czech jurist Karel Vazak at the International Institute of Human Rights in Strasbourg. Through the decades, the theory has become a milestone in the field of human right, thereby raising several criticisms concerning its effectiveness and its capability to adapt to the evolution of the human rights framework in a teleologic perspective. On these issues, see among others Spasimir Domaratzki, Margaryta Khvostova and David Pupovac, 'Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse' (2019) 40 *Human Rights Review* 423.

set of negative obligations, placing a responsibility on governments to ensure that the fulfillment of those rights is not being impeded,[329] the latter limits itself to the establishment of some "positive obligations" of acting, "to the maximum of [the] available resources, with a view to achieving progressively the full realization of the[se] rights".[330]

Progressively gaining relevance at the global scope, the discussion about the contrast between universalism and cultural relativism in the field of international public law and, notably, the human rights sphere seems as having never left the doctrinal discourse concerning international institutions and their global agendas. On the contrary, the issue has reached a central position in the theoretical debate dedicated to international organizations' role within the worldwide context[331]. In particular, the issue has raised moreover in the light of the historical and political circumstances mentioned in the above paragraphs, notably in the context of the study of the global action of the United Nations and its specialized agencies, and, in particular, in the field of UNESCO which, representing the worldwide leading institution for the fostering of culture and human rights, has been acknowledged as one of the main actors in the so-defined "culturalization of human rights" process.[332]

II.2.iii. The consequences of the debate between universalism and relativism on the UNESCO conception of cultural heritage and the notion of "Outstanding Universal Value" of the 1972 World

[329] "1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant", ICCPR, art. 2.

[330] "1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.", ICESCR, art. 2. It is worth noting the provision of paragraph 3 of the same article, which establishes that "Developing countries, with due regard to human rights and their national economy, *may determine to what extent they would guarantee the economic rights* recognized in the present Covenant to nonnationals." (Emphasis added).

[331] The debate between universalism and cultural relativism and its relationship with the international human rights framework has been tackled, notably with reference to the United Nations General Assembly Convention on the Elimination of All forms of Discrimination against Women (New York, 18 December 1979), by the anthropologist Sally Engle Merry, which identifies the reason of the contrast between the international framework for human rights and the local cultural traditions existing in some areas of the world highlighted by the treaty in the adoption of a rather 'restrictive' definition for 'culture' in the field of international law, and, in particular, in the human rights framework. According to Merry, the idea of 'culture' should be interpreted, within the legal discourse, in a more modern, dynamic and evolutive conception. See also Sally Engle Merry, 2003, Human Rights Law and the Demonization of Culture (And Anthropology Along the Way), in *Political and Legal Anthropology Review*, vol 26 issue 1.

[332] See Federico Lenzerini, 'Rethinking the Debate on Universalism and Cultural Relativism in the Light of the Culturalization of Human Rights Law', in Federico Lenzerini, *The Culturalization of Human Rights Law* (Oxford University Press, 2014).

Heritage Convention. Which scope of protection for worldwide cultural heritage pursuant to art. 4 of the WHC?

II.1.iii.a. The origins of the UNESCO "universalist" approach towards the definition of cultural heritage and the 1995 UNESCO World Commission on Culture and Development Report "Our creative diversity"

Established to foster "the wide diffusion of culture, and the education of humanity for justice and liberty and peace", UNESCO has the objective of contributing to the global action for international peace and global welfare of mankind under the aegis of the United Nations, and pursuant to the principles proclaimed by the UN Charter. To reach such aim, as declared in the UNESCO Constitution's preamble, UNESCO is mandated to contribute to international peace and security by promoting collaboration among States Parties through education, science and culture, "in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.".[333]

Welcomed as an institution reflecting the Enlightenment spirit loyal to the legacy of Diderot and Condorcet, UNESCO has been saluted, in the aftermath of its foundation, as a very much needed and revolutionary tool for the international community. Coming in the aftermath of the intense rounds of negotiations held by the representatives of forty-four countries convened in the United Nations Conference which took place in London in November 1945,[334] the birth of the organization is the result of the work carried out by the governments of the European countries which, confronting Nazi Germany and its allies, met as early as in 1942, in wartime, in the United Kingdom for the Conference of Allied Ministers of Education (CAME). Consequently, the main reason why it is established consists in the aim of embodying a genuine worldwide *culture of peace*, fostering the intellectual and moral solidarity of humankind, and thereby preventing the outbreak of another world war.[335] To reach such objective, precisely, UNESCO is uncharged of bringing people together through mutual understanding and dialogue between cultures, and, in particular, to foster cultural interchange in the arts, the humanities and the sciences, because of their key role in promoting freedom, dignity and

[333] UNESCO Constitution, preamble.
[334] See UNESCO, Conference for the Establishment of the United Nations Educational, Scientific and Cultural Organisation, held at the Institute of Civil Engineers, London, from 1 to 16 November 1945, ECO/CONF./29.
[335] The preparatory works, the documents and the archives of the CAME group are available at: https://atom.archives.unesco.org/ag-2-conference-of-allied-ministers-of-education-came. Last access 10 December 2022.

well-being of all.[336] In this sense, art. 1 of the Draft Proposal for an Educational and Cultural Organisation of the United Nations identifies as the objective of the organization the development and maintenance of the mutual understanding and appreciation of the life and culture, the arts, the humanities and the sciences of the peoples of the world, "as a basis for effective international organization and world peace".[337] As it appears, indeed, the establishment of UNESCO comes with a clear vision: to achieve lasting peace, economic and political agreements capable of bringing States Parties' peoples together through mutual understanding and dialogue between cultures.

Indeed, it is in the light of such objective that UNESCO has, over the decades, launched pioneering programs finalized at the creation of a new 'global cultural order' founded on the principles of respect for worldwide culture, universal appreciation of the arts, the humanities and the sciences and global enhancement of education.

Focusing on a set of objectives concerning culture in a wide sense and in particular cultural heritage and diversity, UNESCO has planned and implemented, since its foundation, a vast number of developmental and cooperative projects finalized at the creation of a 'culture of peace'. With the wide range of pioneering programs launched by the organization over the years, UNESCO has been recognized as having made important contributions to international debates about racism, sustainability, and quest for cultural rights, mobilizing States Parties and civil society towards a more inclusive and sustainable conception of the cultural heritage and freedoms of humankind. This, as it is reported on its official site, notably by focusing on a set of overarching objectives considered as of global priority, and namely attaining quality education for all and lifelong learning, mobilizing science knowledge and policy for sustainable development, addressing emerging social and ethical challenges, fostering cultural diversity, intercultural dialogue and a culture of peace and building inclusive knowledge societies through information and communication.[338]

As for the recognition of the effectiveness of UNESCO contribution within the global context, as it has been worldwide acknowledged in occasion of the 75th anniversary of the organization, it appears how arguably significant results have been obtained by such UN agency in the path towards the creation of a peaceful and health global society conceived as a common good. Such assumption refes, in particular, to UNESCO's contribution in the fields of the observance of human rights, mutual

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[336] "[…] and therefore assist in the attainment of under-standing, confidence, security and peace among the peoples of the world". See UNESCO, Conference for the Establishment of the United Nations Educational, Scientific and Cultural Organisation, preamble.

[337] "To co-operate in extending and in making available to all peoples for the service of common human needs the world's full body of knowledge and culture, and in assuring its contribution to the economic stability, political security, and general well-being of the peoples of the world" art. 1 para. 2, Draft Proposal for an Educational and Cultural Organisation of the United Nations. Available at https://unesdoc.unesco.org/ark:/48223/pf0000117626.locale=en. Last access 5 November 2022.

[338] See https://www.un.org/youthenvoy/2013/08/unesco-united-nations-educational-scientific-and-cultural-organization/. Last access 10 December 2022.

respect, and alleviation of poverty, all of which are at the heart of the organization's mission and activities. In the same way, the key role of UNESCO's contribution has been acknowledged about the enhancement of sustainable development, cultural and natural heritage, and cultural diversity, as well as in other connected areas concerning the right to education, the importance of communication and freedom of information and gender justice.[339]

Recognized at the global level both from political and economic international authorities, such key role of UNESCO in the progressive enhancement of humanity has often been recalled in doctrine.[340] In particular, the global action of UNESCO has been saluted in virtue of its capability of involving within its agenda the contribution of civil society, which within the decades appears as having played a progressively active role in the implementation of the UNESCO programs and plans.

Notwithstanding with these undeniable above-mentioned merits recognized to the contribution of UNESCO in the global action for a better world, however, it is remarkable to highlight how, within its decades of action, the organization has been object, also, of a series of important criticisms. This, in particular, concerns the global vision of culture promoted by the organization, as well as the perspective adopted by UNESCO in its widespread "culturalization" of politics and aesthetics carried out in the late 20th century. Instead of the organization's main purpose of enhancing, within the global sphere, the importance of multicultural dialogue, mutual understanding and cultural diversity, in fact, UNESCO has been labelled as adopting a unilateral approach to the protection and the promotion of culture, considering all these values in a rather universalist perspective. Such intrinsic limit of the organization has been raised, among others, by the philosopher Alain Finkielraut who, in 1987, has remarked how UNESCO, although founded in the aim of establishing a "new global cultural order" such as to encompass all the different cultural expressions and forms characterizing the peoples of the world, has progressively degenerated into "a tool for parochialism and supremacist universalism".[341] In the same way, the universalist perspective adopted in UNESCO conceptualization of culture as "culture of peace", as well as the universality of ethics promoted by the organization – notably reproducing the above mentioned traditional German distinction between *Kultur* and *Zivilisation* – has been highlighted by several authors both in the fields of anthropology

[339] See UNESCO, "75 years of history in the service of peace", available at https://www.unesco.org/en/75th-anniversary. Last access 10 December 2022.

[340] See among others Francesco Francioni and Lucas Lixinski, 'Opening the Toolbox of International Human Rights Law in the Safeguarding of Cultural Heritage, in Andrea Durbach and Lucas Lixinski (ed. by), *Heritage, Culture and Rights. Challenging Legal Discourses* (Bloomsbury, 2017); Francesco Francioni, 'Evaluation du travail normative de l'UNESCO dans le domaine de la culture: la Convention de 1972 pour la protection du patrimoine mondial culturel et naturel. Rapport Final', Paris, April 2014; Irena Kozymka, *The Diplomacy of Culture. The role of UNESCO in Sustaining Cultural Diversity* (Palgrave edition, 2014) and Federico Lenzerini, 'Fostering Tolerance and Mutual Understanding Among Peoples', in Abdulqawi Yusuf (ed. by), *Standard-Setting in UNESCO, Volume I: Normative Action in Education, Science and Culture, Essays in Commemoration of the Sixtieth Anniversary of UNESCO* (2007).

[341] Alain Finkielraut, *La defaite de la pensée* (Paris Gallimard, 1987).

and international public law. In particular, such aspect has been raised, above all, with reference to the work carried out by the organization in the 1990s/2000s decades.[342]

In particular, such critique to UNESCO's universalist perspective has been referred to by the anthropologist Thomas Eriksen and, notably, with regard to the UNESCO Report "Our creative diversity" adopted by the UNESCO World Commission on Culture and Development in 1995.[343]

Identified as one of the most significative UNESCO documents in reason of its programmatic approach and its declaratory scope, such report has been pointed by part of the doctrine as a linchpin in the analysis and interpretation of the UNESCO attitude towards the worldwide enhancement of cultural heritage and diversity.

Adopted in the aim of enhancing the importance of culture in the global economic and development processes, as well as to foster development and economy as a part of a people's culture,[344] the UNESCO Report "Our creative diversity" consists in a declaration of policy adopted by the organization to orient its global action in the following decades. As referred to in the document, in particular, the UNESCO World Commission on Culture and Development identifies a number of actions to be carried at the global level to reach these objectives. In this sense, according to the document, UNESCO's action should seek to enhance the discussion and analysis of culture and development, to foster the emergence of an international consensus on culture and development, particularly through the universal recognition of cultural rights, and to mobilize civil society – from the local level to the international sphere and from central governments to the private sector – towards the realization of these UNESCO's objectives worldwide.[345]

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[342] Among the scholars of international public law, see among others, Vittorio Mainetti, 'Diversité Culturelle à l'UNESCO: Ombres et lumières', *Approches juridiques de la diversité culturelle*, Academie de droit international de la Hague, 2013, p. 64 ff, and Vittorio Mainetti, 'Diversité culturelle et droit international', in Patrick Suter, Nadine Bordessoule- Gilliéron, Corinne Fournier Kiss (ed. by), *Regards sur l'interculturalité. Un parcours interdisciplinaire* (MetisPresses, 2016). For an anthropology perspective, see Richard A. Wilson (ed. by), *Human rights, culture and context: anthropological perspectives* (London Pluto, 1997), and Susan Wright, 'The Politicization of Culture' (1998) 14 *Anthropology Today* 1.

[343] UNESCO, "Our creative diversity: Report of the World Commission on Culture and Development" (Paris, 1995), available at https://unesdoc.unesco.org/ark:/48223/pf0000101651. Last visit 11 December 2022. See Thomas Hylland Eriksen, 'Between universalism and relativism: a critique of the UNESCO concept of culture', in Jane K. Cowan, Marie-Bénédicte Dembour and Richard A. Wilson (ed. by), *Culture and Rights. Anthropological Perspectives* (Cambridge University Press, 2012).

[344] See UNESCO, "Our creative diversity: Report of the World Commission on Culture and Development", p. 15.

[345] "These actions seek to: (i) enhance and deepen the discussion and analysis of culture and development; (ii) foster the emergence of an international consensus on culture and development, particularly through the universal recognition of cultural rights, and of the need to balance these rights with responsibilities; (iii) ensure that through the advance of human development, wars and internal armed conflicts can be reduced; (iv) apply the balance of rights and duties to the media of communication; initiate a process of consultation that will lead to a Global Summit on Culture and Development; (v) promote the widest democratic participation by all, especially women and young people; promote this participation at all levels, from the local, the provincial, and the central government levels to the international and global level, where it has so far been neglected; and for all organizations, including private voluntary organizations and private firms (for which democratic participation has been much less discussed than for governments); and (viii) mobilize energies around several practical initiatives." UNESCO, "Our creative diversity: Report of the World Commission on Culture and Development", pp. 18-19.

Although saluted by the UNESCO World Commission on Culture and Development as "an urgent call for the widest possible democratic mobilization" towards the worldwide enhancement of "the unity in the diversity of cultures", indeed, the UNESCO Report "Our creative diversity" appears as entailing, as it emerges from its words, the necessity of enhancing a new "global ethics [and] *universal* imperative[s]" applicable to the cultures of all the people of the world, in the aim of furnishing, in the cultural field, a set of "minimal standards any community should observe". According to this view, the document declares the importance of eliminating those cultural habits representing "obstacles and inhibitions in the path forward" what it defines, precisely, "nothing less than a new Renaissance - a new, creative vision of a better world". [346]

Defined by Eriksen as an expression of supremacist universalism, the UNESCO Report "Our creative diversity" appears as entailing as its major shortcoming the lack of a unique, global definition for culture, such as to be applicable to all the diverse cultural traditions coexisting around the globe.[347] As a matter of fact, it seems that the document does not provide any kind of general principle or standard suitable for the worldwide identification of what is culture – and what needs, therefore, to be protected and enhanced with a view to the economic and sustainable perspective. On the contrary, the work of the UNESCO World Commission on Culture and Development appears as referring, *de facto*, to a conception of "culture" already embedded within the UNESCO framework, thereby promoting the birth of a "new global ethics" capable of standardizing all the variety of worldwide cultural expressions to the UNESCO pre-fixed standards.[348]

Furthermore, it appears that the rather universalist conception of the cultural sphere and, in general, of such "cultural globalization" seems as entailed in the UNESCO Report "Our creative diversity" with regard to its focus on enhancing the strict interconnection between culture, sustainability and economy. Stressing the importance of enhancing the consideration of culture and sustainable development in the context of economic processes, thereby avoiding all those cultural behaviors which might be in contrast with the achievement of such objective, the document appears indeed as providing a remarkably European-oriented perspective of the matter, grounded on the evidence of the economic conditions of Western States at the moment of the report adoption. As for the reasons of such bias, it appears how the composition itself of the UNESCO World Commission on Culture and Development itself may represent an intrinsic limit. Although comprised of an apparently balanced combination of representatives from both Western and non-Western countries, in fact, such organ

[346] UNESCO, "Our creative diversity: Report of the World Commission on Culture and Development", pp. 16. Emphasis added.
[347] On the obstacles encountered by UNESCO in providing a global definition for "culture", see Chapter I.
[348] See Chapter I "Why we need a global ethics", UNESCO, "Our creative diversity: Report of the World Commission on Culture and Development", p. 34.

appears as affected by the different burden of its components' decisions within the processes of negotiation. In particular, it seems how a consequence of such composition may therefore consist of the unavoidable favoring, because of the pre-existing international relations existing among the concerned States, of the point of view of those functionaries coming from countries of a Western tradition.[349]

II.1.iii.b. The UNESCO 1972 World Heritage Convention approach towards the international protection of worldwide cultural heritage and the World Heritage List of cultural heritage of "Outstanding Universal Value"

Likewise, the same intrinsic limits to the adoption of a real global, non-biased and all-encompassing cultural perspective have been highlighted by part of the doctrine in the provisions of the UNESCO World Heritage Convention – with specific reference, this time, to the UNESCO framework for the global protection of the cultural heritage of the world.

Coming as the result of the global initiatives carried out, since the 1960s, for saving the cultural heritage of worldwide importance, the treaty seeks to institutionalize a global responsibility for the preservation of those cultural elements considered as of universal significance for humanity.[350]

As stated in the World Heritage Convention preamble, in fact, States Parties acknowledge how the protection of the cultural heritage of the world often remains incomplete at the national level, because of the scale of the resources which it requires and in reason of the possibly insufficient economic, scientific, and technological resources of the country where the property to be protected might be situated.[351]

With regard to the property recipient of such universal protection provided by the international community, States Parties specify how such safeguard is intended to those part of the cultural heritage considered as of *outstanding interest* for the whole humanity, which therefore need to be preserved as part of the world inheritance in virtue of their value for present and future generations.[352]

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[349] For the establishment and composition of the UNESCO World Commission on Culture and Development, see UNESCO, "World Commission on Culture and Development", 27C/INF.11 (Paris, 8 October 1993). For a further analysis of the limits of the UNESCO Report "Our creative diversity", see Arne Martin Klausen 'Our Creative Diversity: critical comments on some aspect of the World Report, in Our Creative Diversity: A Critical Perspective' (1998), Report from the international conference on culture and development, Lillehammer 5-7 September 1997, Oslo, Norwegian National Commission for UNESCO, and Susan Wright 'The politicization of culture' (1998) 14 *Anthropology today* 1.

[350] On the history and the framework of the World Heritage Convention, see Chapter I.

[351] World Heritage Convention, preamble. For an analysis of the preamble of the treaty, see Francesco Francioni, 'The Preamble', in Francesco Francioni (ed.), *The 1972 World Heritage Convention: A Commentary* (Oxford Commentaries on International Law, 2008).

[352] "Considering that, in view of the magnitude and gravity of the new dangers threatening them, it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding universal value, by the granting of collective assistance which, although not taking the place of action by the State concerned, will serve as an efficient complement thereto, […]" World Heritage Convention, preamble.

In particular, the World Heritage Convention identifies as the requirement for cultural goods and sites to be covered by the "effective system of collective protection" established from the treaty their recognized "*outstanding universal value*" ("OUV"), demonstrating the uniqueness and irreplaceability of such property "to whatever people it may belong".[353]

As a matter of fact, it is only this "outstanding" property that should be inscribed, according to the procedures set up by the treaty, in the so-called "World Heritage List" which consists, pursuant to art. 11 of the World Heritage Convention, in the official UNESCO inventory of the cultural and natural property considered as "having outstanding universal value in terms of such criteria as it shall have established". [354]

In the light of the above assumptions, the World Heritage Convention proceeds in the identification of the cultural heritage falling within the scope of its protection in its article 1, which specifies that, for the purpose of the treaty, those monuments, buildings and sites "of outstanding universal value from the point of view of history, art or science", as well as "from the historical, aesthetic, ethnological or anthropological point of view" shall be considered as "cultural heritage.[355]

With respect to the definition of the OUV, the World Heritage Convention refers to the provisions entailed in its Operational Guidelines[356] which establish, at paragraph 48, that "Outstanding Universal Value means cultural and/or natural significance which is so *exceptional* as to transcend national boundaries and to be of common importance for present and future generations of all humanity."[357]

As such, the WHC Operational Guidelines continue: "the permanent protection of this heritage is of the highest importance to the international community as a whole"[358], and, in this sense, UNESCO calls States Parties on the implementation of the provisions established by the World Heritage Convention pursuant to art. 4 and following of the treaty.[359]

As for the criteria to assess the OUV, paragraph 77 of the WHC Operational Guidelines provides ten criteria applicable to the evaluation of heritage. Namely, it should be considered cultural heritage of "outstanding cultural element" any property which:

"(i) represent a masterpiece of human creative genius;

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[353] World Heritage Convention, preamble, emphasis added.

[354] "On the basis of the inventories submitted by States in accordance with paragraph 1, the Committee shall establish, keep up to date and publish, under the title of "World Heritage List," a list of properties forming part of the cultural heritage and natural heritage, as defined in Articles 1 and 2 of this Convention, which it considers as having outstanding universal value in terms of such criteria as it shall have established. An updated list shall be distributed at least every two years." World Heritage Convention, art. 11 para. 2. On the establishment of the World Heritage Committee and on the procedure for inscription of cultural heritage in the World Heritage List, see *infra*.

[355] World Heritage Convention, art. 1.

[356] See Chapter I.

[357] WHC Operational Guidelines, para. 48, emphasis added.

[358] WHC Operational Guidelines, para. 48.

[359] On the obligations pending on States Parties pursuant to the World Heritage Convention, see Chapter I.

(ii) exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design;

(iii) bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared;

(iv) be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history;

(v) be an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change;

(vi) be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance. (The Committee considers that this criterion should preferably be used in conjunction with other criteria);

(vii) contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance;

(viii) be outstanding examples representing major stages of earth's history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features;

(ix) be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals;

(x) contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of Outstanding Universal Value from the point of view of science or conservation;".[360]

[360] WHC Operational Guidelines, para. 77. These criteria were formerly presented as two separate sets of criteria - criteria (i) - (vi) for cultural heritage and (i) - (iv) for natural heritage. The 6th extraordinary session of the World Heritage Committee decided to merge the ten criteria (Decision 6 EXT.COM 5.1)". This, notably, in line with the inclusion within the framework of the World Heritage Convention of the notion of "cultural landscape(s)", defined as "cultural properties and represent the "combined works of nature and of man" designated in Article 1 of the Convention. They are illustrative of the evolution of human society and settlement over time, under the influence of the physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces, both external and internal. They should be selected on the basis both of their Outstanding Universal Value and of their representativity in terms of a clearly defined geo-cultural region. They should be selected also for their capacity to illustrate the essential and distinct cultural elements of such regions. The term "cultural landscape" embraces a diversity of manifestations of the interaction between humankind and the natural environment. Cultural landscapes often reflect specific techniques of sustainable land use, considering the characteristics and limits of the natural environment they are established in, and may reflect a specific spiritual relationship to nature. Protection of cultural landscapes can contribute to current techniques of sustainable land use and can maintain or enhance natural values in the landscape. The continued existence of traditional forms of land use supports biological diversity in many regions of the world. The protection of traditional cultural landscapes is therefore helpful in maintaining biological diversity."; "Cultural landscapes fall into three main types, namely: (i) The most easily identifiable is the clearly defined landscape designed and created intentionally by people.

Furthermore, to be considered as of "OUV", an element of cultural heritage should meet the requirements of "authenticity" – or the capacity of expressing in a veritable and credible way its cultural value[361] – and of "integrity" – which consists, as expressed in para. 88 of the WHC Operational Guidelines, in the possession of all the necessary elements to express its OUV.

Apart from such, rather general, criteria – which, as it has been argued in doctrine, *de facto* limit themselves in the reiteration of those slightly broad and descriptive concepts already expressed in the World Heritage Convention preamble and art. 1[362] – no further indication concerning the assessment of the value of cultural heritage – and therefore, the inclusion of it in the scope of protection provided by its art. 4 – can be found in the disposition of the World Heritage Convention.

On the contrary, the assessment of the "outstanding universal value" attributable, *in concreto*, to worldwide goods and sites of cultural relevance appears as left to the discretion of the evaluations of the *ad hoc* established World Heritage Committee, set up by the treaty pursuant to its art. 8.[363]

In detail, the process for the inscription of cultural heritage in the World Heritage List is outlined in part III of the WHC Operational Guidelines, and it is structured as such. Pursuant to the WHC Operational Guidelines, State Parties should prepare a nomination of a site for its inscription in the World Heritage List following the procedure set up by para. 120 and following. At this stage, they should carry out initial preparatory work to establish that a site "has the potential to justify Outstanding Universal Value", as well as demonstrate its authenticity and integrity.[364] After

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This embraces garden and parkland landscapes constructed for aesthetic reasons which are often (but not always) associated with religious or other monumental buildings and ensembles. (ii) The second type is the organically evolved landscape. This results from an initial social, economic, administrative, and/or religious imperative and has developed its present form by association with and in response to its natural environment. Such landscapes reflect that process of evolution in their form and component features. […] (iii) The final type is the associative cultural landscape. The inscription of such landscapes on the World Heritage List is justifiable by virtue of the powerful religious, artistic or cultural associations of the natural element rather than material cultural evidence, which may be insignificant or even absent." (WHC Operational Guidelines, paras. 47 and 47bis).

[361] "Properties nominated under criteria (i) to (vi) must meet the conditions of authenticity. Annex 4, which includes the Nara Document on Authenticity, provides a practical basis for examining the authenticity of such properties and is summarized below.". WHC Operational Guidelines, para. 77. See also paras. 80 – 86.

[362] "It will be immediately apparent that these [criteria] are types or substantive aspects of heritage sites rather than "criteria" in the strict sense and that, rather than defining "outstanding", they themselves use that word or similar, equally undefined alternatives ("masterpiece", "important", "unique", "exceptional, "superlative", "significant", etc.)." Christoph Brumann, 'The Best of the Best: Positing, Measuring and Sensing Value in the UNESCO World Heritage Arena', in Ronald Niezen and Maria Sapignoli (ed. by), *Palaces of Hope. The Anthropology of Global Organizations*, (Cambridge University Press, 2017).

[363] "An Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value, called "the World Heritage Committee", is hereby established within the United Nations Educational, Scientific and Cultural Organization. It shall be composed of 15 States Parties to the Convention, elected by States Parties to the Convention meeting in general assembly during the ordinary session of the General Conference of the United Nations Educational, Scientific and Cultural Organization. The number of States members of the Committee shall be increased to 21 as from the date of the ordinary session of the General Conference following the entry into force of this Convention for at least 40 States." World Heritage Convention, art. 8 para. 1.

[364] "Such preparatory work might include the collection of available information on the site, thematic studies, scoping studies on the potential for demonstrating Outstanding Universal Value, including integrity and/or authenticity, or an

completing such process, the first preliminary assessment[365] on the nomination is carried out by the World Heritage Convention Advisory Bodies and, notably in the field of cultural heritage, by the International Council on Monuments and Sites (ICOMOS).[366]

As for the inclusion of the cultural good or site in the World Heritage List, para. 153 of the WHC Operational Guidelines establishes that the decision whether a property should or should not be inscribed on the World Heritage List is up to the World Heritage Committee.[367] Guided by the Advisory Bodies, the World Heritage Committee adopts a Statement of Outstanding Universal Value for the concerned property, including "a summary of the Committee's determination that the property has Outstanding Universal Value, identifying the criteria under which the property was inscribed, including the assessments of the conditions of integrity, and, for cultural and mixed properties, authenticity".[368]

As for the possible reasons of such a framework, the doctrine has recalled how they might be entailed in the intrinsic structure of the World Heritage Convention, which has been established to confer its international protection only to a limited number of cultural elements, selected by UNESCO in virtue of their relevance for the international community.[369] In this sense, para. 52 of the WHC Operational Guidelines establishes that "The Convention is not intended to ensure the protection of *all* properties of great interest, importance or value, but *only for a* […] *list of the most outstanding* of these from an international viewpoint" selected by the World Heritage Committee pursuant to the procedures of the treaty.[370]

In other words, although the identification of the cultural elements part of the national heritage to be nominated for the potential inclusion in the World Heritage List lies in the hands of States Parties, in fact, the WHC Operational Guidelines confer the final decision on the issue to the World Heritage

initial comparative study of the site in its regional or wider global context, [….]" WHC Operational Guidelines, para. 120.

[365] "The Preliminary Assessment is a mandatory desk-based process for all sites that may be nominated to the World Heritage List and is undertaken following a request by the relevant State(s) Party(ies)." WHC Operational Guidelines, para. 122.

[366] ICOMOS is a nongovernmental organization with headquarters in Charenton-le-Pont, France. Founded in 1965, its role is to promote the application of theory, methodology and scientific techniques to the conservation of the architectural and archaeological heritage. Its work is based on the principles of the 1964 International Charter on the Conservation and Restoration of Monuments and Sites (the Venice Charter). "The specific role of ICOMOS in relation to the Convention includes: evaluation of properties nominated for inscription on the World Heritage List, monitoring the state of conservation of World Heritage cultural properties, reviewing requests for International Assistance submitted by States Parties, and providing input and support for capacity building activities." WHC Operational Guidelines, para. 35.

[367] "The World Heritage Committee decides whether a property should or should not be inscribed on the World Heritage List, referred or deferred." WHC Operational Guidelines, para 153.

[368] WHC Operational Guidelines, para. 154. For some examples of the evaluations of the nominations of national cultural heritage carried out by the World Heritage Committee see Tullio Scovazzi, 'Le patrimoine cultural mondial', in Tullio Scovazzi, *Le patrimoine culturel de l'humanité*, Centre d'étude et de recherche de droit international et de relations internationales, Académie de droit international de La Haye, 2005.

[369] See Francesco Francioni, 'The Preamble', in Francesco Francioni (ed. by), *The 1972 World Heritage Convention: A Commentary* (Oxford Commentaries on International Law, 2008).

[370] WHC Operational Guidelines, para. 52 (emphasis added).

Committee, specifying that "It is not to be assumed that a property of national and/or regional importance will automatically be inscribed on the World Heritage List".[371]
Indeed, in the absence of any other more specific standard applicable to the selection of the cultural heritage placed under the aegis of the World Heritage Convention, the choice of the cultural elements deserving international protection, in times of peace, at the global scope, appears as having leaned, since the adoption of the treaty, on the discretionary evaluations of the 21 members of the World Heritage Committee, being its primary function the "identif[ication of the] cultural and natural properties of Outstanding Universal Value which are to be protected under the Convention and to [be] inscribe[d] on the World Heritage List;".[372]

II.1.iv. The research for a definition of "Outstanding Universal Value" within the practice of the World Heritage Committee. From the comparative analysis of cultural heritage to the adoption of the "Global Strategy for a Representative, Balanced and Credible World Heritage List"

II.1.iv.a. A doctrinal perspective: the comparative analysis of worldwide cultural heritage carried out by the World Heritage Committee in light of the principles established by the Vienna Convention on the Law of the Treaties

As it has been suggested in doctrine, the formulation mentioned before might also be in line with the interpretation of the World Heritage Convention according to the rules on treaty interpretation contained in the 1969 Vienna Convention on the Law of Treaties.[373]
Referring, in particular, to the provisions of the WHC preamble, Francesco Francioni has remarked how, according to art. 31 of the VCLT, a treaty shall be interpreted "in accordance with the ordinary meaning to be given to the terms" and "in the context and in the light of its object and purpose".[374] In this sense, para. 2 of the same article specifies that for the purpose of interpretation, the context must be understood so as to comprise other agreements related to the treaty, and any instrument made by one or more parties in connection with the treaty and accepted by the parties as an instrument related

[371] WHC Operational Guidelines, para. 52.
[372] WHC Operational Guidelines, para. 24. The composition of the World Heritage Committee is available at https://whc.unesco.org/en/committee. Last visit 15 December 2022.
[373] United Nations, Vienna Convention on the Law of Treaties, adopted on 23 May 1969, Vienna. United Nations, Treaty Series, vol. 1155, p. 33 ("VCLT").
[374] "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention, art. 31, para. 1.

to the treaty.[375] Para. 3 goes then beyond the context of the treaty, and it gives relevance for purposes of interpretation to, notably, b) any subsequent implementing practice.[376]

Applying these criteria to the WHC, according to Francioni, no particular highlight concerning the interpretation of the treaty would seem to be offered, by the ordinary meaning of the terms as expressed in art. 31 para. 1 of the VCLT. As a matter of fact, if the world "outstanding" would refer, according to such criterion, to a general notion of "unique[ness], exceptional[ity], excellen[ce]", the term "universal" would be applicable, at a textual level, to the cultural heritage that can be understood as defining the quality of a site being able to exercise a "*universal* attraction for all humanity", being such concept a mere repetition of the treaty provision.[377]

On the contrary, according to the doctrine, it is in the light of the "subsequent practice in the application of the treaty" that the WHC may find a relevant key of interpretation such as to provide a concrete meaning to its norms. Following the provision of art. 31 para. 3 lett. b), in fact, the interpretation of the WHC may successfully pass through the analysis of the *practice* of the World Heritage Committee which, since its early deliberations, has shown a constant concern with the precise identification of the concept of OUV at an operational level. Indeed, the search for the "universality" of worldwide cultural heritage has marked more than thirty years of practice of the World Heritage Committee, which has identified as its main goal the identification of all those intellectual, aesthetic, religious and sociological elements susceptible to be inscribed in the World Heritage List. Indeed, since its institution, the World Heritage Committee has aimed at the creation of an ideal inventory of all the treasures of the world, such as to represent the totality and diversity of all worldwide cultural expressions. Having turned out the pursuit of such an objective as "too difficult, unrealistic and even misleading",[378] the World Heritage Committee has focused itself, starting from the early 1980s, to the identification of general categories of world heritage to be analyzed and considered in view of their inscription in the list, and, in this sense, on the comparative evaluation of worldwide cultural heritage.

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[375] "2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.". Vienna Convention, art. 31, para. 2.

[376] "3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties." Vienna Convention, art. 31, para. 3.

[377] Francesco Francioni, 'The Preamble', in Francesco Francioni (ed. by), *The 1972 World Heritage Convention: A Commentary* (Oxford Commentaries on International Law, 2008), pp. 18-19.

[378] Francesco Francioni, 'The Preamble', in Francesco Francioni (ed. by), *The 1972 World Heritage Convention: A Commentary* (Oxford Commentaries on International Law, 2008), p. 20.

In absence of *a priori* general criteria to define the "universal" and the "outstanding" character of cultural heritage, in fact, the World Heritage Committee has grounded its evaluations concerning the possibility of inscription of cultural heritage in the World Heritage List on the basis of the characteristics of the worldwide cultural goods and sites *already inscribed* in the inventory at the moment of the evaluation, having been the OUV of these items already acknowledged by the international community.

Since the establishment of the treaty, in fact, it appears how the World Heritage Committee has progressively inscribed in the World Heritage List, notably, two categories of cultural heritage elements peacefully acknowledged as of "OUV" for the international community. It is the case, on one side, of those most "famous and *iconic* sites that many people would expect to feature on such a list in any event", such as the historic center of Rome, Machu Picchu and the Taj Mahal.[379] This is also the case, on the other side, of those "*most iconic* churches, cathedrals, historic town centers" which, recognized as of fundamental importance, notably, for the Western society, have been inscribed, since the establishment of the World Heritage Committee, in the WHC inventory under the initiative of European and North American countries. Recognized as of "OUV" in the name of their historic, artistic, and architectonic significance, commonly acknowledged by the Occidental tradition, those elements appear as having been used as a yardstick by the World Heritage Committee in the context of its evaluations, consequently addressing its inscription processes towards the adoption of a rather "monumental" approach to worldwide cultural heritage.

As a result, it seems, the fact that the remarkably Eurocentric and neoliberal perspective entailed in the composition of the World Heritage List actually reflects the evaluations of the World Heritage Committee. As it appears from the WHC official site, counting 1157 items of which 900 cultural sites in January 2023, [380] the WHC List is indeed composed at approximately 70 % by cultural expressions referred to the Western-oriented and post-colonial tradition standards applicable to determine the value of worldwide cultural heritage. Of those elements, almost 50% come from the European and North American regions. [381]

As a result of such composition of the World Heritage List, the reiterated concerns expressed, within the World Heritage arena, by the representatives of the States not sharing such "Eurocentric" approach to cultural heritage, and, notably, of the States coming from the Global South. As it has been reported, hence, it is since the 1880s that several States such as Brazil, Mexico, Egypt and

[379] Christoph Brumann, 'The Best of the Best: Positing, Measuring and Sensing Value in the UNESCO World Heritage Arena', in Ronald Niezen and Maria Sapignoli (ed. by), *Palaces of Hope. The Anthropology of Global Organizations*, (Cambridge University Press, 2017) supra, p. 250.

[380] See World Heritage List, available at https://whc.unesco.org/en/list/. Last visit 27 January 2023.

[381] See World Heritage List Statistics – Number of World Heritage Properties per Region. Updated statistics available at https://whc.unesco.org/en/list/stat. Last visit 27 January 2023.

Turkey have raised, in the context of the World Heritage Committee sessions, several critiques concerning the rather "Western-oriented" attitude towards cultural heritage entailed in the evaluation of the WHC organs. In particular, such strong concerns have been raised in the context of the 2010 World Heritage Committee session held in Brasilia, in occasion of which several political heavyweights from the Global South have criticized the traditional orientation of the World Heritage Committee with regard to the inscription of cultural heritage and sites of nations within the World Heritage List, thereby calling for a significative change of pace.[382]

II.2.iv.b. The adoption of the UNESCO 1994 "Global Strategy for a Representative, Balanced and Credible World Heritage List" by the World Heritage Committee

In the light of such a scenario, recognizing the current limits entailed within the "traditional" framework of the WHC, and to respond to the criticisms of its States Parties, the World Heritage Committee adopted a package of reform measures applicable to the evaluation process of worldwide cultural heritage such as it is outlined in the WHC Operational Guidelines, aimed at conceptualizing the cultural inheritance of the world and, in particular, the cultural elements of recognized "OUV", in a less Eurocentric way.

Coming as a result of an intense negotiation process carried out in the 1990s, such measures convey in the "Global Strategy for a Representative, Balanced and Credible List" ("Global Strategy"), a wide-range UNESCO plan adopted by the World Heritage Committee in 1994 and aimed at ensuring that the World Heritage List "reflects the world's cultural and natural diversity of outstanding universal value.".[383]

Finalized with the objective of acknowledging, at the global level, the importance of preserving all the diverse cultural expressions coexisting in the world, the Global Strategy recognizes the necessity of broadening the scope of the concepts of "world heritage" and "OUV", to provide a more comprehensive framework and operational methodology for implementing the World Heritage Convention. This, in particular, by enhancing the inclusion within the scope of the treaty also of those cultural expressions native in the Global South – and, notably, in Africa, in the Pacific and Andean sub-regions, in the Arab and the Caribbean regions, in central Asia and south-east Asia – characterized by their strict interconnection between human interactions, spirituality and creative expressions.

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[382] On this debate, see Christoph Brumann, *The Best of the Best: Positing, Measuring and Sensing Value in the UNESCO World Heritage Arena*, in *Palaces of Hope. The Anthropology of Global Organization*, edited by R. Niezen and M. Sapignoli, Cambridge University Press, 2017.

[383] The Global Strategy objective, the analysis, the on-going efforts and the reports of the expert meetings and studies are available at https://whc.unesco.org/en/globalstrategy/#objectives. Last visit 16th January 2023.

Acknowledged by the international community as a significative effort put in place by the World Heritage Committee in the aim of determining an important change of pace in the context of the WHC framework established by the World Heritage Committee and its Advisory Bodies since the adoption of the treaty in 1972, the Global Strategy has been object of a detailed analysis.

Such assumption is true, notably, in the context of the UNESCO Report on the Expert Meeting on the "Global Strategy" and thematic studies for a representative World Heritage List which, adopted by the World Heritage Committee itself in occasion of its 18th session, consists in an overall analysis of the World Heritage Committee practice, within the concerned decades, in terms of inscription of cultural heritage in the World Heritage List.[384]

Turning the present inquiry to the analysis of the content of such UNESCO document, it appears how, since its first lines, the Report highlights that, in spite of the "many high-quality attempts had been made over the past decade to consider the best ways of ensuring the representative nature, and hence the credibility, of the World Heritage List", "the current state of the World Heritage List (for cultural and mixed sites [was] not meeting the original concept of heritage as set forth in the World Heritage Convention", instead "suffer[ing] from geographical, temporal, and spiritual imbalances". As a matter of fact, the Report acknowledges how the inscription of cultural elements in the World Heritage List has mostly been based on an "almost exclusively 'monumental' concept of the cultural heritage", coherently with the architectural-oriented approach embedded in the traditional European conception of "cultural heritage".[385]

This is true, as highlighted in the UNESCO thematic studies for a representative World Heritage List mentioned in the document, in particular with reference to the detriment of those "complex and multidimensional cultural expressions", demonstrating the social structures, ways of life, beliefs, systems of knowledge, and representations of different past and present cultures in the entire world. In other words, in fact, the 1994 World Heritage List, with its emphasis still on architectural monuments, represented no more than "a narrow view of cultural heritage", "fail[ing] to reflect living cultures, ethnographic and archaeological landscapes, and many of the broad areas of human activity which are of outstanding universal value.

As it has been reported by the World Heritage Committee itself, hence, at twenty-two years since the adoption of the WHC, a number of gaps and imbalances was discernible on the World Heritage List. In detail, Europe appeared as over-represented in relation to the rest of the world, historic towns and religious buildings were over-represented in relation to other types of property, Christianity was over-represented in relation to other religions and beliefs, "elitist" architecture was over-represented in

[384] Expert Meeting on the "Global Strategy" and thematic studies for a representative World Heritage List, WHC-94/CONF.003/INF.6 (Phuket, 13 October 1994).

[385] Expert Meeting on the "Global Strategy" and thematic studies for a representative World Heritage List, part II.

relation to vernacular architecture and, more in general, among the 410 properties inscribed in the World Heritage List, 304 were cultural sites referrable to an Eurocentric approach to cultural heritage.[386] In the same way, a global study carried out by ICOMOS from 1987 to 1993 revealed that Europe, historic towns and religious monuments, Christianity, historical periods, and 'elitist' architecture (in relation to vernacular) were all over-represented on the World Heritage List. [387]

It is to cope with such acknowledged limits that the World Heritage Committee, aiming at enhancing the representative nature of the World Heritage List, therefore ensuring its credibility, has reiterated its commitment to the balance of the diverse cultural categories recognized as deserving international protection in reason of their inclusion in the World Heritage List, thereby limiting the over-representation of 'Eurocentric' cultural heritage in the inventory and rather giving more space to those underrepresented cultural traditions and 'living cultures' existing among peoples of the world.[388]

In particular, such assumption has been done with reference to the necessity of conceiving a more inclusive approach towards the notion of 'cultural heritage', setting aside the idea of a rigid and restricted World Heritage List instead taking into account all the possibilities for extending and enriching the WHC conception of cultural heritage, and being receptive to "the many and varied cultural manifestations of outstanding universal value through which cultures expressed themselves."[389].

In detail, to achieve such an objective, the UNESCO Report on the Expert Meeting on the "Global Strategy" and thematic studies for a representative World Heritage List focuses on two principal initiatives to be taken in the context of the WHC, in the aim of ensuring for the future a representative, balanced and credible World Heritage List. On one side, the document focuses on the importance to increase the number of types, regions, and periods of cultural property that are under-represented in the coming years, and, on the other side, to take into account the new concepts of the idea of cultural

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[386] "[…] historical periods were over-represented in relation to prehistory and the 20th century"; "[…] in more general terms, all living cultures - and especially the "traditional" ones -, with their depth, their wealth, their complexity, and their diverse relationships with their environment, figured very little on the List. Even traditional settlements were only included on the List in terms of their "architectural" value, taking no account of their many economic, social, symbolic, and philosophical dimensions or of their many continuing interactions with their natural environment in all its diversity. This impoverishment of the cultural expression of human societies was also due to an over-simplified division between cultural and natural properties which took no account of the fact that in most human societies the landscape, which was created or at all events inhabited by human beings, was representative and an expression of the lives of the people who live in it and so was in this sense equally culturally meaningful. Expert Meeting on the "Global Strategy" and thematic studies for a representative World Heritage List, part II.

[387] See https://whc.unesco.org/en/globalstrategy/#objectives, last access 17th January 2022.

[388] "[…] The world heritage should thus consider the products of culture by means of several new thematic approaches: modes of occupation of land and space, including nomadism and migration, industrial technology, subsistence strategies, water management, routes for people and goods, traditional settlements and their environments, etc". Expert Meeting on the "Global Strategy" and thematic studies for a representative World Heritage List, part II.

[389] "Two initiatives must therefore be undertaken concurrently rectification of the imbalances on the List between regions of the world, types of monument, and periods, and at the same time a move away from a purely architectural view of the cultural heritage of humanity towards one which was much more anthropological, multi-functional and universal." Expert Meeting on the "Global Strategy" and thematic studies for a representative World Heritage List, part II.

heritage that had been developed over the past twenty years. To achieve such objectives, the World Heritage Committee recognizes the necessity of enhancing its dynamic, continuous and inclusive cooperation with States Parties which are called, on one side, to play a rather more proactive role in the identification of all those elements of cultural heritage considered as part of their tradition – this, notably, in the case of under-represented cultures[390] – and, on the other side, to enhance their participation in the global "process of continuous collaborative study of the development of knowledge, scientific thought, and views of relationships between world cultures".[391]

Integrated in the WHC Operational Guidelines since the adoption of the UNESCO Report on the Expert Meeting on the "Global Strategy" and thematic studies for a representative World Heritage List, these objectives are outlined from point II.B of the WHC Operational Guidelines.[392] Recognizing the necessity of identifying and filling the major gaps in the World Heritage List, the WHC Operational Guidelines stress on the need of creating a more representative and balanced inventory of the worldwide cultural heritage insisting on one side, on the enhancement of the participation of the States Parties whose heritage of OUV is less represented within the decisional processes of the World Heritage Committee – this, notably, by developing Tentative Lists as defined by para. 62 of the Operational Guidelines–[393] and establishing a limit, on the other side, to the inscription in the World Heritage List of cultural items attributable to already over-represented cultural traditions or States Parties.[394]

All this, as it has been highlighted in the above paragraph, in cooperation with all the States Parties to the WHC, which are encouraged to participate in the implementation of the Global Strategy by participating in the meetings and comparative and thematic studies organized for this purpose by the

[390] "In order to encourage nominations from under-represented regions, the group strongly preferred a series of regional meetings to the proposal for a large scientific conference. Regional meetings for States Parties and for regional experts should be organized, using as working documents the areas identified in recommendation 2 as well as analyses of properties already inscribed on the World Heritage List. In addition, in preparation for such regional meeting, States Parties are encouraged to develop tentative lists of properties for inscription as an additional working document." Expert Meeting on the "Global Strategy" and thematic studies for a representative World Heritage List, part II.

[391] Expert Meeting on the "Global Strategy" and thematic studies for a representative World Heritage List, part II.

[392] "The Committee seeks to establish a representative, balanced and credible World Heritage List in conformity with the four Strategic Objectives it adopted at its 26th session (Budapest, 2002)." WHC Operational Guidelines, para. 54.

[393] "States Parties whose heritage of Outstanding Universal Value is underrepresented on the World Heritage List are requested to: a) give priority to the preparation of their Tentative Lists and nominations; b) initiate and consolidate partnerships at the regional level based on the exchange of technical expertise; c) encourage bilateral and multilateral cooperation so as to increase their expertise and the technical capacities of institutions in charge of the protection, safeguarding and management of their heritage; and, d) participate, as much as possible, in the sessions of the World Heritage Committee." WHC Operational Guidelines, para. 60.

[394] "To promote the establishment of a representative, balanced and credible World Heritage List, States Parties are requested to consider whether their heritage is already well represented on the List and if so, to slow down their rate of submission of further nominations by: a) spacing voluntarily their nominations according to conditions that they will define, and/or; b) proposing only properties falling into categories still underrepresented, and/or; c) linking each of their nominations with a nomination presented by a State Party whose heritage is under-represented; or d) deciding, on a voluntary basis, to suspend the presentation of new nominations." WHC Operational Guidelines, para. 59.

World Heritage Committee[395]. This, furthermore, in cooperation with the World Heritage Committee three Advisory Bodies – and namely ICOMOS, IUCN and ICCROM – who have been saluted by UNESCO for their key role in providing external support in the challenge of "diversifying the World Heritage List [to] make it truly balanced and representative of the world's heritage".[396]

II.2.iv.c. The merits and the limits of the UNESCO 1994 "Global Strategy for a Representative, Balanced and Credible World Heritage List". The World Heritage Centre-commissioned study "Analysis of the Global Strategy for a Representative, Balanced and Credible World Heritage List 1994-2020".

Acknowledged for its significance in providing a broad framework to increase the representativity, balance and credibility of the World Heritage List, the World Heritage Committee Global Strategy for a more inclusive and representative WHC appears as having obtained, since its adoption, a series of results. As a matter of fact, since the launching of the campaign by the World Heritage Committee, 39 new countries have ratified the WHC, and many of them from small Pacific Island States, Eastern Europe, Africa, and Arab States. Furthermore, the number of countries around the globe that have signed the treaty in the course of the last ten years has risen from 139 to 194; in the same way, the number of States Parties who have submitted Tentative Lists complying with the format established by the World Heritage Committee has grown from 33 to more than 130 units. With regard to the expansion of the notion of cultural heritage, since the adoption of the Global Strategy a series of new categories for world heritage sites have been promoted, such as the categories of cultural landscapes, itineraries, industrial heritage, deserts, coastal-marine and small-island sites. This is the case, in particular, of several elements of the cultural and natural heritage situated in Africa, in the Pacific and Andean sub-regions, in the Arab and Caribbean regions and in central and south-east Asia.
Notwithstanding such results, however, the Global Strategy appears as having entailed, within its adoption and implementation, a series of shortcomings. Such limits are highlighted in the World Heritage Centre-commissioned study "Analysis of the Global Strategy for a Representative, Balanced and Credible World Heritage List 1994-2020", adopted in March 2021.[397]
Adopted to evaluate the impact of the improvements of the Global Strategy in terms of geographical coverage and credibility of world cultural heritage, as well as its results in ensuring representativity

[395] The reports of the expert meetings and studies presented to the World Heritage Committee are available at: https://whc.unesco.org/en/globalstrategy. See WHC Operational Guidelines, para. 56.
[396] See https://whc.unesco.org/en/globalstrategy/#objectives, last access 17th January 2022.
[397] "Analysis of the Global Strategy for a Representative, Balanced and Credible World Heritage List 1994-2020", 16 June 2021, available at https://whc.unesco.org/en/documents/187906. Last visit 25th January 2023.

and balance of properties in the World Heritage List, the Global Strategy has in fact been recognized as a necessary, although not exhaustive, tool for the effective and complete implementation of the WHC.

As the study reports, in fact, even if since the adoption of the Global Strategy the number of States Parties ratifying the WHC has "almost reached its cap", representing this evidence a rather positive impact of the implementation of the treaty, from the 55 States Parties mentioned above, 22 (40%) still do not have any property on the World Heritage List to date. In the same way, altogether, the remaining 33 States Parties count 90 properties inscribed in the World Heritage List – representing this value only the 8% of the total of the 1121 properties inscribed on the UNESCO inventory. In addition to that, with regard to States Parties ratifications, the study shows how even though the largest number of States Parties ratifying the WHC from 1994 to 2020 are from Asia, the Pacific and Africa, the nine new ratifications from Europe and North America cover the 44.5% of the properties situated in this group of new States Parties. Such evidence is reported in the study at Table 1, which shows how even if the WHC has extended, within the last decade, its range of application, the increased number of States Parties from under-represented regions has not increased, since 1994, the proportional representativity of these regions in the World Heritage List, by 2020, in terms of the number of inscribed properties. [398]

In the same way, the "Analysis of the Global Strategy for a Representative, Balanced and Credible World Heritage List 1994-2020" highlights the limits of the Global Strategy with regard to the improvement of the States Parties' Tentative Lists. In detail, the analysis of those inventories carried out in the report shows how the large majority of States Parties (61,5%) have 10 or even less sites on their Tentative List, while only the 5% of States Parties count more than 30 sites on their national inventories. This is true, in particular, with regard to the two States having the largest number of properties inscribed on the World Heritage List – and, namely, Italy and China with their 55 inscription each – which also figure in the group of the 9 States Parties with the largest number of sites inscribed on their Tentative List.[399] On the contrary, it appears that no State Party belonging to Africa, Latin American and the Caribbean is included in such group, meaning this that the larger Tentative Lists belong to the same regions where most properties inscribed in the World Heritage List are located, representing such disparity a potential continuity in terms of regional imbalance.

As it is highlighted in the study, in fact, in spite of the objective of the Global Strategy of establishing a more credible, balanced and inclusive list of the cultural heritage of the world, at 50 years since the

[398] See "Analysis of the Global Strategy for a Representative, Balanced and Credible World Heritage List 1994-2020", Table 1, p. 3.

[399] More than 30 sites. See "Analysis of the Global Strategy for a Representative, Balanced and Credible World Heritage List 1994-2020", Table 3, p. 4.

adoption of the WHC cultural sites from Europe and North America continue heading the number of total sites inscribed in the World Heritage List (25,8%), as well as of the properties included on Tentative Lists (25%) – denoting such evidence a potential continuity in the current trend.[400]

In the aim of identifying the causes of such shortcomings, the "Analysis of the Global Strategy for a Representative, Balanced and Credible World Heritage List 1994-2020" identifies two elements possibly interfering with the effective enhancement and implementation of a credible and inclusive WHC mechanism.

First, the study highlights how, while the objectives of the Global Strategy make an apparent consensus, they have not been accompanied by a clear strategy or plan of action. Neither outcomes nor indicators to monitor its results in an objective manner have been established, rather leaving a wide margin for divergent interpretations in absence of defined notions of reference in the WHC Operational Guidelines.[401]

Second, the "Analysis of the Global Strategy for a Representative, Balanced and Credible World Heritage List 1994-2020" highlights how the composition itself of the World Heritage Committee may have a rather negative impact, in terms of credibility and representativity, on the World Heritage List. As it is showed by the study, in fact, if in 2009, 110 States Parties had never been part of the World Heritage Committee (59,14% of States Parties), in 2019, several years after the implementation of the Global Strategy, this percentage was still at 50,26%, having 97 of the 193 States Parties never been included in the World Heritage Committee.[402] In particular, the study observes a strong correlation between the States Parties represented on the World Heritage Committee and the location of the properties nominated for the inclusion in the World Heritage List, remarking how these practice seriously damage the credibility of the List and the Convention. As highlighted in the analysis, from 1977 to 2005, the 42% of the inscriptions in the WHC inventory had benefited States Parties member of the World Heritage Committee during their term office, amounting this number at 314 cultural items. To cope with this limit, indeed, the "Analysis of the Global Strategy for a Representative, Balanced and Credible World Heritage List 1994-2020" recommends to "revise the Rules of Procedure of the Committee and to prohibit a State Party from submitting a nomination file during its term of office (or at least to postpone its examination by the Committee while the State Party is part of the Committee)". To respond to such critiques, the World Heritage Committee has highlighted,

[400] See "Analysis of the Global Strategy for a Representative, Balanced and Credible World Heritage List 1994-2020", Table 5 and 6, p. 6.

[401] See "Megalithic Jar Sites in Xiaoguang – Plain of Jars (Lao People's Democratic Republic)" World Heritage Committee, Decision 43 COM 8B.19 (WHC/19/43.COM/8) available at https://whc.unesco.org/en/decisions/7378/.

[402] See "Analysis of the Global Strategy for a Representative, Balanced and Credible World Heritage List 1994-2020", Table 16, p. 22.

in its official statistics, how the above-mentioned percentage has gone down in later years. In the same way, in 2017, the World Heritage Committee has revised the WHC Operational Guidelines mentioning at para. 61.c that [as from 28 February 2018 the following order of priorities will be applied in case of the overall limit of 35 nominations is exceeded] "xi) nominations of States Parties, former Members of the Committee, who accepted on a voluntary basis not to have a nomination reviewed by the Committee during their mandate. This priority will be applied for 4 years after the end of their mandate on the Committee".[403]

Notwithstanding such action, the conclusions reached by the experts of the "Analysis of the Global Strategy for a Representative, Balanced and Credible World Heritage List 1994-2020" highlight intrinsic limits existing within the mechanisms entailed in the Global Strategy. In particular, the analysis concludes that, even if the adoption of the Global Strategy has had an impact on the number of the worldwide cultural properties inscribed in the World Heritage List, such improvement has not addressed the under-represented categories of the cultural heritage of the world, nor the conservation and promotion of these elements at the international level has been enhanced in the aftermath of the adoption of the Global Strategy. On the contrary, the conclusions of the report highlight how, in the WHC World Heritage List as well as in the existing Tentative Lists, the highest representativity is continuously held by the Europe and North America region, and the imbalance between "monumental" cultural properties and new expressions of worldwide persists. As a matter of fact, even if those categories were non-represented or under-represented in 1994, they are now present on the WHC World Heritage List as well as in the Tentative Lists of the States Parties. However, statistics show how the disproportion in terms of representation of cultural heritage has been maintained within the last decades. In view of the above, the "Analysis of the Global Strategy for a Representative, Balanced and Credible World Heritage List 1994-2020" concludes with a strong recommendation to encourage nominations from under-represented categories having a OUV potential, thereby proposing a new conception of cultural heritage more dynamic and encompassing, capable to include within the scope of its definition also those "nontraditional" forms of heritage which nevertheless deserve, at 50 years from the adoption of the World Heritage Convention, international protection.

Enhancing an interdisciplinary approach towards the study of the international framework for worldwide protection of cultural heritage: a personal point of view

[403] See World Heritage Committee, Decision 41 COM 11, "Revision of the Operational Guidelines", available at https://whc.unesco.org/en/decisions/6939/ . Last access 26 January 2023.

In the light of the assumptions exposed in the above paragraphs, it might be the case, it seems, to leave the door open to a series of considerations about the effectiveness and inclusiveness of the international framework for the worldwide protection of cultural heritage considered, notably, also from the anthropological perspective. As for the first aspect which seems interesting to raise, from the perspective of an international jurist, there is the fact that, when dealing with the study of fields of law concerning the *rationale* of 'critical' issues – as in the case of nature, science, human life and, notably, culture – it seems necessary to include, within the scope of the research, the contribution of social and anthropological studies. As it has been highlighted in Chapter II para. I, in fact, a merely legal-oriented approach to the analysis of 'culture' as a critical subject appears poorly capable of providing effective solutions in terms of definition and regulation possibly applicable in the global context. In particular, such assumption may be true in reason of the absence of a true and unique understanding of the issue in question by the international legal framework. Such assumption comes clear, notably, by the absence of a common definition of 'cultural heritage' within the scope of the instruments adopted in the context of the United Nations and, in particular, within the UNESCO framework, as well as from the several interpretations of the notion of 'culture' which have been provided through the decades by the different international law schools of thought. In this sense, the present research suggests how anthropological studies, and, notably, legal anthropology and cultural anthropology appear as providing international public law a series of rather *necessary*, effective tools for filling the unavoidable normative void provoked by the above mentioned conceptual *aporia*. In particular, the analysis carried out in Chapter II para I. has suggested, as it has emerged notably from the analysis of the studies of, among others, Franz Boas and Bronislaw Malinowski, how a rather emic, relativist-oriented and pluralist approach towards the regulation of cultural matters may offer significant solutions to provide more inclusive and adaptive mechanisms towards the protection of cultural heritage worldwide.

Without prejudice to this first consideration, nevertheless, as a result of the analysis carried out in the present research, it comes clear that, even in the rather more 'humanized' and relativist-oriented field of anthropological sciences, it seems actually extremely difficult, if not impossible, to avoid, in the study and interpretation of 'critical' issues like culture, the intrinsic perspective of the *point of view of the observer*. Such assumption comes clear, in view of the considerations made in Chapter II, from the historical *excursus* concerning the raise of anthropological studies as a Western-based branch of human sciences, as well as from the actual absence, in terms of both legal and cultural anthropology, of a commonly accepted definition for 'culture', and from the accurate description of the intrinsic bias entailed in the United Nations and UNESCO norm-set for the protection of culture and human rights – as accurately described, notably, in the *ouvrage Palaces of Hope. The Anthropology of Global*

Organizations (Ronald Niezen and Maria Sapignoli eds., see note 137). In the same way, such unavoidable truth has been suggested by the studies of Franz Boas, who admits that, even in the field of anthropological studies, *nobody* comes from a neutral position when it comes to the study and the 'evaluation' of a determined human society together with its legal system – and, even more in the field of 'critical' issues.

Turning back to the perspective of the international law scholar, then, it appears how, in the context of the analysis of, notably, culture and cultural heritage, both legal and anthropological studies might incur in the same limit concerning the adoption of a slightly 'universalist-oriented' perspective, which unavoidably derives from the assumption about the *intrinsic* validity of the point of the view of the observer as an inescapable precondition in the context of 'cultural' matters. In this sense, it appears, it is such approach that may lead to a biased understanding and ruling of such phenomena, which appear as conceived only from the perspective of the reporter – in the case of anthropology – or the regulator – within the legal field – thereby not equally ensuring a 'non-Western' understanding and protection of these concerned 'critical' features.

In view of all the above, hence, the present research aims at setting as its final objective the feasible identification, at the current status, of potentially applicable solutions such as to ensure, at the global level, a rather more inclusive and relativist-oriented attitude towards the protection of worldwide cultural heritage, capable of guaranteeing an equivalent and encompassing protection to all the cultural expressions and traditions coexisting in the globe, in the light of the fundamental principle of cultural diversity.

To reach such ambitious objective, the present research suggests, in particular, two possible approaches towards worldwide cultural heritage protection which may be rather relevant in the strengthening of the international cooperation – notably, in the United Nations framework – for the protection of cultural heritage.

As it will be exposed in Chapter III, it is the case, on one side, of the international legal framework for the protection and enhancement of human rights and fundamental freedoms, as it has been established since 1948 with the Universal Declaration on Human Rights and as it has progressively developed in the international jurisprudence and doctrine such as to include in its scope an increasingly wide protection for cultural heritage as an element of cultural rights. Although established notably in the context of the United Nations[404], in fact, the international human rights framework establishes, remarkably, a universal human right to *cultural diversity*,[405] which needs to

[404] Thereby entailing, as it has been exposed in Chapter II para. II, an intrinsic Western-oriented, universalist perspective in the conception and regulation of the concerned issues.

[405] This, notably, in the light of art. 15 para. 1 lett. a) of the International Covenant on Economic, Social and Cultural Rights. See *infra*, Chapter III para. II.

be preserved, in a ‘contextualist’ perspective as the one suggested by the anthropologist Masaji Chiba, in view of its undisputable importance for the whole humanity.

In addition to that, on the other side, the present research suggests how another rather significative contribution to the enhancement of a more relativist-oriented approach to the protection of worldwide heritage, to be preserved in peace time and in war in view of its significance for individuals and communities, may be offered, in the context of the United Nations – and, notably, UNESCO – by the progressively emerging framework establishing the necessity of preserving cultural heritage and traditions as a core component of sustainable development, as it is entailed in the Goal 11.4 of the United Nations 2030 Agenda. Concerning such latter aspect, in fact, the present research suggests how the necessity, acknowledged by the international community, of conserving the cultural heritage of peoples to transmit it intact to future generations may refer to a rather more relativist, cultural diversity-led attitude to worldwide cultural heritage protection, which needs to be preserved, rather than from its eventual ‘Outstanding Universal Value’, in the name of its core identarian value for present and forthcoming generations.

Chapter III. Beyond universalism and cultural relativism: which protection for cultural heritage of 'non-Outstanding Universal Value'? The protection of cultural heritage of peoples as an element of the human right to culture. The emerging United Nations framework for the transmission and conservation of worldwide cultural heritage to future generations as a component of sustainable development

III.I. The apparent absence of an international norm safeguarding the cultural heritage of peoples in peacetime. The issue of the intentional destruction of cultural heritage situated in the territories of States in the absence of armed conflict

III.I.i. The intentional destruction of cultural heritage of States carried out in the context of cultural cleansing campaigns. The notorious episode of the Buddhas of Bamiyan.

It is in the light of the considerations carried out in the above Chapters, it seems, that it is important to address the issue of the risk of the destruction of the cultural heritage of peoples possibly occurring within the territories of States. In particular, it is important to analyze how the phenomenon of the intentional destruction of the cultural heritage of peoples has progressively grown, notably in peace time situations, within the territories of States. Remarkably, such phenomenon has occurred notwithstanding with the international norm-set for the protection and conservation of the worldwide heritage set up by the international community – and, in particular, by UNESCO – which, as it has been anticipated in Chapter I, appears as basically overlooking the existence of an international norm establishing a general duty of protection towards all the expressions and manifestation of the cultural life of peoples.[406]

As a matter of fact, all the considerations carried out in Chapter I and II have shown how if, within the UNESCO norm-set, a general obligation such as to prohibit the intentional destruction of cultural heritage is entailed in the Hague Convention dedicated to the safeguard of endangered cultural property in the event of armed conflict, there seem not to be any analogous provision such as to protect, *in times of peace*, all the cultural elements of mankind possibly endangered by human or natural activities. In this sense, the present analysis has shown how, in such circumstances, the only existing obligation seems the one established by the World Heritage Convention which, in virtue of its art. 4 and in the light of all the above considerations, appears as conferring its international protection *only* to those elements of the worldwide cultural heritage which have been inscribed by the World Heritage Committee in the World Heritage List, in the name of their attributed OUV. On

[406] See *infra.*

the contrary, at the state of the art, the WHC seems not to foresee any kind of international duty concerning the conservation and protection of all the worldwide cultural elements not included, for any possible reason, in the WHC World Heritage List, being the complete discretion on such items left to the sovereignty of States Parties.

Indeed, it is in the light of such a scenario that it appears how a concrete risk for the cultural property of peoples and States not included in the World Heritage List, because of their non-recognition as "of OUV", may be represented by those possible acts of destruction, damage, or deterioration of cultural heritage, carried out, in any possible circumstances, in the territories of States in the absence of armed conflict.

In this sense, the several events occurred, within the last decade, in the global context for the enhancement and protection of worldwide cultural heritage, have shown how, even in the absence of warfare, the cultural heritage of peoples and sites might find itself in danger within the territories of States. As for the circumstances of such occurrences, in particular, the most recent times have shown how a possible threat to the conservation and safeguard of the cultural property and sites *in situ* may derive from the States authorities having jurisdiction of the concerned territory themselves which may opt, for different reasons, for the 'lawful' destruction of their national cultural heritage.[407]

About the possible reasons motivating such decisions, as it comes clear from the events occurred in the last decades, two main circumstances. On one side, the intentional destruction of the cultural heritage situated on the territories of States has been conceived in the context of the set-up of economic and infrastructural policies carried out by States. In such circumstances, the intentional destruction of cultural property and sites situated in situ has been accepted as a possible consequence of development, and in the name of the enhancement of national economic conditions and overall well-being.

On the other side, the intentional destruction of national monuments, historic or archaeological sites and artistic objects situated in the territories of States has been carried out by the concerned authorities for ideological reasons, in the context of the so-called campaigns of 'cultural cleansing' or 'cultural propaganda' campaigns.

Having its roots in the religious, political, and cultural tensions that may affect the concerned communities and groups, this latter kind of intentional destruction of cultural heritage accompanies human history since very ancient times. First examples of such phenomenon include the destruction of the Temple of Serapis in Alexandria of Egypt, ordered by the Roman Emperor Theodosius in A.D.

[407] See Kangchana Wangkeo, 'Monumental Challenges: The Lawfulness of Destroying Cultural Heritage during Peacetime' (2003) 28 *The Yale Journal of International Law* 183.

391,[408] the devastation of the Somnath temple and its *jyotirlinga*[409] in Gujarat (India) by Mahmud of Ghazni in 1024[410] and the attempted demolition of the Pyramid of Menkaure, in Egypt, by Sultan Al-Aziz Uthman, in the late 12th century. Centuries later, episodes of intentional destruction for political reasons occurred in the aftermath of the French Revolution, when the revolutionaries carried out the systematic destruction of artworks and monuments connected to the Ancien Régime.[411] Likewise, similar waves of 'iconoclastic propaganda' have been carried out in 1917, when the Bolsheviks took control of Russia and ordered the demolition of all pre-revolutionary monuments present in the concerned territories, and, some decades later, during the Chinese Cultural Revolution. In this latter context such social and political reform, launched in 1966 by the Chairman Mao Tse Dong, had the aim of definitively eradicating the so-called "Four Olds", and, namely, "Old Thinking", "Old Habits", "Old Ideas" and "Old Culture", together with all its representations and expressions, perceived as a symbol of a neglected tradition.[412] In the same way, significant episodes of intentional destruction of cultural heritage have been occurring in the nineties, affecting several areas of the globe. This, in particular, in the context of the Balkan wars occurring since 1992 in the former Yugoslavia,[413] and India, where in the same year a large group of Hindu activists carried out the demolition of the Babri Mosque in Adyodhya, Uttar Pradesh.[414]

Although ever since arousing clamor within the public opinion of the concerned communities, it appears how, from the international law standpoint, such reiterated acts of intentional cultural heritage destruction perpetrated throughout centuries in the territories of States, have never provoked a unique, unequivocal reaction on the part of the international organizations, States, or other relevant actors and stakeholders.

On the contrary, it comes clear how such acts have always been received with a rather blurred reaction from the part of international community. As a matter of fact, it seems, apart from isolated political statements released in few circumstances expressing – depending on the concrete cases[415] – some

[408] This, to obliterate the last sanctuary of non-Christians.
[409] Devotional objects representing the God Shiva.
[410] Founder of the Turkic Ghaznavid dynasty, ruling in parts of India and Middle East from 889 to 1030.
[411] See Dario Gamboni, *The Destruction of Art: Iconoclasm and Vandalism since the French Revolution*, 1997; Daniel J. Sherman, *Worthy Monuments: Art Museums and the Politics of Culture in Nineteenth Century France*, 1989.
[412] See Kifle Jote, *International Legal Protection of Cultural Heritage,* 1994.
[413] Occurring in the event of armed conflict, the attacks against cultural heritage perpetrated during the Balkan wars have been criminalized, notably, by the ICTY. See *supra*, paragraph. I.1. On the intentional destruction of cultural heritage in the Balkans, see Andràs J. Riedlmayer, 'Destruction of Cultural Heritage in Bosnia-Herzegovina, 1992-1996: A Post-War Survey of Selected Municipalities' (report to the ICTY, 2002) and Helene Walasek, *Bosnia and the Destruction of Cultural Heritage* (Routledge 2005).
[414] See Federico Lenzerini, 'Intentional Destruction of Cultural Heritage', in Francesco Francioni and Ana Filipa Vrdoljak (ed. by), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press, 2020).
[415] As it has been remarked in doctrine, the condemnation or the acceptance of the episodes of intentional destruction of cultural heritage occurred during centuries has always been driven by the various ideologies and different ways of thinking unavoidably at the core of the international community and, notably, of the United Nations. As an example, no reaction from the international community has been provoked by the destruction of the statue of Ferliks Dzerzhinsky, the founder

possible justifications or the complete aversion about those acts, international organizations and States have always refrained from entering the substance of the issue, considering it as falling within the jurisdiction of the domestic authorities competent on the determined territories.

In other words, as several authors have remarked, although, since its very first expressions, arguably in favor of the existence of an international responsibility towards the preservation of the cultural heritage of the peoples of the world, the international community appears as having never manifested an effective and real interest towards the necessity of protecting the *all* the cultural heritage endangered, in times of peace, by acts of intentional destruction carried out in under the jurisdiction of States. As for the reasons of such reluctance, arguably, the deep-rooted perception of the administration of cultural heritage in peacetime as a question of purely domestic jurisdiction, expression of national sovereignty.[416]

Such absence of an international norm prohibiting the intentional destruction of the cultural heritage of States occurring in the absence of armed conflict has showed up, notably, in the notorious episode of the demolition of the Buddhas of Bamiyan, occurred in Afghanistan in 2001. Ordered by the decree issued by the Taliban's Supreme Ruler Mullah Muhammad Omar on 26th February 2001, the destruction of the two monumental statues of Buddha situated in the Bamiyan Valley was conceived as part of the wider cultural cleansing campaign carried out by Taliban authorities to eradicate from their territory any symbol or 'false idol' considered as going against the principles of *sharia*.[417] In detail, the decree ordered the destruction of the two monuments in reason of their presumed contrast with the precepts of *a'fatwah*[418] as interpreted and handed down by Afghan clerics, due to the fact that, according to Islam, the depiction of living things is in art is considered an affront to Allah, which is why human forms never appear in Islamic art.[419] Rather favorably received by part of the Afghan society,[420] the announcement of the destruction of the two Buddhas of Bamiyan appears as having

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of the Soviet secret police, nor for the destruction of the statue of Saddam Hussein from the American troops in 2003. Although arguably historical monuments, these two elements of cultural heritage were in fact perceived as symbols of a pathological ideology, therefore their destruction has been easily accepted as 'legitimate' by the international community. See Helmut Lehmann-Haupt, *Art under Dictatorship*, (Oxford, 1954). On the debate between cultural universalism and relativism, see *supra*, Chapter II.

[416] See Tullio Scovazzi, 'Le rapport entre la souveraineté nationale et l'intérêt collectif des Etats', in Tullio Scovazzi, in *Le patrimoine culturel de l'humanité*, Centre d'étude et de recherche de droit international et de relations internationales, Académie de droit international de La Haye, 2005.

[417] According to Mullah Omar, "These statues are there to be worshipped, and that is wrong. They should be destroyed so that they are not worshipped now or in the future." Agence France-Presse, 'Pre-Islam Idols Being Broken Under Decree by Afghans, New York Times, 2 March 2001; see also Molly Moore, 'Afghanistan's Antiquities Under Assault', Washington Post, 2 March 2001, and Stanislav Bychkov, 'Taleban Decision to Ruin Buddha Statues is Irreversible-View', Itar-Tass, 3 March 2001, Lexis, Nexis Library, News Group File.

[418] Traditional interpretation of the Islamic law.

[419] For Muslims, "God exists on a plane of power and sanctity above any other being and to associate anything with him in any visual symbol is a sin.". Laurie Krieger, 'Chapter 2: Society and Its Environment' in Richard F. Nyrop and Donald M. Seekins (ed. by), *Afghanistan: A Country Study* (Peter R. Blood ed., 1986).

[420] In Afghanistan, Taliban authorities presented the destruction of the Buddhas as a successful accomplishment towards the realization of the principles of sharia, symbol of victory and cause for celebration. International sources report that in

triggered an immediate and harsh response at the global level. Immediately in the aftermath of the event, indeed, the international community acted uniformly in condemning the bombing of the Buddhas, pleading the Taliban to reverse the course of their destruction. This, in particular, in view of the concerns raised by the global community concerns about the fate of the Bamiyan Buddhas, in reason of their religious, historic, and artistic significance, first of all, for the Buddhist peoples, and, beyond that, for the whole humanity. Monumental sculptures of massive size,[421] the statues were carved into the Bamiyan cliffs around the 15th century, when Afghanistan was a center of Buddhism. As a matter of fact, until the 11th century, Bamiyan was also home to a large monastery, and Buddhist monks lived in the caves surrounding the statues rendering the site an important pilgrimage destination for Buddhist, full of religious importance. In addition to that, the two statues were acknowledged for their historic and artistic significance. Placed in a territory which was once an important juncture along the Silk Route connecting Europe to Asia, the monuments were acknowledged for having played a relevant role in the strengthening of the cooperation and cultural dialogue among the populations running across the Silk Route, thereby having positive consequences on their economic exchanges. Furthermore, from an artistic point of view, the two statues were considered of unique interest in virtue of their feature of presenting a rare blend of Central Asian, Indian, and Hellenistic influences.[422]

With regard to the demonstrations occurring at the international level in the aftermath of the attacks, among the protesting States, political declarations condemning the intentional destruction of the Bamiyan Buddhas perpetrated by the Taliban came from Afghanistan, Andorra, Argentina, Armenia, Australia, Austria, Azerbaijan, Belgium, Benin, Bhutan, Bolivia, Bosnia-Herzegovina, Brazil, Bulgaria, Burma (Myanmar), Cambodia, Canada, Chile, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Fiji, Finland, France, Georgia, Germany, Greece, Guatemala, Haiti, Hungary, Iceland, India, Iran, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Korea (Republic of), Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malta, Malaysia, Mauritius, Mexico, Micronesia, Netherlands, New Zealand, Moldova, Monaco, Mongolia, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Panama, Pakistan, Paraguay, Peru, Poland, Portugal, Qatar, Romania, Russia,

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that occasion Mullah Omar had fifty cows slaughtered at the site and flew in Taliban dignitaries for the event. He also ordered a hundred more cows to be killed to atone for the delay and to distribute the meat to the poor. See 'Islamic Clerics Return Empty-Handed from Afghanistan: Report', Agence France Presse, 12 March 2001, Lexis, Nexis Library, News Group File and Barry Bearak, 'Afghan Says Destruction of Buddhas Is Complete', New York Times, 12 March 2001.

[421] The two statues were 165 feet and 114 feet tall respectively. Dave Clark, 'UNESCO Chief Sends Envoy to Try and Halt Toppling of Afghan Statues', Agence France Presse, 2 March 2001, Lexis, Nexis Library, News Group File.

[422] Jet van Krieken, 'The Buddhas of Bamiyan: Challenged Witnesses of Afghanistan's Forgotten Past', International Institute for Asian Studies, http://www.purabudaya.com/resources/bamiyan/bamiyan.htm. Last visit 14 October 2022.

Saudi Arabia, Samoa, San Marino, Sierra Leone, Slovakia, Slovenia, Spain, Solomon Islands, South Africa, Sri Lanka, Sweden, Switzerland, Suriname, Tajikistan, Thailand, Togo, Turkey, Ukraine, United Arab Emirates, United Kingdom, United States, Uruguay, Uzbekistan, Vietnam and Yugoslavia.[423] Likewise, the former UN Secretary General Kofi Annan and the Dalai Lama released two individual declarations firmly condemning the deliberate attacks against Afghan cultural heritage, after having unsuccessfully attempted to negotiate with the Taliban authorities in the context of international diplomacy.[424]

III.I.ii The adoption of the UNESCO 2003 Declaration concerning the Intentional Destruction of Cultural Heritage. A programmatic document or a mere 'declaration of intents'?

In such a context, joining the outcry against the irreversible destruction of the two monumental Buddhas of Bamiyan, on 9 March 2001 the UN General Assembly adopted a resolution calling for the Taliban's "immediate action to prevent the further destruction of the irreplaceable relics, monuments or artifacts of the cultural heritage of Afghanistan".[425] In the same way, such acts have been condemned by the Council of Europe, the European Union, the Organization of the Islamic Conference, the G-8 group and UNESCO. In particular, the latter expressed its deep concern with regard to the irreversible destruction of the two monuments which, although not inscribed in the World Heritage List at the moment of the attacks,[426] were nevertheless recognized by the organization as expressions of cultural heritage "not limited to a particular group or region, but [extending] across geographical, cultural and political boundaries.".[427]

Notwithstanding with the far-reaching scope of the global outcry against the intentional destruction of the two Buddhas of Bamiyan perpetrated by the Taliban authorities, it appears how the reaction of the States and organizations, clear-cut from the political side, has been rather less effective and outspoken from the standpoint of international law. Apart from the declarations released in the

[423] For an insight on the political reactions of States to the destruction of the Buddhas of Bamyian see Kangchana Wangkeo, *supra* p. 246 ss.

[424] Barry Bearak, 'Afghan says destruction of Buddhas is complete', New York Times, 12 March 2001, available at https://www.nytimes.com/2001/03/12/world/afghan-says-destruction-of-buddhas-is-complete.html last access 14 October 2022; Alex Spillius, 'Taliban Ignore Appeals to Save the Buddhas', Daily Telegraph, 5 March 2001, available at https://www.telegraph.co.uk/travel/717061/Afghanistan-Taliban-ignore-all-appeals-to-save-Buddhas.html last access 14 October 2022. On the relevance of the international community response to the episode of destruction of the Buddhas of Bamiyan in the context of the progressively emerging principle establishing the necessity of preserving all the cultural heritage of peoples irrespectively of its OUV, see *infra* .

[425] UN General Assembly, *The Destruction of Relics and Monuments in Afghanistan*, U.N. Doc. A/RES/55/243 (2001), 9 March 2001.

[426] See *infra*.

[427] *UNESCO Condemns Destruction of Afghan Monuments, Summons OIC Members,* Agence France Presse, 1 March 2001, Lexis, Nexis Library, News Group File.

aftermath of the attacks by the UN General Assembly and by UNESCO, in fact, no enforceable provision has been adopted to try to face the irreversible destruction of the two monuments, nor any binding measure has been approved to cope with the deliberate attacks against cultural heritage perpetrated by the Taliban in Afghanistan.[428]

As for the reasons of such hesitancy, arguably, the context in which such acts of intentional destruction of cultural heritage have been carried out.

Notwithstanding with the tensions at the international level provoked by their raise in power, the Taliban group was the *de facto* government of Afghanistan from 1996 to 2001, having effective control on Kabul and the southern part of the country. With their promise to bring the peace and stability of a pure Islamic state releasing Afghanistan from the threat of the *mujahedin*,[429] the Taliban gained the support of the majority of the Afghan population. Likewise, at the international level, the Taliban regime was favored, in the initial phase of their government, by United States, Pakistan, Turkey and Saudi Arabia which, for economic reasons – connected notably to the exploitation of the oil resources in Central Asian Republics – saw Taliban's victory over *mujahedin* as a positive evolution.[430]

Perpetrated in the absence of international conflict nor in the event of warfare, the destruction of the two Buddhas of Bamiyan appears hence as not falling within the scope of the Hague Convention of 1954, which recognizes as a precondition for its application the presence of an armed conflict such as to gravely damage and endanger the cultural heritage of the concerned States.

Nor, according to the circumstances, such acts seem to fall within the scope of the World Heritage Convention. In spite of their recognized exceptional value not only from the religious, but also from the historic, archaeological and artistic standpoint, acknowledged, notably, by UNESCO, the two Buddhas of Bamiyan were indeed not inscribed, at the moment of the attacks, in the *ad hoc* World Heritage List. For this reason, as it appears, they were not entitled, pursuant to art. 4 and following of the treaty, to the international protection accorded to the cultural heritage of humankind by the World Heritage Convention. As for the reasons of such an exclusion, the fact that, in 1982, the Democratic Republic of Afghanistan had submitted a nomination for the inscription of the monuments in the World Heritage List, however rejected by the World Heritage Committee because it was considered

[428] In particular, no action has been carried out, in such context, by the UN Security Council.

[429] Guerrilla Islamic fighters present in Afghanistan since the end of the Cold War, when they expelled the Soviet from the country in 1990 and engaging in blocking roads, looting, corruption, theft, rape, and murder in their attempts to consolidate power.

[430] For a thorough account on Afghanistan and the Taliban's raise to power, see generally Richard F. Nyrop and Donald M. Seekins (ed. by), *Afghanistan: A Country Study* (Peter R. Blood ed., 1986); Michael Griffin, *Reaping the Whirlwind: The Taliban Movement in Afghanistan* (Pluto pr., 2000); Peter Mardsen, *The Taliban: War, Religion and the New Order in Afghanistan* (Zed Books, 1999) and Ahmed Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia* (Yale University Press, 2001).

incomplete.[431] In the following years, the previous Afghan governments have tried to reiterate the request, but the ongoing civil war has rendered such submission impossible.[432] Therefore, this explains why, although acknowledged for their cultural significance, the two Buddhas of Bamiyan were not, at the moment of the Taliban decree, officially recognized by UNESCO as cultural heritage of "Outstanding Universal Value" pursuant to art. 1 of the World Heritage Convention. Rather, it seems, the statues appeared as 'ordinary' elements part of the national Afghan cultural property, submitted to the sovereignty of the Afghanistan and, notably, to the domestic jurisdiction of Afghan authorities in the field of cultural heritage.

It is in the light of such a scenario, and to cope with such normative void, that the international community converged, in the aftermath of the Bamiyan episode, in the adoption of a new international document dedicated to the protection of cultural heritage in peacetime. In particular, the global community was committed to recognize the necessity of protecting *all* the elements of the worldwide cultural heritage which, even in the absence of armed conflict, might find themselves endangered in the territories of States – being or not their inscribed, at the moment of the threat, in the World Heritage List.

As a result of such effort, on 17 October 2003, the UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage has been adopted *per consensus* in order to respond to such aforementioned needs.[433] "Deeply concerned and appalled by the […] deliberate ongoing destruction of […] relics and monuments which belong to the common heritage of humankind" and, notably, "of the unique Buddhist sculptures in Bamiyan, [which destruction] would be an irreparable loss for humanity as a whole",[434] the international community expresses in this document its "[…] serious concern about the growing number of acts of intentional destruction of cultural heritage" affecting worldwide countries, together with their unavoidable "adverse consequences on human dignity and human rights".[435] In particular, the UNESCO Declaration reflects the commitment of the international community towards the protection of cultural heritage, and in the "fight[ing] against its intentional destruction in any form so that such cultural heritage may be transmitted to the succeeding

[431] UNESCO, *Report on the Convention Concerning the Protection of the World Cultural and Natural Heritage*, U.N. Doc. WHC-0I/CONF.208/24 (2002), 8 February 2002.

[432] Stephanie Cash, 'Afghan Culture Remains in Peril', Art AM, 1 May 2001; Aamir Shah, 'Taliban Begin Demolishing Buddhas', United Press International, 1 March 2001.

[433] UNESCO, Declaration Concerning the Intentional Destruction of Cultural Heritage. Adopted in Paris, 17 October 2003. ("UNESCO Declaration").

[434] "Recalling the several appeals made by the General Assembly to all Afghan parties to protect the cultural and historic relics and monuments in Afghanistan, and welcoming recent calls by the Security Council, the United Nations Special Mission to Afghanistan, the United Nations Educational, Scientific and Cultural Organization, the Islamic Educational, Scientific and Cultural Organization and others, urging the Taliban to halt their destruction, […]". UN General Assembly, *The Destruction of Relics and Monuments in Afghanistan*, U.N. Doc. A/RES/55/243 (2001), 9 March 2001, preamble.

[435] UNESCO Declaration, preamble. On the strict interconnection between the international protection of cultural heritage and human rights, see *infra*.

generations.".[436] To this end, States are called to "take all appropriate measures to prevent, avoid, stop and suppress acts of intentional destruction of cultural heritage, wherever such heritage is located" and, in particular, to "adopt the appropriate legislative, administrative, educational and technical measures, within the framework of their economic resources, to protect cultural heritage" in accordance with "the evolution of national and international cultural heritage protection standards.".[437] Precisely, the UNESCO Declaration asks States to endeavor, in warfare and in times of peace, to ensure an adequate protection and respect to the cultural heritage situated on their territory, in the name of their importance for humanity and in accordance with the international existing principles and norms for the protection of cultural heritage – and, notably, with art. 1 para. 2. lett. c) of the UNESCO Constitution, that entrusts UNESCO with the task of ensuring the conservation and protection of the world's cultural heritage.[438]

Representing the first and unique UNESCO instrument considering the necessity of establishing a *general* duty, pending on the international community, towards the protection of *all* the elements of the cultural heritage of peoples possibly endangered, in the absence of armed conflict, in the territories of States, the UNESCO Declaration has been received, at the global scope, in a rather disenchanted way.

As a matter of fact, notwithstanding with the great expectations related to its adoption, the UNESCO Declaration has been object of several reprovals from relevant part of the doctrine, which has criticized the document, notably, for its lack of enforceability at the international scope. In detail, some authors have raised their concern about the absence, within the provisions of the UNESCO Declaration, of any kind of effective obligation pending on the international community towards the protection of the worldwide cultural heritage in times of peace, consisting, instead, in a rather political document adopted by States under the aegis of UNESCO, precisely shaped as a mere 'declaration of intents'.[439]

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[436] UNESCO Declaration, art. 1. "For the purposes of this Declaration "intentional destruction" means an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, in a manner which constitutes a violation of international law or an unjustifiable offence to the principles of humanity and dictates of public conscience, in the latter case in so far as such acts are not already governed by fundamental principles of international law." UNESCO Declaration, art. 2 para. 2. Such definition has been object of several criticisms in doctrine, in particular in reason of its supposed reference to the "clause Martens" in the last part of the wording, recalling the hypothesis in which the intentional destruction of cultural heritage would be "already governed by fundamental principles of international law". See Tullio Scovazzi, 'La Dichiarazione sulla distruzione intenzionale del patrimonio culturale' (2006), 21 *Rivista giuridica dell'ambiente* 551.

[437] UNESCO Declaration, art. III.

[438] UNESCO Declaration, preamble and art. IV.

[439] See Tullio Scovazzi, 'La Dichiarazione sulla distruzione intenzionale del patrimonio culturale' (2006), 21 *Rivista giuridica dell'ambiente* 551.

Coming as the result of the negotiations carried out by the *ad hoc* Group of Experts from December 2002 to July 2003,[440] the UNESCO Declaration recalls, since its preamble, the necessity of strengthening the international cooperation in the field of cultural heritage protection. This, notably, in the light of the most recent threats affecting cultural goods and sites in the territories of States, both in war and in peace time. In this sense, and to cope with such scenario, the document recalls the necessity for States Parties to uniform to all the international standards established by the whole UNESCO framework for the protection of cultural heritage, and it reiterates, in particular, the fundamental principles entailed in the preamble of the Hague Convention and in the World Heritage Convention.[441]

Notwithstanding with such a premise, however, it appears how the UNESCO Declaration, when it comes to the establishment of effective duties pending on the international community towards the preservation of worldwide cultural heritage, does not impose, in reason of its declaratory nature, any kind of obligation towards the protection of cultural goods and sites in addition to the ones already established by the afore-cited UNESCO framework. *A contrario*, it appears, the UNESCO Declaration seems to confine itself to the mere reiteration principles of international cultural heritage law already acknowledged by the international community, and even, as it has been raised by some authors, weakening them within the scope of its provisions by the means of improper terminological choices.[442] As it has been noted in doctrine, precisely, relevant shortcomings may come from the wording of the UNESCO Declaration dispositions concerning the fight against intentional destruction of cultural heritage (art. III) and the protection of cultural heritage in war time and in peace (arts. IV and V), which establish that States "should" take all the appropriate measures to achieve the objects of the UNESCO Declaration – this, with no reference to any binding provision. In the same way, arts. VII and VIII establish that States "should" take measures to provide effective jurisdiction over

[440] The Group of Expert was composed of 18 States Parties; the other States Parties participated to the meeting as observatories. UNESCO *Draft UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage*, UNESCO Doc. 32 C/25, 17 July 2003.

[441] "Reiterating one of the fundamental principles of the Preamble of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict providing that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world". UNESCO Declaration, preamble.

[442] "When conducting peacetime activities, States should take all appropriate measures to conduct them in such a manner as to protect cultural heritage and, in particular, in conformity with the principles and objectives of the 1972 Convention for the Protection of the World Cultural and Natural Heritage, of the 1956 Recommendation on International Principles Applicable to Archaeological Excavations, the 1968 Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works, the 1972 Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage and the 1976 Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas." UNESCO Declaration, art. IV.

individual criminal responsibility[443] and to cooperate with each other's for the worldwide protection of cultural heritage, leaving to their discretion the entire implementation of such norms.[444]
This, remarkably, notwithstanding with the provision of art. VI, which, establishing that

"A State that intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish *any intentional destruction* of cultural heritage of great importance for humanity, *whether or not it is inscribed on a list maintained by UNESCO* or another international organization, bears the responsibility for such destruction, to the extent provided for by international law"[445]

might appear as relying on the existence of a general duty, pending, in theory, on States Parties, towards the conservation of all the cultural heritage of nations irrespectively from its inscription on any inventory or "World Heritage List".
It is in the light of the above, hence, that doctrine has raised several concerns regarding the effective contribution provided by the UNESCO Declaration to the international framework for the protection of the cultural heritage of peoples, which indeed seems to rely, still, notably on the UNESCO Hague Convention – for the event of armed conflict – and the UNESCO World Heritage Convention – for what it concerns peacetime. As for the reasons of such a shortcoming, as it has been anticipated, the rather political, instead of the intrinsic nature of the UNESCO Declaration which, coming as a result of delicate negotiations, appears as reflecting the unwillingness of States Parties towards the establishment of further international duties in the field of cultural heritage protection. As it emerges from the discussions carried out in the context of the Group of Experts, in fact, States Parties did not agree, in the context of the drafting of the document, on the adoption of a binding treaty affirming new obligations in the field of cultural heritage protection, on the contrary considering as already complete and effective the existing UNESCO framework put in place, notably by the Hague Convention and the World Heritage Convention.

[443] "Individual criminal responsibility States should take all appropriate measures, in accordance with international law, to establish jurisdiction over, and provide effective criminal sanctions against, those persons who commit, or order to be committed, acts of intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization." UNESCO Declaration, art. VII. It is worth noting that, although not establishing positive obligations on States Parties, the last part of this provision foresees the existence of a general obligation of protecting all the elements of the cultural heritage of humankind, irrespectively of its inscription in the World Heritage List.
[444] The use of "should" instead of "shall" has been approved by the Group of Experts in the second and last phase of their negotiations, notably in accordance with the observations of the delegate of the United States. See Federico Lenzerini, 'The UNESCO Declaration concerning the intentional destruction of cultural heritage: one steps forward and two steps back' (2003), 13 *The Italian Yearbook of International Law*, 1, pp. 131-145.
[445] UNESCO Declaration, art. VI, emphasis added.

III.II.iii. Two decades after the facts of Bamiyan: the new wave of 'iconoclastic propaganda' occurred since the 2000s and the necessity of finding out a more encompassing framework for worldwide cultural heritage protection. The 2016 Report of the UN Special Rapporteur in the field of cultural rights

As it appears, other than from the outline of Chapter I and II, from the considerations carried out in the above paragraphs concerning the issue of the intentional destruction of cultural heritage in the absence of armed conflict – notably, with reference to the Bamiyan episode –, the current status of the international framework for the protection of worldwide cultural heritage put in place, in particular, by UNESCO seems to present a series of shortcomings when it comes to the international protection of the cultural heritage of peoples put at risk, at the global level, by a series of occurrences. Indeed, the above considerations have suggested how, in the territories of States, the cultural, historic and artistic expressions of peoples and traditions may find themselves in danger in presence of several circumstances which, although not apparently addressed by the current global framework for the international protection of cultural heritage, may nevertheless entail the deterioration or, even, the destruction, of the inheritance of peoples. As it has been exposed above, this has been true, above all, in the case of the intentional destruction of cultural heritage carried out, in the absence of war, with the avail or by order of the national authorities competent on the concerned territory. Nevertheless, it seems, such possible endangerment or degradation might represent a concrete risk for the cultural heritage of humankind also in several other circumstances occurring in the territories of States in time of peace, notwithstanding with the above exposed norm-set set up by international organizations and UNESCO for the protection and conservation of the inheritance of peoples.

These current limits entailed within the UNESCO framework for cultural inheritance, as well as the necessity of finding out, within the global context, new strategies and modalities applicable worldwide such as to ensure, with their effectiveness and scope, an adequate and encompassing protection to the whole cultural heritage of peoples has been raised by several scholars of international law. As it has been anticipated in the above paragraphs, this, even more, in the aftermath of the adoption of the 2003 UNESCO Declaration which, notwithstanding with its declared aim of maintaining, increasing "the conservation and protection of the world's inheritance of books, works of art and monuments of history and science" as established in art. 1 para. 2 lett. c) of the UNESCO Constitution, appears as not establishing *any kind of positive obligation* towards the international

protection of the world's cultural heritage pending on States Parties, rather representing, within the current UNESCO framework, in a "one step forward and two steps back" evolution.[446]

In the same way, such inadequacy of the current international standards set up by the global community for the worldwide protection of the cultural heritage of peoples has been recently raised, *inter alia*, by the UN Special Rapporteur in the field of cultural rights, the independent expert nominated since 2009 by the Human Rights Council to monitor and enhance the worldwide respect and promotion of cultural rights conceived as fundamental freedoms.[447] In her 2016 Report on the intentional destruction of cultural heritage as a violation of human rights,[448] the former Special Rapporteur in the field of cultural rights Karima Bennoune[449] has highlighted how, within the last years, the international community has experienced an alarming increase of destructive acts addressed to worldwide cultural heritage. This, notably, not only in the context of the international and non-international armed conflicts around the world, but also and remarkably in situations of peace time, where the cultural heritage of people is jeopardized even in the absence of any kind of warfare. In this sense, the 2016 Report stresses on the necessity of an "urgent response" to these "recent highly visible and openly declared acts of intentional destruction of cultural heritage" spreading across multiple regions of the world, which are increasing in frequency and scale thereby leading, in most of the cases, to the irreversible degradation – or, even, to the complete destruction – of artistic, historic and archaeologic expressions of the culture of humanity.[450]

In particular, the 2016 Report identifies a series of circumstances in which, in the absence of armed conflict – and, even, in the absence of any kind of physical violence addressed to the targeted elements

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[446] See Federico Lenzerini, 'The UNESCO Declaration concerning the intentional destruction of cultural heritage: one steps forward and two steps back' (2003), 13 *The Italian Yearbook of International Law*, 1, pp. 131-145.

[447] In detail, the mandate of the UN Special Rapporteur in the field of cultural rights consists in : "Identify best practices of promoting and protecting cultural rights at local, national, regional and international levels; Identify obstacles to the promotion and protection of cultural rights, and submit recommendations to the Council on ways to overcome them; Work with States to foster the adoption of measures—at local, national, regional and international levels—to promote and safeguard cultural rights, and make concrete proposals to enhance cooperation at all levels in that regard; Collaborate closely with States and other relevant actors like the United Nations Educational, Scientific and Cultural Organization, to study the relationship between cultural rights and cultural diversity, with the aim of further promoting cultural rights; Integrate a gender and a disability perspective into this work; Coordinate with intergovernmental and non-governmental organizations, other special procedures, the Committee on Economic, Social and Cultural Rights, the United Nations Educational, Scientific and Cultural Organization, and relevant actors, representing the broadest possible range of interests and experiences, including by attending relevant conferences and events." For an insight on the role and the initiatives carried out by the UN Special Rapporteur in the field of cultural rights, see https://www.ohchr.org/en/special-procedures/sr-cultural-rights/about-mandate. Last access 27 March 2023.

[448] Report of the Special Rapporteur in the field of cultural rights on the intentional destruction of cultural heritage as a violation of human rights, UN. Doc. A/71/317, 9 August 2016 (also 2016 Report on the intentional destruction of cultural heritage or 2016 Report).

[449] The current mandate holder is Alexandra Xanthaki. For an insight on her mandate, see https://www.ohchr.org/en/special-procedures/sr-cultural-rights. Last access 28 March 2023.

[450] "Given that destruction of cultural heritage is most often irreversible, even in this digital age, we must come together to prevent and stop, as a matter of priority, such deliberate attacks on cultural rights and the culture of humanity", 2016 Report, para. 5.

of cultural heritage[451] –, the cultural heritage of peoples, conceived both as minorities and as the whole humanity, has been addressed in the territories of States and revendicated for a series of reasons, both from State and non-State actors.[452] In detail, such circumstances are reported in paras. 35 – 45 of the 2016 Report, which identifies the reasons of these acts of intentional destruction of cultural heritage in the perpetration of strategies or programs aiming at the "homogenization of world views" by the mandators of such acts, which are embodied, depending on the circumstances, in public authorities, authoritarian governments or extremist groups. As, well, the UN Former Rapporteur in the field of cultural rights recalls how the *mise en place* of "cultural engineering" and "cultural cleansing" campaigns seeking to eradicate from the concerned territory any expression or symbol of past events, minoritarian traditions, or whatever element of the cultural heritage perceived as "deviating from official discourses" is progressively jeopardizing the cultural heritage of the world, with no sign of slowing down.[453]

In the light of these considerations, indeed, such necessity of strengthening the international framework for the contrast to the intentional destruction of the cultural heritage of peoples comes even more clear if someone considers the progressively increasing wave of 'iconoclastic' campaigns and propaganda which has spread all over the world within the last two decades – and, remarkably, twenty years after the notorious episode of the Buddhas of Bamiyan. To cite some examples of the diffusion of such phenomenon, the massive destruction of Sufi religious and historic sites and desecration of graves in Libya occurring between 2011 and 2012, the cultural cleansing campaign perpetrated against cultural and religious sites, artefacts and manuscripts during the occupation of northern Mali between 2012 and 2013,[454] as well as the systematic destruction of temples, monasteries, shrines and millenniums-old sites such as at Palmyra in the Syrian Arab Republic carried out, for ideological reasons, by fundamentalist groups including Da'esh, Al-Qaida (and its various branches and affiliates), Jabhat Al-Nusra, Jabhat Ansar al-Din, Jaish al-Fateh and Boko Haram – in

[451] "Physical violence need not be used to destroy cultural heritage, as attested, for example, by the systematic changing of place names in the northern part of Cyprus by Turkish Cypriot authorities." 2016 Report, para. 44. See also the preliminary conclusions and observations by the Special Rapporteur at the end of her visit to Cyprus, 24 May-2 June 2016, available at www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx? NewsID=20048&LangID=E. Last access 28 March 2023.

[452] "States, as well as a range of non-State actors, may bear responsibility for such acts. Sometimes actions of States and non-State actors affect the same site in succession, as has been alleged to be the case in Palmyra, for example." 2016 Report, para. 41.

[453] "There are many examples where destruction is part of the "cultural engineering" practised by diverse extremists who, rather than preserve tradition, seek to radically transform it, erasing whatever does not accord with their vision. They seek to end traditions and erase memory, in order to create new historical narratives affording no alternative vision." 2016 Report, para. 36. See also 2016 Report para. 20, the submissions of Emma Loosley and Endangered Archaeology in the Middle East and North Africa (EAMENA) and the joint allegation letter of 11 July 2014 on case No. BHR 9/2014, regarding the destruction of the Pearl Roundabout in Bahrain.

[454] In particular, such campaign was accompanied by a ban on music and restrictions on women's dress. See 2016 Report para. 37.

addition to numerous civilian militias. In the same way, some concerning examples of 'iconoclastic propaganda' can be identified in the context of the cultural cleansing campaigns carried out in the Islamic Republic of Iran, where the repeated destruction of the Baha'is cemeteries and places of cultural religious significance has been reported both by the UN Former Special Rapporteur in the field of cultural rights and her predecessor, and in Saudi Arabia, where the systematic demolition of mosques, graves and shrines, houses and places of religious, historical and cultural significance has been ordered by the competent authorities in reason of the alleged contrast of these cultural expressions with the 'official' *Wahhabi* interpretation of Islam. In this sense, the same ideological and religious motives are the reason of the destruction of Coptic churches and monasteries in Egypt, Jewish sites in Tunisia and hundreds of shrines belonging to the Sufi sect of Islam across Northern Africa occurred since 2012, as well as of the reiterated attacks carried out against cultural heritage which have spread within the last decade in the territories of Armenia, Azerbaijan, Georgia, Serbia, India and – once again – Afghanistan.[455]

III.II.iv.. The most recent episodes of 'iconoclastic propaganda' occurred since May 2020: the cases of Afghanistan and United States and the progressive emergence of a 'right to destroy'

It is, in particular, in such latter context that, as repeatedly warned by the international press, the most recent episodes of systematic cultural heritage destruction carried out in the context of a 'cultural policy' put in place by an authoritarian regime have been occurred within the very last years, leaving open the interrogative concerning the actions and strategies possibly put in place by the global community for the safeguard and protection of the endangered cultural goods. As a matter of fact, as it has been reported, it is since the Taliban takeover in the Afghan territories, occurred in August 2021, several episodes of 'iconoclastic propaganda' have been occurred in various areas of the country, jeopardizing an integral part its monuments and sites, in the context of systematic cultural plans put in place by the competent authorities. As for the reason of such destruction, as in the case of the Buddhas of Bamiyan, the alleged contrariety of the meaning attributed to these elements of the Afghan cultural heritage to the official message vehiculated by the Taliban's regime.[456] As it has been highlighted by UNESCO Director-General Audrey Azoulay, this has been true, notably, with regard

[455] See 2016 Report, paras. 39 and 40. See also Heghnar Watenpaugh, 'Cultural heritage and the Arab Spring: war over culture, culture of war and culture war', *International Journal of Islamic Architecture*, vol. 5, No. 2 (2016), pp. 245-263.
[456] See among others Roberta Capozucca, 'I Talebani a Kabul: il patrimonio culturale afghano è di nuovo a rischio?', Il Sole 24 Ore, 22 August 2012, available at https://www.ilsole24ore.com/art/i-talebani-kabul-patrimonio-culturale-afghano-e-nuovo-rischio-AEtYrDe?refresh_ce=1. Last access 28 March 2023.

to the jeopardization of several exhibition areas and local museums perceived as in contrast with the principles of *shari'a*, including the case of the National Museum in Kabul.[457]

Although often placed at the center of the public debate, these episodes of 'iconoclastic propaganda' appear as having provoked a rather fuzzy reaction at the global scope. Indeed, apart from few declarations released by some institutions engaged in the international campaign for the conservation of worldwide cultural heritage – and, notably, by ICOM – the global arena appears as having mainly overlooked the progressive jeopardization of the cultural property of the Afghan people and the risks entailed in such destruction for the cultural heritage of humanity.[458]

As a matter of fact, the only concern which has been raised by the international community in the aftermath of such events refers to the risk, entailed in those Taliban cultural cleansing campaigns, of jeopardizing elements of those elements of the worldwide cultural property recognized as relevant parts of the 'cultural heritage of mankind' and, notably, included in the UNESCO 1972 World Heritage List – therefore deserving international protection.[459]

Such approach comes clear, in particular, when taking into account the statement released by the UNESCO Director-General in the aftermath of the attacks. Declaring herself concerned for the fate of the Afghan cultural property put at risk by the Taliban's cultural cleansing plan, and establishing the organization's commitment in preserving the cultural heritage of mankind situated in the territories of Afghanistan, the UNESCO Director-General makes specific reference to the urgent necessity of avoiding the destruction or damage of, *in particular*, the Minaret and Archaeological Remains of Jam and the Cultural Landscape and Archaeological Remains of the Bamiyan Valley. In detail, the UNESCO Director-General has highlighted the impact of the destruction of these objects of universal significance for the whole humanity, and, in particular, their *inscription* in the UNESCO 1972 World Heritage List, of which the two items are part, respectively, since 2002 and 2003.[460] On the contrary, nor a similar declaration, nor any kind of reaction, has been registered from the international community in the aftermath of the *mise en danger* of those elements of the Afghan cultural heritage not inscribed (or, not yet), for several reasons, in the World Heritage List. As a matter of fact, *a contrario*, these latter episodes have been essentially ignored by the international

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[457] See UNESCO Director-General Audrey Azoulay statement, 19th August 2021, available at https://en.unesco.org/news/afghanistan-unesco-calls-protection-cultural-heritage-its-diversity. Last access 28 March 2023.

[458] See ICOM, 'Statement concerning the situation facing cultural heritage in Afghanistan', 17 August 2021, available at https://icom.museum/en/news/statement-concerning-the-situation-facing-cultural-heritage-in-afghanistan/. Last access 29 March 2023. See also Gareth Harris, 'Unesco calls for Afghanistan's heritage to be protected – but how will it seek enforcement?', 23 August 2021, available at https://www.theartnewspaper.com/2021/08/23/unesco-calls-for-afghanistans-heritage-to-be-protectedbut-how-will-it-seek-enforcement. Last access 29 March 2023.

[459] On the obligations pending on the international community pursuant to the World Heritage Convention and on the inclusion of cultural heritage in the World Heritage List see *supra* Chapter I and II.

[460] See the World Heritage Convention Report on Afghanistan, available at https://whc.unesco.org/en/statesparties/af. Last access 27 March 2023.

community, which appears as having mostly given up on taking a clear and uniform stand on such events, rather mainly relegating the issue to a question of purely domestic law.

Likewise, the same 'OUV-oriented' approach to the worldwide protection of the cultural heritage of peoples appears as having been adopted, by the international community, in the context of another, rather relevant, recent phenomenon entailing the systematic intentional destruction of the cultural heritage of States in the absence of armed conflict. It is the case, notably, of the monuments toppling-down movement raised in the United States since the outbreak of the Black Lives Matter[461] demonstrations and spread all over the world in a vigorous wave of 'protest iconoclasm', outcrying for the elimination from global society of the inheritance of colonialism and 'American white supremacy'. Soared with the first protests taking place in May 2020 in the aftermath of the death of the black citizen George Floyd, murdered by a white police officer in Minneapolis, the Black Lives Matter demonstrations have rapidly spread all over the majority of the municipalities of the United States, thereby reaching the global scope, within the last three years, expanding themselves in some cities of Europe, Australia and the Far East.[462] Aiming at eradicating from modern society all the avowed expressions of the neglected supremacist tradition, the BLM demonstrators recognize the necessity of definitively eliminating from their territories all those 'dark heritage' symbols still present in the public space, in reason of their alleged proximity to those ideas of racism and slavery which have characterized a neglected part of Western history. It is the case, in particular, of all those monuments, statues and sites, situated on the public sole and celebrating peoples or events of the past perceived as intrinsically connected, in reason of their representation or of the circumstances in which they were constructed, with the avowed principles and ideas celebrated in such historic periods. Acknowledged as "purposefully celebrating" the values of the Confederacy by "ignoring the death, the enslavement and the terror that [they] actually stood for" , those elements of the American cultural heritage are indeed considered as necessitating their removal from the public space. As for the reasons of such intervention, notably, the avowed misconception of civil society which might be entailed in their exposition, as well as of the "no more acceptable" values and ideas underpinning their edification[463].

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[461] Also, "BLM".

[462] See, among others, 'Toppled and Removed Monuments: A Continually Updated Guide to Statues and the Black Lives Matter Protests' available at <https://www.artnews.com/art-news/news/monuments-black-lives-matter-guide-1202690845/>. Last access 24 March 2023. On the outbreak of the BLM protests in Australia see 'Australia, Asia embraces Black Lives Matter protests', 6 June 2020, available at <https://asia.nikkei.com/Spotlight/Society/Australia-Asia-protests-embrace-Black-Lives-Matter-movement>. Last access 24 March 2023.

[463] See the declarations of the former mayor of New Orleans (Louisiana), Mitch Landrieu. See *New Orleans mayor: we can't ignore the death, enslavement and terror the Confederacy stood for, VOX Media*, 23 May 2017, available at <https://www.vox.com/policy-and-politics/2017/5/23/15680472/new-orleans-mayor-confederate-monuments> accessed 28 June 2022.

Indeed, it is in such context that, three years since the outbreak of the first demonstrations in Minneapolis after the murder of George Floyd in 2020, the monument toppling-down wave coming accompanying the Black Lives Matter ('BLM') movement is far from coming to an end.[464] According to the 2022 "Whose Heritage?" Report of the Southern Poverty Law Center, since the beginning of the protests 157 Confederate memorials have been removed from public spaces, in the United States, in several municipalities of, notably, Alabama, Carolina, Georgia, Mississippi, and Tennessee.[465] In the same way, along with the worldwide reach of the movement, the international press has reported that a number of monuments and statues dedicated to historical figures, such as Winston Churchill, President Theodore Roosevelt and Christopher Columbus, have been toppled in Europe, as well as in Australia and India.[466]

Frequently placed at the center of the political and social debates occurring in the concerned communities and criticized by a significative part of the public opinion as despicable expressions of an emerging 'cancel culture',[467] these episodes of 'political iconoclasm' appear as having been occurred, in most of the cases, under the aegis of the public authorities competent *in situ*. Supporting the commitment of the BLM demonstrators to release contemporary society from the 'dark symbols'[468] of a neglected past,[469] most of the authorities of the concerned municipalities appear as having, depending on the circumstances, availed, authorized, encouraged, or, even, ordered, the demolition – and destruction – of such 'dark cultural heritage'.[470] As for the reason of such an

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[464] *The last stands: Richmond starts taking down Confederate statues' pedestals, too, The Washington Post,* 1 February 2022, available at https://www.washingtonpost.com/dc-md-va/2022/02/01/richmond-confederate-statues-pedestals-removal/. Last access 30 March 2023 .

[465] See *'Whose Heritage? Public symbols of the Confederacy'*, 1 February 2022, available at <https://www.splcenter.org/20220201/whose-heritage-public-symbols-confederacy-third-edition>. Last access 30 March 2023.

[466] On the outbreak of the BLM protests in India, see *Black Lives Matter should be a Wake-up Call for India*, 17 June 2020, available at <https://thediplomat.com/2020/06/black-lives-matter-should-be-a-wake-up-call-for-india/> . Last access 30 March 2023.

[467] See *A Letter on Justice and Open Debate*, an open letter signed by several representatives of US publishing industry, cultural sector and academia published in Harper's Magazine on 7 July 2020, available at <https://harpers.org/a-letter-on-justice-and-open-debate/>. Last access 30 March 2023.

[468] Absent any official definition for 'contested heritage', the Special Rapporteur in the field of cultural rights has defined it as "[…] monuments celebrat[ing] the memory of past human rights violations, or promot[ing] ideas, concepts or action that are no longer acceptable, such as violence and discrimination" *2016 Report*, para. 13. In the same way, an analogous conception of "contested heritage" can be found in the Report of the Special Rapporteur in the field of cultural rights on Memorialization processes, UN. Doc. A/HRC/25/49, 23 January 2014, para. 5: "[…] memorials, understood as physical representation or commemorative activities located in public spaces, that concern specific events regardless of the period of occurrence (wars and conflicts, mass or grave human rights violations) or the persons involved (soldiers, combatants, […])". See *infra*.

[469] See *Connecting Past and Present: How to Understand the Idea of Erasing History – Heritage in War*, 2017, available at <https://www.heritageinwar.com/single-post/2020/06/23/connecting-past-and-present-how-to-understand-the-idea-of-erasing-history-and-how-it-appl>. Last access 30 March 2023.

[470] See, for example, the demolition of a Confederate statue carried out by demonstrators without any interference from the police, which occurred in Durham (North Carolina), in August 2017. 'Protesters tear down Confederate statue in Durham, North Carolina', CBS news, 15 August 2017, available at <https://www.cbsnews.com/news/durham-north-carolina-protesters-tear-down-confederate-monument/>. Last access 30 March 2023.

approach, the fact that the concerned authorities recognize how these contested monuments' continuous presence on the public sole might represent a potential catalyst of social tensions,[471] which has to be eradicated from civil society together with all the still existing traces of the contested 'white supremacy' regime.[472]

Adopted by the majority of the US municipalities concerned by the BLM protest since the very first episodes of 'political iconoclasm', such 'pro-removal' approach towards those national cultural elements conceived by part of society as 'contested monuments' shows no sign of slowing down. On the contrary, as it has been reported by NGOs close to the BLM movement, are increasingly declaring their commitment to progressing the fight to remove Confederate iconography from the United States. – even in the case in which that means discontinuing their preservation laws.[473] Supported by part of the doctrine, in fact, the authorities of the concerned United States' municipalities have referred to the progressive emergence of a so-called 'right to destroy' accruing to them, conceiving such permissibility of cultural heritage destruction as a "limited exception to cultural preservation law" applicable in specific circumstances.[474] In this view, notably, there are two conditions which would permit, in the absence of armed conflict, the demolition of cultural heritage: the establishment of such property in celebration of a violation of human rights law, and the express consent of the majority of the concerned population for this 'cultural eradication'.[475] Remarkably part of US law since the '80s,[476] the present doctrine has been recently recalled, with reference to the Confederate memorials, also by the Virginia Supreme Court in the case *Taylor v. Northam*.[477] Referring to the necessity of eradicating any expression of principles in contrast with the core values of American society, the Court authorized the removal of the General Lee monument from its pedestal in Richmond square. As for the reasons of behind such a decision, the fact that "any symbolism associated with the Lee Monument [may consist in] a message endorsed by the government", and any reference to principles contrasting with the values at the core of the United States should be eradicated in reason of their "troubling presence" on the national soil. Received with enthusiasm by the concerned BLM

[471] See the declarations of the Major of Raleigh (North Carolina) concerning the removal of the Confederate monument placed in front of the City Hall: "[the statue's] continued presence could lead to injury or violence and therefore must be immediately removed".

[472] See the declarations of the Mayor of Norfolk, Kenneth Alexander Cooper, and of the Governor of North Carolina, Roy Cooper, released in the aftermath of the attacks against Confederate monuments and the Capitol Ground (Washington D.C.) occurred in June 2020.

[473] See *'Fighting the 'Lost Cause': Whose Heritage? Report documents progress in battle to remove Confederate iconography'*, 4 February 2022, available at <https://www.splcenter.org/news/2022/02/04/cost-remove-confederate-monument-south. Last access 30 March 2023.

[474] See E. Perot Bissell V, 'Monuments to the Confederacy and the Right to Destroy in Cultural-Property Law' (2019) 128 The Yale Law Journal 1157.

[475] E. Perot Bissell V, *supra* note 45.

[476] See among others *Texas v. Johnson*, [491, 397], US Supreme Court, 21 June 1989, and *Virginia v. Black*, [538, 343], US Supreme Court, 7 April 2003.

[477] *Taylor v. Northam*, [210113], Virginia Supreme Court, 2 September 2021.

supporters, such a decision gave rise to mixed reactions. As it has been reported by the media, part of the concerned community has referred to the present episode as a necessary, "liberatory act" aiming at definitely eradicating from the concerned society any symbol of racism and hate; on the other side, several voices have been raised with regard to the contrast of this cultural heritage removal with the importance of transmitting to future generations a free and complete vision on their historical past, referring to these latest episodes as to a "loss of an opportunity to teach about history".[478]

Having provoked, as it has been exposed, a rather vibrant reaction within the concerned communities, these acts appear as having not been equally considered, on the other side, at the international scope. As in the case of the recent attacks against cultural heritage occurred in Afghanistan, in fact, it seems how, since the outbreak of the BLM protests in 2020, any kind of reaction nor response has been registered from the side of the global establishment engaged in the worldwide protection of the cultural inheritance of people, which appears as rather having relegated such phenomenon to a question of purely domestic law, to be left completely to the discretion of the entitled local authorities. Criticized in only few occasions by isolate political leaders,[479] these episodes seem indeed as having been mainly overlooked by the international arena, which appears as, rather, having chosen to focus, while approaching the issue, on the political and social aspects connected to the Black Lives Matters demonstrations not directly entailing the cultural heritage destruction but, rather, promoting a message of tolerance, inclusion and reject to racism.

As for the reason of such reluctance to cope with the attacks against the concerned cultural heritage, again, the fact that none of the 'contested monuments' addressed by the attacks of the BLM demonstrators in the context of the protests was inscribed, at the moment of the event, in the UNESCO 1972 World Heritage List, being there not entitled, as it has been raised in the above paragraphs of the present research, to any kind of international protection pursuant to the current UNESCO framework for the conservation of the cultural heritage of peoples.

Also in the light of these latter circumstances,[480] it seems important to consider, at the current time, the risk of progressive jeopardization, in times of peace, of the cultural heritage of peoples as it has been highlighted by the Special Rapporteur in the field of cultural rights' 2016 Report. As a matter

[478] See the declarations of Virginia's Governor Ralph Northam, Robert E. Lee statue: 'Virginia removes contentious memorial as crowds cheer', BBC News, 9 September 2021, available at https://www.bbc.com/news/world-us-canada-58491967. Last access 30 March 2023.

[479] In particular, see the declarations of the Prime Minister of England Boris Johnson and of the French President Emmanuel Macron in the aftermath of the Black Lives Matter mass demonstrations occurring in the United Kingdom and in France in June 2020 https://jacobinitalia.it/buttare-giu-le-statue-serve-a-elaborare-la-storia/.

[480] The 2016 Report refers to the systematic intentional destruction of cultural heritage in the context of colonialism and nationalist policies in post-colonial States at its para. 43. "The Special Rapporteur recalls the grievous history of destruction of diverse forms of indigenous cultural heritage in many parts of the world as a systematic part of, inter alia, colonialism or nationalist policies in post-colonial States. She agrees with the determination in the final report of the Truth and Reconciliation Commission of Canada".

of fact, it seems, this also in view of the current status of the UNESCO norm-set for the international protection of the cultural heritage endangered in the absence of armed conflict, and, notably, of the scope of the UNESCO Declaration on the intentional destruction of cultural heritage.

As it has been anticipated in the above paragraphs, the 2016 Report recalls how the 2001 UNESCO Declaration, although establishing an international liability pending on those States and individuals responsible for the intentional destruction of cultural heritage "in a manner which constitutes a violation of international law or an unjustifiable offence to the principles of humanity and dictates of public conscience",[481] does not entail in itself any kind of *concrete obligation*, pending on the international community, towards the general protection of all the elements of the cultural heritage of humankind. In this sense, it seems, it is important to insist on the urgent necessity of strengthening the international community's efforts to establish a more effective global framework for the worldwide protection of endangered cultural heritage, which needs to be protected, without discrimination, in the name of its value for the whole humankind.

III.II. Beyond universalism and cultural relativism. The protection and conservation of cultural heritage as an element of the human right to take part in cultural life and a component of sustainable development

III.II.i. The protection of cultural heritage as a component of the human right to take part in cultural life. Art. 15.1 lett. a) of the International Covenant on Economic, Social and Cultural Rights and the progressively emerging doctrine towards the adoption of a human rights-oriented approach to cultural heritage protection

Among all the considerations carried out in the above paragraphs, it seems relevant, for the scope of the present research, to recall how the 2016 Report expresses serious regrets on the fact that the "the discourses on cultural heritage are *selective*: the parties to discourse exclude the losses of others and the destructive acts engaged in by their own side and fail to recognize the cultural rights of all. […]". As a matter of fact, it seems – also in the light of the considerations concerning the relationship among cultural heritage, anthropology and international law carried out in Chapter II – the Special Rapporteur in the field of cultural rights seems to condemn the adoption from the international community of a rather *universalist-oriented* attitude towards the necessity of conserving the endangered cultural heritage of peoples, such as to focus only on an isolated number of cultural

[481] See 2001 UNESCO Declaration, preamble and arts. VI and VII. "The qualification of intentional destruction may also be applied in cases of wilful neglect of cultural heritage either during armed conflicts or in times of peace, including with the intent of letting others destroy the cultural heritage in question, for example, through looting." 2016 Report, para. 32.

properties, thereby leaving aside the protection of all the others element of worldwide cultural inheritance which, for any reasons, might be excluded from such 'special protection regime'. As for the limits of such selective approach, notably, the misconception and the neglect of the universal value of cultural diversity, as well as the unavoidable disrespect towards the different expressions of cultural heritage which might exist and coexist in the territories of States.

To cope with such universalist-oriented approach, the present analysis notes how the 2016 Report stresses on the idea that cultural heritage should not be conceived as a political instrument, nor, even, a 'cultural weapon'[482]. On the contrary, remarkably, the necessity of avoiding the intentional destruction of cultural heritage represents "[….] *an issue concerning universal human rights*", deserving the strengthening of the international community's efforts to "[…] come together to defend the heritage of all, for all.". [483]

In the light of all the above considerations, it comes clear how such argumentation may consist, for the scope of the present research, in a pivotal element. As a matter of fact, it seems, the 2016 Report may suggest how, among all the argumentations for the necessity of strengthening the international community's effort towards the protection of the cultural heritage possibly endangered, in the territories of States, in the absence of armed conflict, the one representing the most substantial reason consists in the strict interconnection between the conservation of the cultural heritage of humankind and the universal framework for cultural freedoms as human rights.

As a matter of fact, it appears, the 2016 Report insists on the necessity of protecting, in times of war and peace the cultural heritage of peoples, above all, in virtue of its key role in the fundamental freedoms' framework, consisting every element and expression of worldwide cultural traditions a fundamental element of *human dignity* for individuals and communities. In this sense, the document seems to promote a more inclusive, relativist, attitude towards the conservation of worldwide cultural expressions, which need to be enhanced, in virtue of their significance for human dignity, in all their diversity[484]. Unavoidably, such approach may lead to the progressive abandon of the universalist, 'OUV-oriented', approach towards the protection of cultural heritage adopted by the international community – and, notably, by UNESCO – within the last decades, which might be identified, as it comes clear from the present research, as one feasible reason of the progressive deterioration of the cultural heritage of peoples.

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[482] On the politicization of the notion of 'culture' and an insight concerning the universalist approach towards the definition and protection of cultural heritage, see Chapter II.

[483] 2016 Report, para. 13, emphasis added.

[484] In this sense, the 2016 Report remarks how the mandate of the Special Rapporteur in the field of cultural rights has been established "to protect not culture and cultural heritage per se, but rather the conditions allowing all people, *without discrimination*, to access, participate in and contribute to cultural life through a process of continuous development.". 2016 Report, para. 13, emphasis added.

Although representing no more than a programmatic, non-binding document, the 2016 Report represents, for the present analysis, a significative element to be considered in the analysis of the progressive evolution of the international framework for the protection of cultural heritage. In particular, it seems relevant to remark how it is in the strict interconnection subsisting between human rights and cultural heritage, as it is assumed in the document, that the international community may find a way to cope with the current *aporia* concerning the protection of cultural heritage – notably, of 'non-Outstanding Universal Value' in times of peace.

In this sense, it is important to mention how, at its para. 15, the 2016 Report affirms how the necessity of establishing a more effective norm-set to protect the cultural heritage of people possibly endangered, in the absence of war, by intentional destruction is entailed in a series of provisions *binding* for the international community and applicable in the field of human rights protection and, notably, in art. 15 para. 1 lett. a) of the International Covenant on Economic, Social and Cultural Rights ('ICESCR').[485] Recognizing the right of everyone to take part in cultural life as a *universal human right*, the ICESCR imposes on its States Parties the duty to take action, to the maximum of their available resources, to achieve the full realization of such fundamental freedom.[486] In particular, and more relevantly for what it concerns the scope of the present research, art. 15 para. 1 lett. a) of the ICESCR establishes the obligation for its States Parties to respect and protect the cultural heritage *in situ* "in all its forms, in times of war and peace, and natural disasters". According to para. 50 of the Committee on Economic Social and Cultural Rights' General Comment No. 21, precisely, "cultural heritage must be preserved, developed, enriched and transmitted to future generations as a record of human experience and aspirations, in order to encourage creativity in all its diversity and to inspire a genuine dialogue between cultures".[487] In this sense, States Parties have the *duty* to ensure an adequate care,[488] preservation and restoration of historical sites, monuments and works of art, being these elements part of the rather wide conception of the notion of 'culture' entailed in the ICESCR provisions and in the work of CESCR.[489] As for the scope of such obligations pending on States

[485] New York, 16 December 1966, entered into force on 3 January 1976, UNTS, vol. 993, 3.

[486] For an analysis of the scope of art. 15 para. 1 lett a) ICESCR, see among others Laura Pineschi, 'Cultural Diversity as a Human Right? General Comment No. 21 of Committee on Economic, Socia, and Cultural Rights, in Silvia Borelli and Federico Lenzerini (ed. by), *Cultural Heritage, Cultural Rights, Cultural Diversity. New Developments in International Law*, Nijhoff, 2012, and Roger O'Keefe, 'The "Right to Take Part in Cultural Life" under Article 15 of the ICESCR' (1998) 47 *International and Comparative Law Quarterly* 4, pp. 904-923.

[487] Committee on Economic, Social and Cultural Rights ("CESCR"), General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights, UN. Doc. E/C.12/GC/21, 20 November 2009 ("General Comment No. 21").

[488] According to General Comment No. 21, States Parties have to ensure "the full realization of the right of everyone to take part in cultural life on the basis of equality and non-discrimination", and according to the principles of availability, accessibility, acceptability, adaptability, and appropriateness. See General Comment No. 21, para. 16.

[489] "Various definitions of "culture" have been postulated in the past and others may arise in the future. All of them, however, refer to the multifaceted content implicit in the concept of culture"; "In the Committee's view, culture is a broad, inclusive concept encompassing all manifestations of human existence. The expression "cultural life" is an explicit

Parties, the General Comment No. 21 establishes that the duties imposed on States Parties by art. 15 para. 1 lett. a) ICESCR and, notably, the duty of protecting the cultural heritage *in situ*, imply the requirement from States Parties of both abstention and positive actions such as to ensure an effective access to cultural life and heritage. As a matter of fact, States Parties are required, not only, to ensure preconditions for access to and preservation of cultural goods, but also to non-interfere with the free and equal access to cultural goods placed under their jurisdiction, thereby not creating any kind of obstacle to the full realization of such human right – and consequentially avoiding, as it comes clear, the deterioration or destruction of such cultural heritage.[490] In this sense, according to para. 54 of General Comment No. 21, States Parties are required to set up legislative mechanisms, policies and programmes aimed at preserving and restoring the cultural heritage *in situ*, in the name of its core significance for the enhancement of the right to take part in cultural life.[491]

Establishing the duty of protecting the cultural heritage of peoples as a core element in the realization of the human right to take part in cultural life, art. 15 para. 1 lett. a) ICESCR does not represent, within the international framework for the protection of human rights, an isolated norm.

On the contrary, a 'complementary' obligation of protecting the cultural heritage of peoples as an element of their human right to cultural diversity is entailed in art. 27 of the International Covenant on Civil and Political Rights, which establishes the right of peoples to freely enjoy their own culture together with their communities, thereby avoiding any discrimination.[492] In the same way, the importance of preserving the cultural heritage of peoples as a fundamental component of human dignity and freedom is enshrined in art. 27 of the Universal Declaration on Human Rights which, adopted by the United Nations in 1948, can be considered as the milestone of the current international framework for the protection of human rights and fundamental freedoms of every people of the world.[493]

In the light of the above, such nexus subsisting between the necessity of conserving and safeguarding the cultural heritage of peoples and the general obligation pending on the international community towards the protection and enhancement of universal human rights and freedoms has been highlighted, through the decades, by a relevant part of the doctrine, as well as by relevant case law of both international and European courts.[494]

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reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future." General Comment No. 21, paras. 10 and 11.

[490] See General Comment No. 21, para. 6.

[491] See General Comment No. 21, para. 54.

[492] New York, 16 December 1966, entered into force 23 March 1976, UNTS vol. 999, 171. See also UN Human Rights Committee ('HRC'), CCPR General Comment No. 23: Article 27 (Rights of Minorities), 8 April 1994, CCPR/C/21/Rev.1/Add.5].

[493] For a critical analysis of the scope of the UDHR and the circumstances of its adoption, see *supra* Chapter II.

[494] Before proceeding with the analysis of the progressively evolving doctrine and jurisprudence dedicated to the enhancement and protection of cultural heritage in a human right-oriented perspective, it may be relevant to mention that

Since the emergence of cultural rights as a 'human rights of second generation' in the second half of 1990s,[495] indeed, several authors have repeatedly taken the opportunity to underline how, within the international framework for the protection of the cultural heritage of people, particular attention should be given to the establishment of effective norms and obligations ensuring an adequate protection to cultural goods in the name, over than of their value *per se*, of their significance within the international human rights framework, representing the destruction of cultural heritage an outrageous violation which needs to be addresses through the norm-set for the worldwide protection of fundamental freedoms.[496]

Acknowledged also by UNESCO notably, in the aftermath of the facts of Bamiyan, in the context of which the preamble of the 2001 UNESCO Declaration stresses on the "adverse consequences (for) human dignity and human rights" possibly entailed in the intentional destruction of cultural heritage,[497] the necessity of protecting cultural property in the name of its significance for human dignity has been highlighted with reference to several aspects of the human rights framework. In detail, depending on the circumstances, the international community has enhanced the importance of protecting worldwide cultural heritage in the name of its core role in the enhancement of the right to freedom from discrimination, the right to freedom of thought, conscience and religion, and the right

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such strict interconnection between cultural property and fundamental freedoms has been highlighted by the Special Rapporteur in the field of cultural rights also in its Report on Memorialization processes (UN. Doc. A/HRC/25/49, 23 January 2014). In this context, the necessity of preserving the cultural heritage of States Parties – and, notably, those monuments and sites symbols of an historic past – is recalled by the Report in particular in reason of the pivotal role played by cultural heritage in transitional justice processes, as well as in virtue of its importance for present and future individuals and communities pursuant to art. 15 para. 1 lett. a) ICESCR.

[495] For an insight on the historical evolution of human rights and, notably, on the repartition in human rights in human rights of first, second and third generation, see the Report of the Council of Europe "The evolution of human rights" available at https://www.coe.int/en/web/compass/the-evolution-of-human-rights#:~:text=The%20idea%20at%20the%20basis,or%20to%20a%20healthy%20environment. Last access 3 April 2023.

[496] On the relationship between cultural heritage and human rights see, among others, Yvonne Donders, 'Do Cultural Diversity and Human Rights Make a Good Match?' (2010) 61 International Social Science Journal 15; Federico Lenzerini, *The Culturalization of Human Rights Law*, Oxford University Press, 2014 – p. 116 ff; Rodolfo Stavenhagen, 'Cultural Rights and Human Rights: A Social Science Perspective', in Pedro Pitarch, Shannon Speed and Xochitl Leyva-Solano (ed. by), *Human Rights in the Maya Region: Global Politics, Cultural Contentions, and Moral Engagements*, Duke University Press, 2008, pp. 27-50; Janet Blake, Chapter VIII 'Cultural Heritage and Human Rights' in Janet Blake, *International Cultural Heritage Law*, Oxford University Press, 2015; Xiaorong Li, *Ethics, Human Rights and Culture: Beyond Relativism and Universalism*, Macmillan, 2005; Ana Filipa Vrdoljak, 'Human Rights and Culture in International Law', in Federico Lenzerini and Ana Filipa Vrdoljak (ed. by), *International Law for Common Goods: Normative Perspectives on Human Rights*, Culture and Nature, 2014; Francesco Francioni, 'Culture, Heritage and Human Rights: An Introduction', in Francesco Francioni and Martin Scheinin (ed. by), Brill Nijhoff, 2008; Ana Filipa Vrdoljak, 'Human Rights and Culture in International Law', in Federico Lenzerini and Ana Filipa Vrdoljak (ed. by), *International Law for Common Goods: Normative Perspectives on Human Rights*, Culture and Nature, 2014; Yvonne Donders, 'Foundations of Collective Cultural Rights in International Human Rights Law', in Andrzej Jakubowski (ed. by) *Cultural rights as collective rights: An International Law perspective*, Brill Nijhoff 2016 (per p. 1); Mohammed Zakaria Abouddahab, 'Protection du patrimoine culturel et droits de l'homme' in James A. Nazfiger and Tullio Scovazzi (ed. by), *The cultural heritage of mankind*, Nijhoff, 2008; Lorenza Violini, '*Cultura e culture: gli scenari, le prospettive'*; Xiaorong Li, *Ethics, Human Rights and Culture: Beyond Relativism and Universalism*, Macmillan, 2005; Ana Filipa Vrdoljak (ed. by), *The cultural dimension of human rights*, Oxford, 2014.

[497] See 2001 UNESCO Declaration, preamble.

to freedom of artistic expression and creativity and the right to take part in cultural life – this latter, notably, also including the right to maintain and develop the cultural practices of one's choice, and to access cultural heritage including one's own history.[498]

Likewise, the same importance of protecting the cultural heritage of peoples possibly endangered, both in war and in peace time, has been highlighted, on several occasions, by international and regional courts dealing with the prosecution of international crimes and the protection of universal fundamental freedoms.

In particular, the importance of preserving cultural heritage in the name of its significance for human dignity and identity is at the core of the opinion released by the Judge Cançado Trindade in 2011, in relation to the International Court of Justice case concerning the Temple of Preah Vihear. In this context, importance given to the fact that "the ultimate *titulaires* of the right to the safeguard and preservation of their cultural and spiritual heritage are the collectivities of human beings concerned, or else humankind as a whole", and for this reason the authorities of the concerned States need to ensure an adequate protection to such cultural property.[499]

In the same way, such necessity of ensuring an adequate protection to cultural diversity as essential component of human dignity has been reiterated by the International Court of Justice in recent times, and, notably, in occasion of the case concerning the application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia).[500] In these circumstances, the importance of preserving existing different cultural expressions is considered in relationship with the ensuring of the right to freedom from discrimination, in the light of the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination as well as of the international protection for the enhancement of human rights.[501]

From the perspective of international criminal law, the destruction of cultural heritage as a human rights violation giving rise to international criminal responsibility has been highlighted, in 2011, by the Pre Trial-Chamber of the Extraordinary Chambers in the Courts of Cambodia, in its Decision on Ieng Sary's Appeal against the Closing Order.[502]

Furthermore, in more recent times, the existence of a general interest towards the protection and safeguard of the cultural heritage of humanity, and, consequentially, the international criminal

[498] See *infra.*

[499] See the Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Separate Opinion of Judge Cançado Trindade, I.C.J. Reports 2013, p. 606, para. 114.

[500] International Court of Justice, Armenia v. Azerbajan. For an insight on the case, see the material available at https://www.icj-cij.org/case/181. Last access 3 April 2023.

[501] UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

[502] Extraordinary Chambers in the Courts of Cambodia, Pre Trial-Chamber, Decision on Ieng Sary's Appeal against the Closing Order, 11 April 2011, Case No. 002/19-09-2007-ECCC/OCIJ (PTC75).

responsibility of those individuals and States provoking the destruction or deterioration of cultural heritage expressions has been raised, remarkably, by the International Criminal Court ('ICC').[503]

Acknowledged since the 1990s by international tribunals *only* with reference to the event of armed conflict,[504] the principle according to which the intentional destruction of the cultural heritage of peoples may consist, *both in peacetime and warfare*, in a violation of human rights has been openly recognized, in recent times, by the ICC Office of the Prosecutor. As it has been anticipated in Chapter I, it is the case of the Prosecutor v. Ahmad Al Faqi Al Mahdi case, in the context of which, according to art. 8 of the Rome Statute, Al Mahdi has been judged responsible for the destruction of some mausoleums and cultural items situated in the territories of Mali.[505]

Condemning Al Mahdi to nine years of imprisonment with its judgment of 26 September 2016,[506] the Former Prosecutor of the ICC Fatou Bensouda refers to the attacks directed by Al Mahdi against the concerned cultural heritage as a clear affront to the cultural identity and values of the concerned community, thereby classifying them as war crimes pursuant to art. 8 para. 2 lett e) n. vii) of the Rome Statute. As it is stated in para. 15 of the judgment, remarkably, this with no prejudice as to whether those attacks have been carried out in the conduct of hostilities or not, being the protection of such endangered heritage equally important in the hypothesis in which these objects have fallen, in the absence of warfare, under the control of an armed group.[507]

As a matter of fact, recalls the Former Prosecutor, the relevance of the monuments and mausoleums addressed by Al Mahdi's attacks amounts to their religious and historic significance for the communities living in Timbuktu, representing a core element of their cultural life and a meaningful symbol of community attachment full of emotional value for both present and future generations.[508]

Likewise, the same importance of taking accountable, combating their impunity, those responsible for the intentional destruction of cultural heritage, both in peace time and in war, has been reiterated by the ICC in the Al Mahdi case's Reparations Orders.[509] Acknowledging the importance of condemning the destruction of cultural heritage of peoples, in reason of its significance in the enhancement of the human rights to cultural life and its physical embodiments, the Reparations Order

[503] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6.

[504] On the jurisprudence of international tribunals in the field of cultural heritage protection in the event of armed conflict – and in particular on the ICTY case law –, Chapter I.

[505] International Criminal Court, Prosecutor v. Ahmad Al Faqi Al Mahdi, Public Court Records: Pre-Trial Chamber I. See https://www.icc-cpi.int/mali/al-mahdi for all related documents. Last access 4 April 2023. See also *supra*, Chapter I.

[506] On 25 November 2021, the imprisonment sentence was reduced of two years. See *supra* note 93.

[507] International Criminal Court, Prosecutor v. Ahmad Al Faqi Al Mahdi, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15, para. 15.

[508] International Criminal Court, Prosecutor v. Ahmad Al Faqi Al Mahdi, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15, paras. 46, 79 and 80.

[509] International Criminal Court, Prosecutor v. Ahmad Al Faqi Al Mahdi, Reparations Order, 17 August 2017, ICC-01/12-01/15.

recalls the central role played by cultural heritage in the way communities define themselves and bond together, as well as in how they identify with their past and contemplate their future. Indeed, such principle seems in line with the core value of UNESCO, which has recognized, in several occasion, that "the loss of heritage during times of conflict can deprive a community of its identity and memory, as well as the physical testimony of its past. Those destroying cultural heritage seek to disrupt the social fabric of societies".[510]

An aspect appearing as particularly relevant, for the present research, of the Reparations Order provisions, consists in the focus put by the ICC on the tangible dimension of the cultural heritage of peoples, considered in reason of its capability of enabling cultural identification and development processes of individual and groups – notably, *from an anthropological perspective*. As a matter of fact, in this context the notion of cultural heritage is conceived as encompassing all those sites, structures and remains of archaeological, historical, religious, cultural or aesthetic value considered by peoples as core elements of their community, to be transmitted to future generations. Importantly, this in virtue of their intrinsic importance for the concerned societies, and *regardless of* their location and origin.[511] Such rather *relativist-oriented* approach to the international protection of worldwide cultural heritage can be found out, also in the light of the considerations carried out in Chapter II, in the several paragraphs of the Reparations Order. Repeatedly, the decision recalls the importance of ensuring the international community an adequate compensation for such massive loss of worldwide cultural heritage elements, in reason of their importance not only in themselves, but also in relation to its *human dimension*. In this sense, poor reference is done to the fact that some of those mausoleums attacked by Al Mahdi in Timbuktu were inscribed, at the moment of the threat, in the 1972 UNESCO World Heritage List. As a matter of fact, the list is acknowledged by the ICC as an inventory of the cultural heritage of greater significance, considered as such by UNESCO in reason of their historical or artistic features and covered, therefore, by a sort of 'special', additional, protection which, it seems, in no way should be considered mutually exclusive with the general protection to be conferred to *all* the elements of the worldwide inheritance in the name of their identarian value.[512]

[510] "The international community has recognised in various legal instruments the importance of the human right to cultural life and its physical embodiments. These instruments condemn the destruction of cultural heritage, *including* in situations of conflict." International Criminal Court, Prosecutor v. Ahmad Al Faqi Al Mahdi, Reparations Order, 17 August 2017, ICC-01/12-01/15, para. 14, emphasis added.

[511] International Criminal Court, Prosecutor v. Ahmad Al Faqi Al Mahdi, Reparations Order, 17 August 2017, ICC-01/12-01/15, para. 15.

[512] International Criminal Court, Prosecutor v. Ahmad Al Faqi Al Mahdi, Reparations Order, 17 August 2017, ICC-01/12-01/15, paras. 16, 17, 22.

In the same way, the importance of protecting the cultural heritage of peoples in the name of its significance in the enhancement of human rights and fundamental freedoms has been progressively recognized, within the last decades, by the European Court of Human Rights ('ECtHR').[513]

Not officially recognized by the European Convention of Human Rights ('ECHR') nor by its Official Protocols,[514] the right to culture – and, in particular, the right to take part in cultural life as it is established by art. 15 para. 1 lett. a) ICESCR – has been gradually acknowledged, in an increasingly number of cases, by the jurisprudence of the ECtHR. As explained by the Council of Europe in its Research Division 2011 Report dedicated to the enhancement of cultural rights in the case-law of the court,[515] the jurisprudence of the ECtHR provides several examples of cases in which cultural fundamental freedoms have been recognized as to be protected under the scope of the ECHR, notably, with regard to their strict relation to other core civil rights explicitly recognized by the treaty. In accordance with the principle established by General Comment No. 21 para. 1, according to which cultural rights, like the other fundamental freedoms, are, universal, indivisible, and interdependent from other human rights,[516] the Council of Europe recalls how the ECtHR case-law provides examples of how some rights falling under the notion of 'cultural rights' in a broad sense can be protected under core civil rights, such as the right to respect for private and family life (art. 8 of the ECHR), the right to freedom of expression (art. 10 ECHR) and the right to education (art. 2 of Protocol No. 1).[517] In the same way, the existence of a 'general interest' towards the protection and conservation of the cultural heritage situated in the territories of States Parties has been recognized by the ECtHR, in several occasions, in the context of the application of art. 1 Protocol No. 1 of the treaty, which refers to the protection of property in the jurisdiction of the ECHR.[518] Since the case Beyeler v. Italy (2000), the court has referred to the existence of an "*intérêt général de la communauté*", applicable in the territories of States Parties, towards an adequate and sustainable

[513] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), Rome, 4 November 1950.

[514] ECHR, *Travaux Préparatoires to the Convention*, Cour (77)9, vol. I, pp. 44-46, o Rep 1949, II, p. 408. See in particular Pierre-Henri Teitgen intervention in the consultive meeting. On this point, see Andrzej Jakubowski, "Cultural Heritage and the Collective Dimension of Cultural Rights in the Jurisprudence of the European Court of Human Rights", in Andrzej Jakubowski (ed. by), *Cultural Rights as Collective Rights, An International Law Perspective*, Brill Nijhoff 2016.

[515] Council of Europe, Research Division, "Cultural rights in the case-law of the European Court of Human Rights", available at https://www.culturalpolicies.net/wp-content/uploads/2019/10/ECHR_Research_report_cultural_rights_ENG.pdf. Last access 5 April 2023.

[516] See *supra*.

[517] On the recognition and enhancement of cultural rights in the jurisprudence of the ECtHR, see Federico Lenzerini, "Human Rights: Historical Development and Contemporary Regional Models", in Federico Lenzerini, *The Culturalization of Human Rights Law*, Oxford University Press, 2014; Andrzej Jakubowski, "Introduction", in Andrzej Jakubowski (ed. by), *Cultural Rights as Collective Rights – An International Law Perspective*, Brill Nijhoff, 2016.

[518] "Conservation of the cultural heritage [has as its] aim, in addition to the maintenance of a certain quality of life, the preservation of the historical, cultural and artistic roots of a region and its inhabitants. As such, they are an essential value, the protection and promotion of which are incumbent on the public authorities" ECtHR Guide on Article 1 of Protocol No. I of the European Convention on Human Rights, updated on 31 August 2022, para. 132. The document iss available at https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf. Last access 5 April 2023.

conservation and promotion of the cultural heritage *in situ*, which needs to be *equally* and *freely* accessible, also in the light of art. 15 para. 1 lett.a) ICESCR provisions, to *all* the components of the concerned community – irrespective of the existence of eventual property rights applicable to such property.[519]

In particular, the importance of ensuring an adequate access to cultural life, notably by protecting the cultural heritage of peoples in reason of its intrinsic importance for human rights and human dignity[520], has been highlighted by the ECtHR in two cases which appear as particularly relevant for the present research. As a matter of fact, in both these two cases the necessity of protecting, respectively, intangible and tangible cultural heritage situated in the territories of States Parties has been raised by the applicants as a component of their human identity, therefore being consequentially taken into central consideration by the ECtHR judges. The first example is embodied by the well-known case Chapman v. United Kingdom (2001), in the context of which the ECtHR, recognizing the importance of protecting the special needs of cultural minorities and populations, establishes that the necessity of protecting the cultural heritage, life and traditions of those gypsy families situated in the United Kingdom falls under the scope of art. 8 ECHR, which guarantees the right to respect for private and family life as a fundamental and universal freedom.[521]

As for the second example, it seems important to mention the recent case Ahunbay and Others v. Turkey, together with its final decision issued by the ECtHR on 29 January 2019.[522] Concerning the necessity of safeguarding and preserving the cultural site of Hasankeyf (Anatolia, Turkey) from the deterioration and destruction provoked by the public works approved by the Turkish authorities for the construction of the *Ilisu* Dam, the case consists in the first occasion in which the issue of the protection of the cultural heritage of peoples – conceived, as in art. 15 para. 1 lett. a) of the ICESCR, in their individual, 'minoritarian' and 'majoritarian' dimension – as an element of the human rights framework under the scope of the ECHR. As a matter of fact, applicants allege the risk of a violation of their human right to have access to culture entailed in the progressive deterioration of the Hasankeyf site provoked by the construction of the *Ilisu* Dam, notably pursuant to arts. 8, 10 and 2

[519] ECtHR, Beyeler v. Italy (Application No. 33202/96), 2000; ECtHR, Debelianovi v. Bulgaria (Application No. 61951/00), 2007, ECtHR, Kozacioglu v. Turkey (Application No. 2334/03), 2009, ECtHR, Potomska e Potomski v. Poland (Application No. 33949/05), and ECtHR, Ruspoli and Morenes c. Spain (Application No. 28979/07), 2011.

[520] On the notion of "human dignity", see Pasquale De Sena, 2017, "Dignità umana in senso oggettivo e diritto internazionale", 3 *Diritti Umani e Diritto Internazionale* 1.

[521] ECtHR, Chapman v. United Kingdom, 2001 (Application No. 27238/95), para. 78. See also ECtHR, Yordanova and Others v. Bulgaria (Application No. 25446/06), 2012; ECtHR, Winterstein and Others v. France (Application No. 27013/07), 2013; and ECtHR Sejdić e Finci v. Bosnia Herzegovina, (Application No. 27996/06 and 34836/06), 2009. On this point, see Paolo Fois, 2014 "La tutela internazionale dell'identità culturale: diritti collettivi od obblighi degli Stati?", 1 Ordine internazionale e diritti umani 685.

[522] ECtHR, Ahunbay and Others v. Turkey (Application No. 6080/06), 21 February 2019.

Protocol No. 1.[523] Even if declaring itself not entitled, *ratione materiae*, to rule on the present case, the ECtHR appears as taking the occasion, in the present context, to move a significant step ahead in the progressive recognition of cultural rights and freedoms – and, notably, of the right to have access to cultural heritage – within the ECHR jurisdiction, as it has been enhanced by the Council of Europe in its 2011 Report. Although recognizing the absence, at the current state, of an established consensus shared among States Parties towards the existence of a universal right to have access to cultural heritage as a fundamental freedom, in fact, the judges refer in the present circumstances to a progressive "*prise de coscience*" towards the affirmation, within the ECHR jurisdiction, of a *human right to culture*. In particular, the ECtHR refers to the necessity of interpreting the ECHR in the light of the international and European framework established within the decades towards the protection and conservation of cultural heritage as a common source and an element of human dignity, and, in particular, of the number of treaties set up in the context of the Council of Europe for the protection and promotion of its common heritage as a core element of individual and collective identities.[524] Remarkably, such importance of a 'contextualized' interpretation of the Ahunbay and Others v. Turkey case is enhanced by the judges in the light of the VCLT provisions referring to the interpretation of treaties, and, notably, of art. 31 para. 3 lett. c). In this sense, the ECtHR stresses on the effort towards the progressive recognition of the existence of a general obligation pending on the international community – and, notably, on the States Parties of the Council of Europe – towards the preservation and conservation of *all* the elements of their cultural heritage as their intrinsic link with the human rights framework as a "*sujet en évolution*". In particular, the court refers to the progressive formation of a "*communauté de vue international et européenne*" towards the recognition of the human right to have access to cultural heritage, which needs to be considered, in a relativist-oriented perspective, notably in virtue of its anthropological, social and historical value for the concerned communities, essential in the enhancement of free and democratic societies.[525]

[523] On this latter point, see European Court of Human Rights, Guide on art. 2 Protocol I to the European Convention on Human Rights, "The Right to Education". Available at https://www.echr.coe.int/documents/guide_art_2_protocol_1_eng.pdf. Last access 5 April 2023.

[524] See Council of Europe, Faro Convention, 27 October 2005, preamble. See also Council of Europe, Valletta Convention for the Protection of the Archaeological Heritage of Europe (revised), 16 January 1992, Council of Europe, Granada Convention for the Protection of Architectural Heritage in Europe, 3 October 1985, and Council of Europe, Delphi Convention on the Offences Relating to Cultural Property, 3 May 2017. See also Council of Europe, the European Charter of the Architectural Heritage, 25 October 1975, and Council of Europe, European Cultural Convention, 19 December 1954. These treaties are available on the official site of the Council of Europe, https://www.coe.int/en/web/culture-and-heritage/standards. Last access 5 April 2023. See also the Council of Europe recommendations for the safeguard of architectural and architectonic cultural heritage, Council of Europe Committee of Ministers, Recommendation No. R (89)5 Concerning the Protection and Enhancement of the Archaeological Heritage in the Context of Town and Country Planning Operations, 13 April 1989 (No. (89)5); Council of Europe Parliamentary Assembly, Recommendation 880(1979): Conservation of the European Architectural Heritage, 8 October 1979 (No. 880)).

[525] On this point, see also UNESCO, Recommendation on Participation by the People at Large in Cultural Life and their Contribution to it, Doc. 19 C/Resolutions, 1976, "*access to culture and participation in cultural life are two complementary aspects of the same thing*". In addition, see Bahar Aykan, "Saving Hasankeyf: Limits and Possibilities of

III.II.ii. Enhancing a relativist-oriented approach to the safeguard and conservation of cultural heritage as a component of the human right to culture: towards the affirmation of an 'emerging principle' concerning the duty of protecting all the cultural heritage of peoples?

It is in the light of all the above considerations that, for the scope of the present research, it seems relevant to dedicate part of the study to the analysis of what has been defined by some scholars as 'the progressive emergence' of a general obligation, binding the international community, towards the protection of *all* the elements of the cultural heritage of peoples, both in peacetime and in war, irrespectively of their eventual OUV and in reason of its significance in the enhancement of cultural rights.

Related to the studies of the evolving international legal framework for the worldwide protection of cultural heritage and rights, the opportunity of focusing on the possible progressive emergence, at the global level, of an international norm establishing a general duty of protection of the cultural heritage of peoples has been suggested, notably, in the aftermath of the above-mentioned facts of Bamiyan.

Representing one of the most notorious episodes of intentional destruction of the cultural heritage of peoples carried out at the international level, the episode of the Buddhas of Bamiyan distinguishes itself, as it has been illustrated in the previous paragraphs, for the massive reaction that it has provoked at the global scope. [526] Indeed, it has been exposed in the above lines how these attacks have provoked, within the international community – and, namely, States, international organizations and cultural institutions –, a collective, vigorous reaction of deep condemnation of those heinous acts and a call for a stop and non-repetition of such "flagrant violation[s] of international law". [527]

Starting from such premise, several authors – and, notably, Francesco Francioni and Federico Lenzerini– [528] have suggested how, in the light of the acknowledged relevance of the practice of the

International Human Rights Law" (2018) 25 *International Journal of Cultural Property* 11; Berenika Drazewska, "Hasankeyf, the Ilisu Dam, and the Existence of "Common European Standards" on Cultural Heritage Protection*"* (2018) 2 *Santander Art and Culture Law Review* 89; Lorenzo Acconciamessa, "Public-Interest Litigation before the ECtHR: Towards a Human Rights Approach to the "Universal" Protection of Cultural Heritage?" (2022), *Ordine internazionale e diritti umani, 189.*

[526] See *supra*, Chapter III paras. III.I.i and III.I.ii.

[527] See among others the declarations of the delegate of Ukraine in the context of the UN General Assembly 94th Plenary Meeting, 55th (UN GAOR, 55th Sess. 94th meeting, UN Doc. A755/PV.94, 2001). See Maria C. Ciciriello*, 'L'ICCROM, l'ICOMOS e l'IUCN e la salvaguardia del patrimonio mondiale culturale e naturale', in La protezione del patrimonio mondiale*; Gilbert H. Gornig, '*Der internationale Kulturgüterschutz', in* Gilbert H. Gornig, Hans-Detlef Horns & Dietrich Murswiek (ed. by), *Kulturgüterschutz – internationale und nationale Aspekte* pp. 17, 45, 46.

[528] See Francesco Francioni and Federico Lenzerini, 'The Destruction of the Buddhas of Bamiyan and International Law' (2003), 14 *European Journal of International Law* 619. On the role of the practice of States in the international protection of cultural heritage, see Luigi Crema, 'Is the intention of the parties at the heart of interpretation? Some news about subsequent practice from The Hague' (2014), *SIDIBlog*; see also Manlio Frigo, *La protezione dei beni culturali nel diritto*

international community's actors at the global level, it would be possible, in a *de iure condendo* perspective, to encourage the progressive formation of a general norm, applicable, as in the case of Bamiyan, both in peacetime and in war, such as prohibiting States and other global actors the destruction of the cultural heritage *in situ*.

In particular, two elements are raised by the two authors as supporting their doctrinal suggestion. Firstly, they refer to the recognized significance, in the context of the studies dedicated to the evolution of the international legal framework – with regard, in the present context, notably to the field of cultural heritage and rights – of the behaviors, practices and expectancies of the international community's global actors which consists, as it has been accepted by the doctrine, in a relevant element in the process of establishing the existence of international norms and obligations.[529] In this sense, it is unavoidable to remark how the international community's collective reaction to the facts of Bamiyan might represent an expression of such doctrinal principle. As it has been suggested, in fact, the unanimous condemnation of the destruction of the statues as deplorable attacks to humankind might suggest the existence of a *general expectation*, shared at the global level, towards the preservation of the cultural heritage *in situ* placed under the jurisdiction of States, which might be recognized, also in the light of the United Nations framework for the protection of culture, as the first responsible for the enhancement and protection of cultural heritage as an element of human rights. In the same way, such attitude towards the preservation of worldwide cultural heritage may be identifiable, at the global level, when considering States' common practices and legal systems evolved at the domestic level. In this sense, a significant element supporting the gradual, yet continuous, emergence of a shared conscience spreading among States towards the existence of a general prohibition of destroying, damaging, and deteriorating the cultural heritage placed *in situ* may be found out in the context of the comparative analysis of States' domestic legal systems applicable in the fields of cultural heritage protection and cultural rights enhancement. Apart from rather isolated, exceptional permissions towards the removal and demolition of determined monuments and sites, to be carried out *only* in certain rare, pre-determined conditions,[530] in fact, the great majority of States part of the international community appear – in particular, the reference is to the analysis of the practice of more than 400 States carried out by Lyndell Prott and Patrick J. O' Keefe – as opting, within their legal systems, for the adoption of norms and rules such as to protect the cultural heritage

internazionale (Giuffrè, 1986); Joseph L. Sax, *Playing darts with a Rembrandt: Public and Private Rights in Cultural Treasures* (University of Michigan Press, 1999).

[529] See Robert L. Meyer, '*Travaux Préparatoires for the UNESCO World Heritage Convention' (1976)*, 2 *Earth Law Journal* 45–81; Manlio Frigo, *La protezione dei beni culturali nel diritto internazionale*, 1986, pp. 281–310; UNESCO World Heritage Centre, World Heritage: Challenges for the Millenium 26–28 (2007), available at: http://whc.unesco.org/documents/publi_millennium_en.pdf. Last access 6 April 2023.

[530] See *supra*. See also New Zealand, Historic Places Act 1980; Sud Africa, National Monuments Act 1969, Ireland, National Monuments Act 1930.

placed under their jurisdiction. As for the reason of such evidence, the two authors mention not only the importance of such property as a collective, sustainable, resource for the development of the concerned society, but also its significance, from both an anthropological and a legal-oriented perspective, for the enhancement of the human right to participate in cultural life as it has been outlined by art. 15 para. 1 lett. a) ICESCR.[531]

As for the second element, Francioni and Lenzerini suggest how it might be possible to identify, at the global level, an emerging *opinio juris* shared among the international community towards the existence of a general obligation to protect the cultural heritage situated in the territories of States and, conversely, to refrain from its destruction.

In particular, the two authors find how, since the adoption the 1935 Roerich Pact, which establishes the shared principle according to which museums, monuments and cultural institutions require international protection as part of the "common heritage of all peoples",[532] it may be possible to individuate the existence of a general belief, shared both by States and international organizations, concerning the prohibition of destroying worldwide cultural property. As for the scope of application of such prohibition, Francioni and Lenzerini suggest that it may apply, at the current status of international law, both in situations of warfare and peacetime. About the evidence concerning this latter point there may be, notably, the highest rate of ratification obtained by the UNESCO 1972 World Heritage Convention, which establishes the necessity of strengthening the international community's commitment towards the preservation of the cultural heritage of States. As a matter of fact, the two authors recall how, in the preamble of the treaty, UNESCO stresses on the importance of "the existing international conventions, recommendations and resolutions concerning cultural and natural property", in the sense that it "demonstrate the importance, for all the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong […]" notably by renewing and reinforcing the international community effort towards its conservation. Reiterated also by the UNESCO 1972 Recommendation concerning the Protection, at National Level, of The Cultural and Natural Heritage, which establishes in its preamble how "every country in whose territory there are components of the cultural […] heritage has an obligation to safeguard this part of mankind's heritage and to ensure that it is handed down to future generations",[533] such provision – although not binding – may recall the existence a general principle applicable, in peacetime, to *all* the

[531] For an analysis of States' practices in the field of cultural heritage protection, see Lyndell Prott and Patrick J. O' Keefe, *Law and the Cultural Heritage* (Abingdon Oxon, 1984). See also Céline Romainville, 2014 'Le droit de participer à la vie culturelle en droit constitutionnel comparé', 29 *Annuaire International de Justice Constitutionnelle* 567.
[532] See *supra*, Chapter I.
[533] UNESCO, Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage, Paris, 16 November 1972, available at https://en.unesco.org/about-us/legal-affairs/recommendation-concerning-protection-national-level-cultural-and-natural. Last access 6 April 2023.

elements of the cultural heritage possibly endangered *in situ*. As a matter of fact, the two authors recall how, anticipated by the WHC since the preamble, the principle according to which the general obligation concerning the international protection of cultural heritage in its entirety – and irrespectively of its OUV – seems to be enshrined within the formulation of art. 12 of the treaty.

Establishing that "[t]he fact that a property belonging to the cultural or natural heritage has not been included in either of the [World Heritage List or the list of World Heritage in Danger] *shall in no way* be construed to mean that it does not have an outstanding universal value *for purposes other than those* resulting from inclusion in these lists",[534] art. 12 might therefore enlarge the scope of the obligation pending on States Parties pursuant to art. 4 of the treaty, thereby requiring from the international community a *general attitude* towards the preservation of the whole cultural heritage of humankind – this without prejudice to the eventual 'special' regime possibly applicable to those cultural goods considered, for any reason, as of OUV.[535]

In view of all the above considerations, the two authors suggest how, in the light of such gradual emergence, at the international scope, of the above-mentioned practice, and *opinio juris*,[536] would possibly entail the progressive, desirable, establishment of a *customary norm* setting up the duty of protecting cultural heritage as it constitutes "part of the general interest of the international community as a whole". In the view of the authors, such principle may have its theoretical foundation in the concept of *erga omnes* obligations formulated by the International Court of Justice ('ICJ') in one of its leading cases *Barcelona Traction*, in which the ICJ distinguishes between bilateral norms creating obligations of reciprocal character, binding upon individual States *inter se*, and norms that create international obligations *erga omnes*, or obligations owed to all States, in the public interest.[537]

In this sense, Francioni and Lenzerini suggest how the prohibition of acts of willful and systematic destruction of the cultural heritage of peoples may also fall, as in the case of those norms concerning the prohibition of force, the protection of basic human rights, or the protection of the general environment against massive degradation in the category of *erga omnes* obligations, in view of its significance for humanity recognized *inter alia* by the World Heritage Convention, and, notably, by the above illustrated 'contextual' interpretation of its art. 12.[538]

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[534] World Heritage Convention, art. 12, emphasis added.

[535] See Francesco Francioni and Federico Lenzerini, 'The Destruction of the Buddhas of Bamiyan and International Law' (2003), 14 *European Journal of International Law* 619, p. 631, and Federico Lenzerini, 'Article 12. Protection of properties not inscribed in the World Heritage List', in Francesco Francioni and Federico Lenzerini (ed. by), *The World Heritage Convention: A Commentary* (Oxford, 2008).

[536] For a general insight on customary norms, see among others Carlo Focarelli, *Diritto internazionale* (CEDAM 2021); Benedetto Conforti and Massimo Iovane, *Diritto internazionale, XII edition* (Editoriale scientifica, 2021) and Enzo Cannizzaro, *Diritto internazionale* (Giappichelli 2022).

[537] International Court of Justice, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain),* 5 February 1970.

[538] "This analysis leads us to conclude that the willful and discriminatory destruction of the great Buddhas of Bamiyan perpetrated by the Taliban in March 2001 constitutes a breach of customary international law forbidding the wanton

Supported by part of the doctrine, such theory appears as not having reached overall international consensus.

On the contrary, several authors have suggested how, even in the light of the above-explained circumstances, it may be difficult, at the current status of the international legal framework for the conservation of cultural heritage, to affirm the existence of a general obligation towards the protection of all the cultural inheritance of peoples, encompassing all the elements of worldwide cultural property and pending on States and organizations irrespective of their eventual ratification of the global norm set for cultural heritage protection. In particular, several authors – and, among others, Roger O' Keefe – have remarked how, by way of aside, it seems difficult to conceive the framework of the World Heritage Convention as entailing the existence, and the progressive formation, of a customary norm concerning the worldwide protection of cultural heritage, in view notably of its preamble and its art. 12. According to this view, indeed, the high number of ratifications of the World Heritage Convention may not imply the possibility of finding out, in peace time, the existence of such general obligation towards the protection of all the elements of worldwide cultural heritage – nor it does the 'non-mutually exclusive' attitude of art. 12 formulation. As for the reasons of such a reluctance, the fact that, apart from those above-mentioned norms concerning the importance of preserving those goods of Outstanding Universal Value, as well as the criminalization of certain offences against cultural property such as in the case of UNESCO 1970 Convention, the international framework progressively set up by States and international organizations for the worldwide conservation and enhancement of cultural heritage in peace appears as being composed, for its vast majority, from declarations and *non-binding* documents which, even if unavoidably consisting in the expression of the international community's common concern towards the protection of worldwide inheritance, cannot be considered by themselves an enough solid basis for the recognition of an international customary norm.[539]

Considering the above exposed debate in the light of the scope of the present research, it might be the case, it seems, to make some considerations. As a matter of fact, this because, being the focus of the analysis the identification and study of the worldwide norm-set for cultural heritage conservation, the hypothesis of identifying an emerging international norm, such as the one described in the above

destruction of cultural heritage. […] The Taliban themselves are responsible for this breach, which, in the light of recent precedents cited above, may amount to an international crime." See Francesco Francioni and Federico Lenzerini, 'The Destruction of the Buddhas of Bamiyan and International Law' (2003), 14 *European Journal of International Law* 619, p. 638. See also Francesco Francioni, 'La protezione internazionale dei beni culturali: un diritto consuetudinario in formazione?' in *La Tutela Internazionale dei Beni Culturali nei Conflitti Armati* (Giuffré 2007); Francesco Francioni, 'Au-delà des traites: l'émergence d'un nouveau droit coutumier pour la protection du patrimoine culturel' (2008), *EUI Working Papers* 2008/5; Clémentine Bories, *Le patrimoine culturel en droit international. Les compétences des Etats à l'égard des élements du patrimoine culturel* (Pedone 2011), in particular 147 ff.

[539] See Roger O' Keefe, 'World Cultural Heritage: Obligations to the International Community as a Whole?' (2004), 53 *International and Comparative Law Quarterly* 189.

lines, capable of imposing a general obligation towards the protection of all the cultural property of the world, would represent, arguably, a turning point in the study of the current international framework for the worldwide protection of cultural heritage.

Indeed, as for the first consideration, the present research agrees on the fact that it would be rather complicated, in view of the above, to assert the existence of an established customary norm, generally accepted by the international community, such as to impose a general obligation, pending on States, of protecting the cultural heritage of peoples in times of peace. As it has been suggested by O' Keefe, in fact, it would be difficult to consider the World Heritage Convention's provisions as an enough solid basis to establish the existence of such norm, and the worldwide framework for the protection of heritage seems not to contemplate, at the current stage, any other binding instrument feasibly capable of such an effect.

In this sense, the present research acknowledges how, notwithstanding with the reiterated warnings launched by some global actors involved in the protection of cultural heritage and rights – and notably the Special Rapporteur in the field of cultural heritage –[540] the above-described wave of 'iconoclastic propaganda' spreading around the globe within the last decade has been received by the general restraint of the international community, which seems as having mainly allowed these acts relegating them as issues of purely domestic law. As for the reasons of such an attitude, arguably, the present research suggests the evident reluctance, raised by some authors since the fact of Bamiyan,[541] of States and international organization towards the adoption of *any other binding document*, in addition to the ones already set up notably by UNESCO, such as to impose on States Parties *new obligations* towards the protection of the cultural heritage *in situ* – which still may be confined, as it has been exposed above, as an issue under the *aegis* of States' sovereignty.[542]

Notwithstanding with such first consideration, by the way, this analysis suggests, as a second assumption, how it might be possible, in the light of the most recent events occurred at the global level in the field of cultural heritage protection – and in view of the work of Francioni and Lenzerini exposed in the above paragraphs – to advocate the progressive, desirable, affirmation of an *emerging general principle of international law, gradually establishing at the international level*, imposing a general duty of conserving *all the elements* of the cultural heritage of States, in the name of their importance to present and future generations.

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[540] See *supra*.

[541] See Tullio Scovazzi, 'La Dichiarazione sulla distruzione intenzionale del patrimonio culturale' (2006), 21 *Rivista giuridica dell'ambiente* 551. See *infra*. See also Tullio Scovazzi, 'Le rapport entre la souveraineté nationale et l'intérêt collectif des Etats', in Tullio Scovazzi, in *Le patrimoine culturel de l'humanité*, Centre d'étude et de recherche de droit international et de relations internationales, Académie de droit international de La Haye, 2005.

[542] See Francesco Francioni, 'Culture, Heritage and Human Rights: an introduction', in Francesco Francioni and Martin Scheinin (ed. by), *Cultural Human Rights*, Nijhoff 2008.

A necessary remark on the notion of "general principle of international law" and on its application to the present research

In order to approach the issue in an exhaustive and precise way, coherent with the standards of international law, it seems the case, at this point, to introduce some considerations concerning the nature, the meaning, and the value of the notion of "principle" in international law, notably with reference to the concept of "general principle of international law" – concept to which the present research has referred above when advocating the gradual and progressive affirmation of a *general principle of international law establishing the obligation of protecting worldwide cultural heritage*. Before entering the matter, it is important to make a necessary, methodological, premise. As it has been stated since the introduction, this research does not consist in a "traditional" investigation leaning only on the parameters and the notions proper of international law studies. On the contrary, as it has been argued in the whole work and, in particular, in Chapter II, it is structured and meant to be an interdisciplinary analysis, not exclusively grounded on the basis of international law positivist standards but on the contrary making the effort to merge the concepts of international legal studies with the assumptions and notions coming from social sciences and, in particular, legal anthropology and cultural anthropology. As it has been stated in Chapter II, in fact, one may argue that the intrinsic limits which have been showed by the international legal framework in dealing with the worldwide protection of cultural heritage seem to call for a *more inclusive* investigation, not leaning only on the positivist canons of traditional international law studies. For this reason, to be coherent with such non-merely international law-oriented standpoint, the research follows an interdisciplinary path also when dealing with traditional concept of international law studies, which are approached in this work in a 'functional' perspective. Nevertheless, the research is not meant to leave aside those concepts from the scope of the reasoning; on the contrary, it approaches them through the lens of multidisciplinary studies. Done such premise, coherently with the considerations above, it appears the case to approach the inquiry about general principles of international law, arguably, starting from the notorious debate carried out, in the field of philosophy of law studies, by Herbert Hart and Ronald Dworkin with reference to the distinction between "rules of law" and "principles of law" – having this debate been recognized as the real core of the issue dwelling around the concept of general principle of international law[543]. Placing at the heart of the debate Dworkin's critique to Hart's legal

[543] In this context it seems rather significant to remark how the same "multidisciplinary-oriented" approach towards the investigation of the notion of general principles of international law has been adopted also by Carlo Focarelli in its Carlo Focarelli, Diritto internazionale (CEDAM 2021, 6° ed), p. 146.

positivism – presented, specifically, in Hart's book *The Concept of Law*[544], the contrast consists in the fact that, while Hart insists that judges are bound to legislate on the basis of "rules of law", Dworkin argues that judges ground their work on a set of "principles" which they can use when formulating judgments, and that these principles either form the basis or can be extrapolated from those "rules of law"[545]. In detail, according to Dworkin, principles consist in an element which must be taken *seriously*, as they represent the prerequisite of justice, equity, or other dimension of morality[546]. In this view, Dworkin distinguishes legal principles and legal rules according to a "logical distinction" and, according to him, both sets of standards point to particular decisions about legal obligations in particular circumstances, but they differ in the character of the direction they give. Precisely, says Dworkin in its The Model of Rules I[547], "rules are meant to be applicable in an all-or-nothing fashion", and they are conceived in a way in which, if they are valid, they "dictate the result, come what may"[548]. On the other hand, according to Dworkin, principles *do not dictate a particular result*, even if they clearly are applicable to a given case[549]. As a matter of fact, if sometimes principles can represent the ground for a decision[550], in general they state a reason that argues in one direction, thereby not necessitating a particular judgment. As for the ground of such legal theory, Dworkin lies on the principles of morality and ethics established by Immanuel Kant[551] and, notably, the concept of human dignity (which, other than being a central point of Kant's legal thinking, can be considered as the core pillar of the whole international human rights framework) [552].

The core essence of such debate may be identified, in the light of the above considerations, within the analysis concerning the notion of "general principles of international law" as it has been elaborated by within the decades by the case law and doctrine of international law. Having been defined as "*undoubtedly the most controversial*, if not mysterious, source among the three sources of

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[544] Herbert L. A. Hart, *The Concept of Law* (Clarendon law series, third edition, 2012).

[545] See Rosalyn Higgins, *Problems and Process: International Law and How we Use It* (Oxford, Clarendon Press, 1994) p. 3.

[546] Ronald Dworkin, *Taking Rights Seriously* (London Duckworth, 1978), pp. 22-28.

[547] Ronald Dworkin, The Model of Rules I, in The University of Chicago Law Review, Vol. 35, n. 1 (The University of Chicago Law Review, 1967), pp. 14-46.

[548] See *supra*, p. 35.

[549] It is worth to note that such distinction is coherent with the conception of general principles of international law elaborated by Giorgio Gaja, according to who the distinction between general principles and the other rules lies in the degrees of precision respectively of principles and other sources of international law. Precisely, according to Gaja, if the wording of the provision is sufficiently specific to allow for immediate application with well-defined consequences, then the source may be characterized as a rule, and, in this sense, often such rule may be a 'practical formulation' of a more abstract and general 'principle'. On the other side, principles are characterized by their *high level of abstraction* and the generality of their formulation. According to Gaja, legal principles may even be so abstractly formulated that they can be expressed as a concept, with no practical reference whatsoever to the circumstances in which they may be applied. See *infra*.

[550] In this context, Dworkin refers to the case Riggs v. Palmer, in which a grandson did not inherit his grandfather because he has murdered the latter (Riggs v. Palmer, New York Courts of Appeal, 1889).

[551] Konigsberg, 1724 – Konigsberg, 1804.

[552] On this point, see Ronald Dworkin, *Justice for Hedgehogs* (Belknap Pr., 2013). In this work, Dworkin focuses on dignity, responsibility and free will in relation to human rights.

international law", "general principles of international law" represent one of the most delicate issues at the core of the studies and researches of international law scholars and, even if significative efforts have been done through the years in order to come to a clear and unique definition of their nature and scope, there is still no consensus on the matter – neither having someone ever denied the substantive role they have played in the history and in contemporary international law[553]. Mentioned by art. 38 para. 1 of the International Court of Justice ("ICJ") Statute, which establishes that

"The Court, whose function is to decide in accordance with international law such disputes are submitted to it, shall apply: […] lett c) the general principles of law recognized by civilized nations;"[554]

general principles of international law have never been defined in a clear and unique way by the international community. On the contrary, these principles have always been maintained by judges and scholars as a sort of "all-encompassing", "case-by-case-defined" and general source of international law, with no further remark concerning their nature, their scope, nor their ultimate function within the international legal framework. This is true, even more, in the case of those general principles of international law which, differently from those ones deriving from the laws and practice of States and therefore transposed in the international legal system, represent the result of a *progressive evolution of the international legal system* itself – which seems the case, from the standpoint of the present research, of the above-mentioned emerging one possibly entailing the general obligation to protect worldwide cultural heritage. As for the reason of such assumption, there is the fact that they are not mentioned, expressly, by the text of art. 38 of the ICJ Statute; indeed, for this reason, they represent the most delicate point of the above-mentioned doctrinal debate dwelling

[553] Xuan Shao, '*What We Talk about When We Talk about General Principles of Law*' (2021), 20 Chinese Journal of International Law 219, emphasis added.

[554] United Nations, *Statute of the International Court of Justice*, 18 April 1946, available at: https://www.refworld.org/docid/3deb4b9c0.html. Last access 11 July 2023. It is important, for the scope of this analysis which has been constructed, as it is stated in Chapter II, as an inquiry grounded on the two concepts of universalism and cultural relativism, to remember how such expression, mentioning those general principles of law recognized "by civilized nations", has not come without criticisms. Deriving from the drafting of the 1920 Permanent Court of International Justice ("PCIJ") Statute (League of Nations, *Statute of the Permanent Court of International Justice*, 16 December 1920, available at: https://www.refworld.org/docid/40421d5e4.html. Last access 11 July 2023. See infra), such expression has been, in fact, repeatedly criticized by part of the doctrine and several international tribunals, since it appears as assuming that only certain nations part of the international community should be considered as "civilized". In particular, the "*universalist-led*" perspective entailed in the wording of art. 38 para. 1 of the ICJ Statute has been recalled by Judge Ammoun, in its separate opinion, in the North Sea Continental Shelf Cases (ICJ, Federal Republic of Germany v. Denmark, 20 February 1969, para. 132; Federal Republic of Germany v. Netherlands, 20 February 1969, para. 33). As it has been reported by the UN Secretary General, such critique led then to a proposal by Guatemala and Mexico to amend the ICJ Statute by deleting the term "civilized", but the proposal was not insisted upon (United Nations, General Assembly "Review of the Role of the International Court of Justice: Report of the Secretary General", 15 September 1971, paras. 23-25).

around the concept of general principles of international law – which is still ongoing. Precisely, two are the issues that have been raised by the doctrine concerning this topic: the effective existence, as an autonomous source of international law, of general principles of international law deriving from the evolution of the international legal system, and the function of such principles within the global legal framework.

To these issues and, in general, to the nature and scope of the whole asset of general principles of international law has been dedicated, remarkably, the still in progress work carried out by the International Law Commission ("ILC") since 2022 and, precisely, the reports drafted under by the Special Rapporteur Marcelo Vàsquez-Bermùdez – notably, the Third one[555].

In this context, as for the first point, in its draft conclusion 7 the ILC argues that there are grounds to support the existence of general principles of law formed within the international legal system based on an analysis of practice, jurisprudence, and doctrine. As for the prerequisites for their recognition, according to the ILC, these principles may a) be widely recognized in treaties and other international instrument; b) underlie general rules of conventional or customary international law; or c) be inherent in the basic features and fundamental requirements of the international legal system (being the existence of such condition arguably in progress, as outlined in paragraph III.II.i., in the context of the "emerging principle" concerning the international protection of cultural heritage which is object of discussion of the present work)[556].

Having argued the existence of such principles as an autonomous source of law, the ILC focuses, in the scope of its work, also on the *possible function and value* that such principles of international law formed in the international context – and, in general, all those "general principles of international law" as recognized by art. 38 of the ICJ Statute – may have within the international legal system.

On this point, the ILC acknowledges that, throughout the decades, several theories have been elaborated by the doctrine. In particular, the work of the International Law Commission refers to some referential conceptions of "general principles of international law" and their function within the legal system which deserve to be mentioned. According to such perspectives, "general principles of international law" may be considered as a) norms characterized by a 'general scope', perceived as wider than the others'; b) a 'source for inspiration' for homogeneous groups of norms, not binding in themselves but nevertheless entailing relevant importance in the interpretation of the correspondent

[555] International Law Commission, Third report on general principles of law by Marcelo Vàsquez-Bermùdez, Special Rapporteur, 18 April 2022, A/CN.4/753 (see *infra*).

[556] International Law Commission, Third report on general principles of law by Marcelo Vàsquez-Bermùdez, Special Rapporteur, 9 April 2020, A/CN.4/741, p. 59. Notwithstanding with its considerations, the ILC acknowledges that the inquiry concerning the autonomous existence of such principles is still in progress. See among others Ori Pomson, "General Principles of Law formed Within the International Legal System?", 12 July 2022, available at https://www.ejiltalk.org/general-principles-of-law-formed-within-the-international-legal-system/. Last access 31 July 2023.

norms; c) necessary and 'structural' elements in a legal system with a sort of constitutional value; d) fundamental principles to be pursued in a determined legal system; e) principles obtained through the means of abstraction and *analogia juris*; f) common principles recognized as widely accepted by the majority of legal systems; g) guide principles not binding by themselves, but nevertheless capable to orient the practice and the application of norms by judges and i) 'meta-juridical' principles representing the prerequisite of existing norms[557]. Such wide and detailed picture describing the different possible conceptions of "general principles of international law", which has been reconstructed by the above-mentioned Italian scholar Carlo Focarelli[558], may be also identified within the work on "general principles of international law" carried out by another Italian scholar, Giorgio Gaja, in the context of the Max Planck Encyclopedias of International Law[559]. According to Gaja, in fact, general principles of international law may in no way be considered as a univocal and fix-based source of international law; rather, these principles represent a source of international law with a "case-by-case" value, not necessarily subordinate to the one recognized to the other existing norms[560]. Indeed, according to Gaja, if these norms have been widely acknowledged as capable, in certain circumstances, of having normative value and therefore establishing, *per se*, positive or negative obligations pending on States, general principles of international law do not always have a normative function rather are capable of covering, in different situations, several other roles within the context of the international legal framework[561].

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[557] The present distinction is proposed by Carlo Focarelli in its Diritto internazionale (CEDAM 2021, 6° ed), pp. 145-146. There is huge literature on "general principles of international law"; see, among others, Giorgio Balladore Pallieri, *I "principi generali di diritto riconosciuti dalle Nazioni civili" nell'art. 38 dello Statuto della Corte Permanente di Giustizia Internazionale dell'Aja* (Torino, 1931); Mario Scerni, *I principi generali di diritto riconosciuti dalle Nazioni civili nella giurisprudenza della Corte Permanente di Giustizia Internazionale* (CEDAM, 1932); Alain Pellet, *Recherche sur les principes généraux du droit en droit international* (Thèse, 1974); Giorgio Gaja, 'Principi generali del diritto (diritto internazionale)' in *Enciclopedia del Diritto*, vol. XXXV, 1986; Francesco Salerno, Principi generali del diritto (diritto internazionale) in *Digesto*, vol XI, 1996, p. 524; Lorenzo Gradoni, 'L'exploitation des principes généraux de droit dans la jurisprudence des tribunaux pénaux internationaux', in Emanuela Fronza and Stefano Manacorda (ed. by), *La justice pénale internationale et les décisions des tribunaux ad hoc* (Giuffré, 2003); Luigi Condorelli, Fonti (Dir. Int.), *DDP*, vol. III, 2006; Beatrice Bonafé and Paolo Palchetti, 'Relying on General Principles in International Law', in Catherine Brolmann and Yannik Radi (ed. by), *Research handbook on the theory and practice of international lawmaking* (Research handbook on international law, 2016).

[558] See *supra* note 544.

[559] Giorgio Gaja, 'General Principles of Law', in *Max Planck Encyclopedias of International Law*, published under the auspices of the Max Planck Institute for Comparative Public Law and International Law under the direction of Professor Anne Peters (2021-) and Professor Rudiger Wolfrum (2004-2020), Oxford Public International Law (http://opil.ouplaw.com). (Oxford University Press, 2023).

[560] "The order mentioned simply represented the logical order in which these sources would occur to the mind of the judge", Permanent Court of International Justice: Advisory Committee of Jurists Procès- Annex 333. See Giorgio Gaja, 'General Principles of Law', in *Max Planck Encyclopedias of International Law*, *supra*, para. 23. On this point, see also See Pierre Marie Dupuy and Yann Kerbrat, *Droit international public* (Paris: Dalloz, 2010, 10th ed.), p. 376; Michel Virally, 'Le rôle des "principes" dans le développement du droit international', in *Recueil d'études de droit international en hommage à Paul Guggenheim* (Geneva: Institut universitaire de hautes etudes internationales/Facult de Droit de l'Université de Genève, 1968), pp. 531-554, p. 534.

[561] Concerning the capability of general principles of international law of establishing duties and positive or negative obligations pending on States, the doctrine has assessed how, when determining the 'enforceability' of general principles of international law, international courts and tribunals have always followed different paths, depending on the principle

In the light of these theories, the ILC focuses on such issue concerning the plurality of functions which may be entailed, depending on case to case, in those recognized as general principles of international law in the core part of the Third report on general principles of law. Acknowledging the fact that, in some cases, general principles of international law can *per se* generate positive or negative obligations pending on States[562], the ILC recognizes that, in the light of the vast literature and case law which has progressively established, since the adoption of the ICJ Statute and, before, of the PCIJ Statute[563], such normative value may in no way be considered as the only and ultimate prerogative of general principles of international law, on the contrary necessitating such source to be interpreted differently from case to case.

As a matter of fact, as it is stated in the Draft conclusion 14 of the 2022 report, the ILC converges with the above-mentioned distinction concerning the specific functions of general principles of law

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and on the issue in question, judging upon their discretion and on a case-by-case basis. However, it has to be mentioned that there are several cases in which the ICJ recognized *the existence of positive obligations* deriving directly from general principles of international law irrespectively of the existence of a correspondent treaty or customary norm. Among others, this is the case of the well-known Corfu Channel Case, in which the ICJ found that the Albanian authorities *were under the obligation* to notify the existence of a minefield in their territorial waters and to warn the approaching ships of the imminent danger. Precisely, in this context the ICJ said that "Such obligations are based […] on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States […]". (ICJ, United Kingdom of Great Britain and Northern Ireland v. Albania, 9 April 1949, para. 22). In the same way, in its advisory opinion on Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide the ICJ remarked how "[…] the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, *even without any conventional obligation*" (ICJ, Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, 28 May 1951, para. 23). The same approach to general principles of international law has been adopted in the context of the Boundary Dispute between Argentina and Chile concerning the Frontier Line between Boundary Post 62 and Mount Fitzroy. At para. 68, the Court stated that "A decision with the force of *res judicata* is legally binding on the parties to the dispute. This is a fundamental principle of the law of nations repeatedly invoked in the legal precedents, which regard the authority of *res judicata* as a universal and absolute principle of international law". (ICJ, Boundary Dispute between Argentina and Chile concerning the Frontier Line between Boundary Post 62 and Mount Fitzroy, 21 October 1994). Again on the capability of general principles of international law to establish rights and obligations see also, among others, Alain Pellet and Daniel Müller, "Article 38" in Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm, Christian Tomuschat, The Statute of the International Court of Justice (Oxford Commentaries on International Law, 2019) p. 941; Sienho Yee, "Article 38 of the ICJ Statute and applicable law: selected issues in recent cases" (2016) 7 Journal of International Dispute Settlement 2 p. 488; Stephan Schill, "Enhancing international investment law's legitimacy: conceptual and methodological foundations of a new public law approach" (2011) 52 Virginia Journal of International Law 1, pp. 90–91; Wolfgang Friedmann, "The uses of 'general principles' in the development of international law", *American Journal of International Law*, vol. 57 (1963), pp. 279–299, at pp. 290–299.

[562] Grounding its analysis on the scope of art. 12 (Existence of a breach of an international obligation) of the 2001 articles on responsibility of States for internationally wrongful acts which provides that "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, *regardless of its origin*" (International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: https://www.refworld.org/docid/3ddb8f804.html. Last access 16 July 2023) the ILC has noted how "[i]nternational obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order" (*Yearbook of the International Law Commission 2001*, vol. II (Part Two) and corrigendum, paras. 76−77, at pp. 54–55, para. (3) of the commentary to art. 12. See also *Yearbook of the International Law Commission 1976*, vol. II (Part Two), pp. 80–87) and how general principles of law may establish obligations binding upon States (as well as corresponding rights), engaging a breach of such obligations the international responsibility of the State concerned.

[563] See *supra*.

operated, among others, by Focarelli and Gaja, and it argues that "General principles of law may serve", other than *"*(a) as an independent basis for rights and obligations; (b) *to interpret and complement other rules of international law*; (c) to ensure the coherence of the international legal system." [564]

Precisely on this point, the ILC acknowledges, as it is state at para. 109, that general principles of international law should always be conceived, in reason of their very nature, above all "*in the light of their gap-filling role*"[565] within the international framework. This, in view of their capacity, recognized by doctrine since their appearance in the ICJ Statute[566], to *shed some light on the scope and on the content of generally accepted values and ideas shared by the international community as a whole* – being them or not crystallized in a norm of treaty or customary nature.

In this sense, in its latest work, the ILC recalls, in particular, how general principles of international law may "*provide coherence and unity for the interpretation of the specific rules derived from them*"[567], and it focuses, at para. 122 and followings of the 2022 report, on the role of general principles as a mean to *interpret* and *complement* other rules of international law *in view of the "wider picture" of the whole international law framework*, to be considered, notably, in the light of its latest developments and evolutions[568]. In this view, to provide a normative basis to such inquiry, the ILC refers to the text of art. 31 para. 3 lett. c) of the Vienna Convention, which establishes that, in interpreting treaties, account is to be taken, together with the context, of "*any relevant rules of international law* applicable in the relations between the parties" [569]. Indeed, the ILC recalls, in the light of the interpretation of the Vienna Convention which has been progressively acknowledged by case law and doctrine, how, among these rules, have to be included general principles of law and especially those "general principles of law recognized by civilized nations" mentioned by the ICJ Statute and, *in concreto*, all general principles of international law[570]. In this sense, the 2022 work mentions several examples which show how such conception of general principles of international

[564] International Law Commission, Third report on general principles of law by Marcelo Vàsquez-Bermùdez, Special Rapporteur, 18 April 2022, A/CN.4/753, p. 53, emphasis added.
[565] International Law Commission, Third report on general principles of law by Marcelo Vàsquez-Bermùdez, Special Rapporteur, 18 April 2022, A/CN.4/753, para. 109, emphasis added.
[566] See *supra*.
[567] International Law Commission, Third report on general principles of law by Marcelo Vàsquez-Bermùdez, Special Rapporteur, 18 April 2022, A/CN.4/753, para. 139, emphasis added.
[568] "It is often mentioned in the literature that general principles of law may serve, in fulfilment of their gap-filling function, to interpret and complement treaty and customary rules." International Law Commission, Third report on general principles of law by Marcelo Vàsquez-Bermùdez, Special Rapporteur, 18 April 2022, A/CN.4/753, para. 122.
[569] On the Vienna Convention, emphasis added. On the Vienna Convention, see Chapter I.
[570] Among others, see Benedetto Conforti, Diritto Internazionale (Editoriale Scientifica, 2018); Giorgio Gaja, "Does the European Court of Human Rights use its Stated Methods of Interpretation?" in AA.VV., *Divenire sociale e adeguamento del diritto. Studi in onore di Francesco Capotorti* (Giuffré, 2013); Malgosia Fitzmaurice (ed. by), *Treaty Interpretation and the Vienna Convention* (Brill, 2010); Lorenzo Gradoni, "Regole di interpretazione difficili da interpretare e frammentazione del principio di integrazione sistemica" (2012), 3 *Rivista di Diritto Internazionale* 93.

law, intended a mean of interpretation for those others existing treaty or customary rules, has been adopted, through the decades, by the jurisprudence of international tribunals. In particular, the reference to general principles of international law as a mean of interpreting positively established norm has been remarkably referred to by the jurisprudence of international tribunals dedicated to the global enhancement of human rights, and it is at the core of the well-known case *Golder v. United Kingdom* – judged by the European Court of Human Rights in 1975 and concerning the issue whether article 6 (Right to a fair trial) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) entails, *with no specific reference to such right in the ECHR text,* a right of access to a court or tribunal[571].
In this context, which has become one of the leading cases of the ECtHR jurisprudence[572], the court states how

"The principle whereby a civil claim must be capable of being submitted to a judge ranks as *one of the universally "recognized" fundamental principles of law*; the same is true of the principle of international law which forbids the denial of justice. *Article 6 para. 1 (art. 6-1) must be read in the light of these principles.* […] It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. […] Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1 (art. 6-1). This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty[…] and *to general principles of law*."[573]

In the same way, such approach has been recalled by the ICC in the notorious *Lubanga* case. In this occasion, the judges stated how, referring to the role of general principles of law in the interpretation of art. 17 para. 1 lett d) of its Statute[574],

"Considering that the Statute is an international treaty by nature, the Chamber will use the interpretative criteria provided in articles 31 and 32 of the Vienna Convention on the Law of Treaties

[571] ECtHR, Golder v. the United Kingdom, 21 February 1975.
[572] ECtHR, Demir and Baykara v. Turkey, 18 November 2008.
[573] ECtHR, Golder v. the United Kingdom, 21 February 1975, paras 35-36 emphasis added. See also ECtHR, Enea v. Italy, 17 September 2009, para. 104; ECtHR Demir and Baykara v. Turkey, 12 November 2008, para. 71.
[574] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html. Last access 16 July 2023.

(in particular the literal, the contextual and the teleological criteria) in order to determine the content of the gravity threshold set out in article 17 (1) (d) of the Statute. As provided for in article 21 (1) (b) and (1) (c) of the Statute, the Chamber will also use, if necessary, the "applicable treaties and the principles and rules of international law" and "*general principles of law* […]" [575].

Hence, it seems, it the light of these above considerations, and in view of the above mentioned doctrinal debate concerning the existence of an obligation entailing the duty of protecting, in times of peace, all the cultural heritage of mankind – which has been described above referring notably to the positions of Francioni, Lenzerini and O' Keefe, that it may be rational to argue that, as for the present case, such emerging principles concerning cultural heritage protection may be approached in such lastly mentioned way and, notably, as possible and feasible in future *interpretative instrument for existing treaties and, generally, established positive norms* concerning, notably, the international protection of cultural heritage – and, notably, the global enhancement of cultural inheritance as a component of the "common heritage of humankind" and human rights.

Arguably not capable of establishing, as it has been recalled in the above lines, the existence of a positive obligations of protecting cultural heritage – and its corresponding duty of abstention from its destruction – such emerging general principle may consist in a significant element to be taken into account, also according to art. 31 para. 3 lett c) of the Vienna Convention, in the interpretation of treaty law and customs concerning the international protection of cultural heritage and, in general, the whole international legal framework directly or indirectly facing the issue of cultural heritage preservation.

Consisting, at the current time, in no more than a nascent trend, such an up-and-coming principle of worldwide cultural heritage conservation may, it seems, progressively gaining in credibility. As for the elements of such progressive establishment, firstly, there is the emergent *prise de conscience*, as it has been exposed in the above paragraphs, spreading within the international community towards the condemnation of the intentional destruction of cultural heritage as a threat to the human right to culture notably pursuant to art. 15 para. 1 lett. a) ICESCR. As it has been exposed in the previous paragraphs, in fact, the international community appears as progressively acknowledging the necessity of protecting the cultural heritage of peoples, notably, in view of its significance in the enhancement of the human rights framework, in the light of the international treaties adopted by the international community, and notably of ICESCR and its General Comment No. 21. Even more, in addition to that, the present research suggests how another rather significative point in favor of the

[575] ICC, Situation in the Democratic Republic of the Congo in the case of Prosecutor v. Thomas Lubanga Dyilo, 10 February 2006, para. 42, emphasis added.

progressive established of such emerging acknowledgment towards the duty of protecting worldwide cultural heritage may be offered by the progressively up-coming trend, gradually emerging in the context of the United Nations and, notably, UNESCO, towards the establishment of a new framework for the protection of cultural heritage as a core element in the enhancement of the principles and goals of sustainable development – notably, in a perspective of intergenerational justice.

III.II.iii. The protection and promotion of cultural heritage as a component of the United Nations framework for sustainable development. The emerging UNESCO norm-set dedicated to the conservation of cultural heritage of present and future generations

Recognized by UNESCO since the 1970s, the principle of preserving worldwide cultural heritage to transmit it intact to succeeding generations, in the name of its pivotal role in the enhancement of human dignity and democratic societies, is entailed in the UNESCO Recommendation on Participation by the People at Large to Cultural Life and their Contribution to it, adopted by the organization's General Conference at its 19th session, held in Nairobi in 1976.[576] Stressing on the crucial role of culture as one of the principal factors for the progress of mankind, such as possibly capable to ensure the constant growth of society's spiritual potential "based on the full, harmonious development of all its members", the Recommendation recalls the importance of strengthening the international community effort towards the implementation of more effective and inclusive cultural policies and plan, such as to ensure, in respect of the principle of cultural diversity, an equal and adequate access to cultural life to present and future generations. This, remarkably, notwithstanding with the principles of respect for the sovereignty of States and non-interference in the internal affairs of other countries, which may be balanced with the principle of equality of rights and the right of peoples to self-determination.[577]

In the same way, the principle concerning the necessity of preserving worldwide cultural inheritance in the respect of the rights and interest of future generations is at the core of the UNESCO Declaration

[576] Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It, adopted by the UNESCO General Conference on 26 November 1976, available at < https://atom.archives.unesco.org/upk8x. Last access 10 April 2023.

[577] "**Considering** that access to culture and participation in cultural life are essential components of an overall social policy dealing with the condition of the working masses, the organization of labour, leisure time, family life, education and training, town-planning and the environment,"; **Aware** of the important role that can be played in cultural and social life by: young people, whose mission is to contribute to the evolution and progress of society;" UNESCO Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It, preamble.

on the Responsibilities of Present Generations towards Future Generations, adopted in 1997 by the UNESCO General Conference at its 29th session.[578]

Recalling the ultimate aim of the United Nations to "save succeeding generations from the scourge of wars" and to safeguard the values and principles enshrined in the Universal Declaration of Human Rights, and all other relevant instruments of international law, the UNESCO 1997 Declaration expresses the concern of the international organization about the fate of future generations in the face of the vital challenges of the next millennium. Reminding how, over the decades, the very existence of humankind and its environment has been increasingly threatened by a series of both social and natural phenomena, it recalls the responsibilities pending on the present generations towards the succeeding ones. To establish such principle, the UNESCO 1997 Declaration refers to "all other instrument of international law" established at the global level and, notably, by the United Nations. In particular, the UNESCO 1997 Declaration refers, in its preamble, to the future-oriented perspective at the heart of the United Nations Convention on the Rights of the Child, adopted in 1989 by the General Assembly to strengthen the international cooperation in the protection and enhancement of the younger generations. In this context, the UNESCO 1997 Declaration refers to the treaty as to the most ratified human rights instrument devoted to the enhancement of fundamental freedoms of future generations, as well as a relevant instrument in the promotion of inter-generational solidarity for the perpetuation of humankind.[579] In addition to that, the UNESCO 1997 Declarations mentions the objective of preserving the interests and freedoms of future generations entailed in a series of other documents adopted in the framework of the United Nations and, in detail, the UNESCO 1972 World Heritage Convention,[580] the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity,[581] the United Nations Declaration on Environment and Development (adopted in Rio de Janeiro, 14 June 1992, "Rio Declaration"),[582] and the United Nations General Assembly resolutions relating to the protection of the global climate for present and future generations adopted since 1990.[583]

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[578] Declaration on the Responsibilities of Present Generations towards Future Generations (UNESCO 1997 Declaration). Adopted in Paris, 12 November 1997, preamble. The document is available at < https://en.unesco.org/about-us/legal-affairs/declaration-responsibilities-present-generations-towards-future-generations>. Last access 10 April 2023.

[579] UN General Assembly, Convention on the Rights of the Child (New York, 20 November 1989), entered into force on 2 September 1990, UNTS vol. 1577, 3. The full text of the Convention is available at https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child. Last access 10 April 2023.

[580] On the "sustainable" interpretation of the World Heritage Convention, see *infra*.

[581] Adopted in Rio de Janeiro on 5 June 1992. For an insight of the document, see https://unfccc.int/process-and-meetings/what-is-the-united-nations-framework-convention-on-climate-change. Last access 10 April 2023.

[582] The full text of the Declaration is available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf. On the Rio Declaration and its application to cultural heritage, see *infra*.

[583] In addition, the UNESCO 1997 Declaration refers to the World Conference on Human Rights Vienna Declaration and Programme of Action, adopted in Vienna, 25 June 1993. The document is available at https://www.ohchr.org/en/about-us/history/vienna-declaration. Last access 10 April 2023.

Recalling the existence of a "moral obligation" pending on the international community to hand on a better world to future generations, the UNESCO 1997 Declaration reminds the necessity of strengthening the international cooperation for the creation of social, cultural and economic conditions such as to ensure that the needs and interests of future generations are not jeopardized by the burden of the past. In this context, the document identifies a series of responsibilities pending on States Parties in the light of the necessity of preserving future generations' rights and freedoms, referring to their contribution in resolving present-day problems, including poverty, underdevelopment, discrimination and threats to the worldwide inheritance.

In particular, the UNESCO 1997 Declaration refers, at its art. 7, to the responsibility pending on present generations "to identify, protect and safeguard the tangible and intangible cultural heritage and to transmit this common heritage to future generations".[584] As for the reason of such intergenerational duty, there is the acknowledged importance of worldwide respecting cultural rights recognized as fundamental freedoms, and notwithstanding with the existence of any special regime, applicable in the field of cultural heritage, such as to ensure to certain elements of cultural property of peoples a 'special' regime of protection in the name of its particularly significant value. As evidence of such an inclusive approach towards the worldwide conservation of cultural heritage, notably, there may be the scope of arts. 7 and 8 of the UNESCO 1997 Declaration. As it appears, in fact, art. 7 seems to focus on the issue of the necessity of conserving *all* the elements of the cultural heritage of peoples – notably in a human rights and future generations-oriented perspective –, while art. 8 appears as referring to the importance of using the "common heritage of humankind" avoiding its irreversible destruction, in reason of its possibly acknowledged outstanding interest "as it is defined by international law".[585]

Likewise, the same idea of adopting a rather more inclusive, and future-oriented attitude, towards the protection of the cultural heritage of humankind has been progressively embraced, by UNESCO and its States Parties, in the field of application of the World Heritage Convention. Remarkably entailed, according to some authors,[586] within the scope of the WHC since its adoption in 1972, the principle according to which the international community has the duty of conserving worldwide cultural heritage to transmit it intact to future generations has been openly referred to by the World Heritage Convention Operational Guidelines since 2005. In detail, para. 6 of the document declares how, since the adoption of the treaty in 1972, the protection and conservation of the natural and cultural heritage has been recognized by the international community as a core element for the sustainable

[584] UNESCO 1997 Declaration, art. 7.

[585] "The present generations may use the common heritage of humankind, as defined in international law, provided that this does not entail compromising it irreversibly." UNESCO 1997 Declaration, art. 8.

[586] See Francesco Francioni, 'Preamble', in Francesco Francioni and Federico Lenzerini (ed. by), *The World Heritage Convention: A Commentary* (Oxford, 2008).

development of societies. In this sense, para. 7 of the WHC Operational Guidelines identifies as the aim of the treaty "the identification, protection, conservation, presentation and transmission to future generations" of cultural and natural heritage, in the name of its significance for nowadays and succeeding societies.[587] In the same way, the necessity of preserving the cultural heritage of peoples to transmit it to future generation, in a perspective of sustainable development and transitional justice, is at the core of the World Heritage Convention Policy for Sustainable Development ('WHC Policy'), approved by the General Assembly of States Parties to the WHC at its 20th session on 19th November 2015.[588] Adopted in the same year of the establishment of the United Nations Agenda for Sustainable Development ('2030 Agenda'), the WHC Policy inserts itself in the international framework established within the last two decades by the United Nations for the fostering of the principles of sustainable development and intergenerational justice, identified as two core elements in the progressive path for the strengthening of universal peace and larger freedom.[589] Enhancing the key role of cultural diversity and inheritance in the path towards the achievement of a sustainable global society, the 2030 Agenda refers, at its Goal 11.4, to the necessity of strengthening the international community efforts to protect and safeguard the world's cultural and natural heritage. According to the General Assembly, this action would play a significative role in making cities and human settlements "inclusive, safe, resilient and sustainable" – in a human rights and intergenerational-oriented perspective.[590]

In this context, the WHC Policy by General Assembly of States Parties to the WHC seems to refer, precisely, to the up-coming norm set, progressively emerging in the context of the United Nations and, notably, UNESCO, which stresses on the importance to improve the effort of the international community towards the strengthening of the relationship between cultural heritage, cultural diversity and sustainability. Declared by the organization since the adoption of the UNESCO 2002 Budapest Declaration,[591] the necessity of ensuring an adequate conservation of worldwide cultural heritage to

[587] WHC Operational Guidelines, paras. 6 and 7. See also paras. 112, 214*bis* and 239.

[588] Policy Document for the Integration of a Sustainable Development Perspective into the Processes of the World Heritage Convention. See also World Heritage Committee, Decision 36 COM 5C, 8 February 2012. The adoption of the WHC Policy has been supported by a large number of States. Among others, Brazil, Cote d'Ivoire, France, Philippines, Poland, Sweden, Turkey, and United States.

[589] Transforming our World: the 2030 Agenda for Sustainable Development, UN. Doc. A/RES/70/1 (2015), 25 September 2015. See preamble, para. 1.

[590] 2030 Agenda, Goal 11.4 See also New Urban Agenda, adopted at the UN Conference on Housing and Sustainable Urban Development (Habitat III) (Quito, 20 October 2016), available at https://habitat3.org/the-new-urban-agenda/. Last access 11 April 2023. The New Urban Agenda was endorsed by the UN General Assembly on 23 December 2016, UN Doc. A/RES/71/256, 25 January 2017. According to some authors, references to the conservation of cultural heritage are also entailed in SDG 10 (reduction of inequalities), SDG 13 (climate action) and SDG 16 (inclusive societies). See Jon Hawkes, 'The Fourth Pillar of Sustainability: Culture's Essential Role in Public Planning', (Common Ground Publishing Pty Ltd - Culture Development Network, 2001). See also UNESCO, Thematic Indicators for Culture in 2030 Agenda, available at <https://whc.unesco.org/en/culture2030indicators/>. Last access 11 April 2023.

[591] UNESCO, World Heritage Committee, Budapest Declaration on World Heritage, UNESCO Doc. WHC-02/CONF.202/25, 1 August 2002, art. 3.

transmit it intact to future generations is at the core of the periodical reports adopted by the General Assembly to focus the attention of the United Nations on the relationship between sustainability and culture.[592] In the same way, this importance of strengthening the United Nations efforts in the global action for the protection of cultural heritage as a common source and driver for sustainability appears as being entailed within the scope of Principle 4 of the Rio Declaration, which states that

"In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it".[593]

On this point, as Principle 4 of the Rio Declaration does not directly mention the protection of cultural heritage as an element of sustainable development, it seems the case, before proceeding with the inquiry object of the studies of paragraph III.ii.iii, to introduce a remark on the opportunity of including it in such emerging norm set.

Indeed, principle 4 of the Rio Declaration has been acknowledged, in order of its prerogative of enshrining the idea of the integration of economic and environmental concerns, as the key principle in the whole norm-set and operational framework for sustainable development[594].

Coming as the result of intensely polarized negotiations, the text of Principle 4, as it stands today, is laid out in mandatory language and it intends to set up an obligation on its States Parties concerning the integration of the environmental component within their development process[595]. Precisely such

[592] Culture and Development, UN. Doc. A/RES/65/166 (2010), 20 December 2010; Report on Culture and Development, UN. Doc. A/66/187 (2011), 26 July 2011; Culture and Development, UN. Doc. A/RES/66/208 (2012), 15 March 2012; Report on Culture and Development, UN. Doc. A/68/266 (2013), 5 August 2013; Culture and Sustainable Development, UN. Doc. A/RES/68/223 (2014), 12 February 2014; Report on Culture and Sustainable Development, UN. Doc. A/69/216 (2014), 31 July 2014; Culture and Sustainable Development, UN. Doc. A/RES/69/230 (2015), 4 February 2015 and UN. Doc. A/RES/70/214 (2016), 26 February 2016.

[593] Rio Declaration on Environment and Development ("Rio Declaration"), adopted in Rio de Janeiro, 14 June 1992, UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992).

[594] As it has been remarked in doctrine, such idea of integrating economic and environmental concerns can be traced back to the early 1970s. In particular, it is enshrined in the 1971 Founex Report (The Founex Report on Development and Environment, Founex, Switzerland, 4-12 June 1971), dedicated to the sustainable development of developing countries, and in the 1972 Stockholm Declaration on Human Environment ('Declaration of the United Nations Conference on the Human Environment', Stockholm, 16 June 1972, UN Doc. A/CONF 48/14/Rev.1). In the same way, the Helsinki Final Act in 1975 viewed protection of the environment as a task of major importance for the economic development of all countries, and in In 1982 the UNEP in its Nairobi Declaration advocated an integrated approach to environment, development, population and resources emphasizing their interrelationship in order to lead to sustainable development. Also, nature conservation and/or environmental protection was also viewed as an integral part of economic development activities in many high level international documents such as the 1982 World Charter for Nature, the U.N. General Assembly's 198, Environmental Perspective to the Year 2000 and Beyond, the 1987 WCED proposed Legal Principles the 1989 Commonwealth Langkawi Declaration, or the 1991 World Conservation Strategy. See Virginie Barral and Pierre Marie Dupuy, Pierre-Marie, Principle 4: Sustainable Development through Integration, in Jorge E. Vinuales, (ed. by), *The Rio Declaration on Environment and Development: A Commentary* (Oxford: Oxford University Press, 2015) pp. 157-180.

[595] Precisely, the provision is intended to lahy down that there is no priority granted to environmental protection over the development process or vice versa. Although, via their integration, environmental considerations may limit or impinge

principle, which has been defined as a mostly "procedural" binding principle of international law, requires States to plan their decision-making processes in an improved way, thereby integrating the environmental issue in the pursuit of development which has to be conceived, apart from economically efficient, also socially equitable, responsible and environmentally sound[596].

Although not entailing, as it has been mentioned, any specific reference to the integration, specifically, of cultural heritage within the development processes, it may be possible to state that such principle may represent a rather significant further element in the *de iure condendo* discourse concerning the progressive integration of the cultural heritage protection component within the processes of sustainable development, in the light of its "procedural nature" and of its mandatory formulation. As a matter of fact, possibly, one would argue if it may be feasible to consider the opportunity of extending the marge of application of such principle also to the cultural heritage field, conceived as the other component of the "cultural heritage of mankind" since the adoption of the World Heritage Convention in 1972. This, other than in the light of its remarkably *procedural* content, even more in view of its "vague" and wide scope – which is proper, as it has been recalled above, of general principles of international law.

As a matter of fact, in supporting such assumption, the present research highlights how the *strict interconnection between the cultural component with the environmental one* has been progressively recognized by the international community since the very early stage of the sustainable development framework, and now it represents a core concept of the whole international framework dwelling around the idea of protecting and safeguarding our common heritage to transmit it to future generations. Indeed, the fact that States "should feel prompted to leave the earth's ecosystem to the generations to come in as sound a condition as possible, and they should take all the efforts to *conserve the diversity of natural and cultural resource base* to maintain the quality of the planet *including the non-human nature*"[597] has been widely acknowledged by international law scholars since the adoption of the famous report "Our Common Future", drafted in 1987 by the World

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on the development process, it is also added that environmental protection cannot be considered in isolation from it. See *supra*.

[596] Among others, see the interpretation of the meaning of the principle of integration elaborated by the Arbitral Tribunal in the Iron Rhine Railway case in which the court, after citing principle 4, states that 'Importantly, th[ese] emerging principle[s] now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm.' Award in the Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, 24 May 2005, para 58.

[597] See, among others, Ulrich Beyerlin, 'Sustainable Development' in in *Max Planck Encyclopedias of International Law*, published under the auspices of the Max Planck Institute for Comparative Public Law and International Law under the direction of Anne Peters (2021-) and Rudiger Wolfrum (2004-2020). See also Rudiger Wolfrum, "Common Heritage of Mankind", in *Max Planck Encyclopedias of International Law*, published under the auspices of the Max Planck Institute for Comparative Public Law and International Law under the direction of Anne Peters (2021-) and Rudiger Wolfrum (2004-2020).

Commission on Environment and Development ("Bruntland Report")[598], and it has been widely accepted by international tribunals. In particular, such attitude has been emerged, to progressively expand within the decades to the coverage of the whole cultural sphere, in the hypothesis in which the issue of sustainable development and, more specifically, the necessity of balancing and integrating the economic and the environmental elements, was dealt in the context of safeguarding and enhancing the respect of indigenous peoples and communities. This, arguably, also in view of the strict interconnection subsisting between the cultural and the natural element in the context of their societies which, as it has been detailed in Chapter II, are characterized by a less "monumental" conception of cultural heritage with respect of Western-based societies. As a matter of fact, one may argue, there is significant jurisprudential evidence of the adoption of such approach, in particular, coming from the case law of the Inter American Court of Human Rights ("IACtHR").[599] Indeed, the IACtHR, when ruling on the necessity of preserving indigenous communities from the adverse consequences provoked by positive or negatives actions or plans set up by its States Parties, repeatedly recall the necessity of integrating both the environment and cultural component in the "progressive development" processes of States. This, notably, in view of the provisions of the American Convention on Human Rights[600] (and, notably, of art. 21, "Right to property"[601], and art. 26, "Progressive development"[602]) as well as of the framework set up by the Charter of the Organization of American States as amended by the Protocol of Buenos Aires (United Nations, Treaty Series, vol. 721, p. 324)" for the progressive enhancement of sustainable development[603]. In particular, such importance of embracing an effective sustainable development, thereby without placing in danger the cultural and environmental integrity of populations and communities living in a determined territory, has been highlighted by the IACtHR in the Saramaka People v. Suriname case[604], in which the court, in recognizing the right of the Saramaka

[598] Report of the World Commission on Environment and Development: Our Common Future. United Nations General Assembly document A/42/427, available at http://www.un-documents.net/ocf-ov.htm. Last visit 18 July 2023. See among others Massimo Iovane, Fulvio M. Palombino, Daniele Amoroso and Giovanni Zarra (ed.by), *The Protection of General Interests in Contemporary International Law* (Oxford University Press, 2021), and Philippe Sands, 'Sustainable Development: Treaty, Custom, and the Cross-fertilization of International Law' in Alan Boyle and David Freestone, *International Law and Sustainable Development* (Oxford University Press, 1999).

[599] Established in San Josè, Costa Rica, 22 May 1979.

[600] American Convention on Human Rights, adopted on 22 November 1969, San José, Costa Rica, available at https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf. Last visit 18 July 2023.

[601] American Convention on Human Rights, art. 21 "1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law"

[602] American Convention on Human Rights, art. 26 "The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."

[603] Art. 26, "Progressive Development", American Convention on Human Rights, emphasis added.

[604] IACtHR, Saramaka People v. Suriname, 28 November 2007, emphasis added.

community to preserve and protect the environment and nature in which they used to live since generations, argues how

"[…] the members of the Saramaka people maintain a strong spiritual relationship with the ancestral territory they have traditionally used and occupied. *Land is more than merely a source of subsistence for them; it is also a necessary source for the continuation of the life and cultural identity of the Saramaka people*. The lands and resources of the Saramaka people are part of their social, ancestral, and spiritual essence. In this territory, the Saramaka people hunt, fish, and farm, and they gather water, plants for medicinal purposes, oils, minerals, and wood. Their sacred sites are scattered throughout the territory, while at the same time the territory itself has a sacred value to them.[605]".

In this context, the court refers, notably, to the provisions set up by art. 27 of the ICCPR, which, as it is stated by the judges, entails that

"minorities shall not be denied the right, in community with the other members of their group, to *enjoy their own culture[, which] may consist in a way of life which is closely associated with territory and use of its resources*. This may particularly be true of members of indigenous communities constituting a minority"[606].

Indeed, such strict interconnection subsisting among the environmental, the cultural and the development sphere has been recognized by the IACtHR also in the cases Moiwana village v. Suriname[607], Yakye Axa community v. Paraguay[608] and Sawhoyamaxa indigenous community v. Paraguay[609]. In all of these cases, the judges of the court have stressed the importance of preserving the environment and the traditions of the indigenous community in the context of States Parties' development processes, in view of the cultural significance of the concerned territories for these populations.

In this sense, such necessity of merging the cultural and natural component when dealing with the protection of the common heritage of mankind has also been highlighted UNESCO, by the choice of including, in 2005, the notion of "mixed cultural and natural heritage" within the WHC Operational Guidelines, and it has been progressively insisted on in the context of the work of the World Heritage

[605] IACtHR, Saramaka People v. Suriname, 28 November 2007, paras. 66 and ff.
[606] IACtHR, Saramaka People v. Suriname, 28 November 2007, para. 94, emphasis added.
[607] IACtHR, Moiwana Village v. Suriname, 25 May 2005.
[608] IACtHR, Yakye Axa community v. Paraguay, 17 June 2005.
[609] IACtHR, Sawhoyamaxa indigenous community v. Paraguay, 29 March 2006.

Committee, in its integrated action to enhance sustainable development in worldwide existing cultural and natural environments[610].

Concluding such remark on Principle 4 of the Rio Declaration and going back to the other instruments representing the progressive recognition of the necessity of ensuring an adequate conservation of worldwide cultural heritage to transmit it intact to future generations has been expressly stated the context of the UN Conference on Sustainable Development 'The Future We Want', held in Rio de Janeiro on 22 June 2012, as it appears from the preamble of its outcome document.[611]

In the same way, the same principle has been embraced in the context of the adoption of the 2013 UNESCO Hangzhou Declaration which, focusing on the importance of "Placing Culture at the Heart of Sustainable Development Policies", insists on the fact that culture "should be considered to be a fundamental enabler of sustainability, being a source of meaning and energy, a wellspring of creativity and innovation, and a resource to address challenges and find appropriate solutions" .[612]

In the light of such background, the WHC Policy dwells around the principle according to which the World Heritage Convention should be conceived as an integral part of United Nations' overarching mandate to foster equitable sustainable development, notably in coherence with the principles established by the 2030 Agenda. To this end, States Parties should "ensure an appropriate and equitable balance between conservation, sustainability and development, so that World Heritage properties can be protected through appropriate activities contributing to the social and economic development and the quality of life of our communities" .[613] In particular, States Parties are called to "recognise and promote the properties' inherent potential to contribute to all dimensions of sustainable development". As for the aim of such action, the conservation of such elements in the name of their capacity of providing collective benefits for society, *rather than* in virtue of their possible OUV.[614]

Saluted by some authors as underpinning the scope of the World Heritage Convention since its

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[610] "Properties shall be considered as "mixed cultural and natural heritage" if they satisfy a part or the whole of the definitions of both cultural and natural heritage laid out in Articles 1 and 2 of the Convention" WHC Operational Guidelines, para. 46. See also World Heritage Committee, "The Contribution of World Heritage to Sustainable Development", available at https://whc.unesco.org/en/sustainabledevelopment/, last access 30 July 2023.

[611] See UN. DOC A/RES/66/288 (2012), 11 September 2012, para. 3 ff.

[612] "The extraordinary power of culture to foster and enable truly sustainable development is especially evident when a people-centered and place-based approach is integrated into development programmes and peace-building initiatives." See Culture: Key to Sustainable Development (Hangzhou, 17 May 2013), available at https://unesdoc.unesco.org/ark:/48223/pf000022123. Last access 11 April 2023. See also UNESCO, World Heritage and Sustainable Development, available at <https://whc.unesco.org/en/sustainabledevelopment/>. Last access 11 April 2023.

[613] WHC Policy, para 1. In this context, the WHC Policy refers notably to the Budapest Declaration. See UNESCO World Heritage Committee, General Assembly of States Parties to the World Heritage Convention, Summary Records, 19 November 2015, UNESCO Doc. WHC-15/20.GA/INF.15, item 13.

[614] "In addition to protecting the OUV of World Heritage properties, States Parties should, therefore, recognise and promote the properties' inherent potential to contribute to all dimensions of sustainable development and work to harness the collective benefits for society, also by ensuring that their conservation and management strategies are aligned with broader sustainable development objectives." WHC Policy, para. 4.

adoption in 1972,[615] such principle establishing a *non-exclusive*, cultural diversity and sustainable-development oriented interpretation of the treaty – and, notably, of its art. 12 – has been often recalled, within the global cultural diplomacy arena, by several UNESCO fonctionnaires.[616]

Although consisting, at it comes clear from the present analysis, in a progressively emerging framework made up, at the current stage, basically of *non-binding* documents and provisions, such sustainable development-oriented attitude towards the implementation of the international cultural heritage norm-set appears, as it has been anticipated, as gaining progressive relevance in the context of the global arena for the protection, safeguard and conservation of cultural property. Such assumption may be true, in particular, in the light of the acknowledged role played by international organizations in the context of the formation of general principles and customary norms, as it has been analyzed notably in the third report of the International Law Commission Former Special Rapporteur Sir Michael Wood dedicated to the identification of customary international law.[617]

In this sense, the present research has showed, remarkably, within the last decades a relevant part of both international jurisprudence and doctrine has focused its attention on the necessity of establishing, at the international scope, global strategies to ensure the conservation and enhancement of all the elements of the cultural heritage of humankind, in the name of, over than their significance in the human rights framework, their importance for present and future generations. Entailed in the global agenda for cultural heritage protection since the adoption of the UNESCO 1954 Hague Convention and the decisions of international tribunals judging on the intentional destruction of cultural heritage in the event of armed conflicts, such principle has been reiterated, even in the absence of warfare, notably in the aftermath of the facts of Bamiyan. In this context, the present research has presented how the international community, and, in particular, part of the doctrine, has stressed on the importance of condemning the intentional destruction of cultural heritage of peoples as an irreversible loss for present and future generations.

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[615] See *supra*.

[616] "the scope of action of the Convention seems to go beyond the sites included in its List of World Heritage properties, to encompass national heritage policies and wider development strategies." See the Report on Sustainable Development within the UNESCO framework, available at https://whc.unesco.org/en/sustainabledevelopment/. Last access 11 April 2023. See also the declarations of Richard Engelhardt, Former (1991-1994) Director of the UNESCO Office in Cambodia: "the World Heritage Convention carries in itself the spirit and promise of sustainability, …in its insistence that culture and nature form a single, closed continuum of the planet's resources, the integrated stewardship of which is essential to successful long-term sustainable development – and indeed to the future of life on the Earth as we know it".

[617] International Law Commission, Third report on identification of customary international law, Sir Michael Wood, Special Rapporteur, 27 March 2015, A/CN.4/682 (2015); see also International Law Commission, Draft conclusions on identification of customary international law, 2018, *Yearbook of the International Law Commission*, vol. II, Part Two (A/73/10) para. 65 and Sufyian Droubi and Jean d'Aspremont (ed. by), *International organisations, non-State actors, and the formation of customary international law*, Manchester University Press, 2020.

In the same way, in the light of the above exposed emerging norm-set, the principle referring to the duty of conserving the cultural heritage of peoples to transmit it to future generations has been reiterated by a progressively relevant part of the doctrine.[618]

Such assumption refers, notably, to the sustainability-led interpretation of the World Heritage Convention pursuant to art. 3, para. 2, lett. a) and b) of the Vienna Convention on the Law of Treaties enhanced by some authors, according to which, as also referred in the Summary Records of the General Assembly of States Parties to the WHC, the treaty should be interpreted from a sustainable development perspective, such as to ensure the long-term conservation of world cultural heritage.[619]

As for the reason of such assumption remarked by these authors, notably, there is the acknowledged strict interconnection subsisting among the fields of cultural heritage, human rights and sustainable development, which need to be considered as three substantial, interdependent and indissoluble aspects of the enhancement and safeguard of the core value of human dignity. In the same way, other relevant evidence of such strict interconnection is enshrined, *inter alia*, in the provisions of the already mentioned 2016 Report on the intentional destruction of cultural heritage which emphasizes, at its paras. 6 and 7, the importance of preserving cultural heritage "not only in itself", but also in relation to its dimension within the human identity and development process and in virtue of its significance for future generations. As for the basis of such conception, as it has been stressed on in the previous paragraph, there may be notably the duty of protecting cultural heritage pursuant to art. 15.1 (a) of the ICESCR and its General Comment No. 21[620], as well as of what is established by art. 27 of the ICCPR and, more in general, of the existing international framework for the protection of cultural rights.

Conclusions

As a result of the study exposed in the above Chapters, this thesis sheds some lights on the current global framework for the worldwide protection of cultural heritage applicable in the territories of States to ensure adequate protection and conservation to *all* the elements of worldwide cultural heritage of peoples, possibly endangered both in the event of armed conflict and in peace time.

[618] See among others Andrea Cannone, 'La Convenzione UNESCO del 1972 sulla tutela del patrimonio mondiale culturale e naturale' in *La tutela dei beni culturali nell'ordinamento internazionale e nell'Unione Europea* (EUM 2020) 86.
[619] WHC Policy, Draft Resolution, para. 9.
[620] See *supra.*

In particular, this thesis delineates the scope of the existing global framework progressively set-up, within the decades, by the United Nations and UNESCO for the safeguard and protection of the cultural property of nations and peoples. In this sense, the research clarifies which are the actual features and shortcomings of such a norm-set, identifying their feasible causes as well as their consequences in terms on the effective conservation and transmission of the cultural heritage of people within the territories of States.

Concerning its first main outcome, this thesis highlights the remarkable *fragmentation* of the current international framework established by the United Nations, and, notably, by UNESCO, for the worldwide protection of worldwide cultural inheritance and property. As for the reasons of such a shortcoming, a feasible cause might be found in the historical development of such norm-set, as well as in its gradual expansion at the global level, which might have played a rather significative role in such progressive dilution. As a matter of fact, international cultural heritage law was born as a branch of humanitarian law and it has developed, since its first dispositions enshrined in the Lieber Code (1863) and in the Roerich Pact (1935), as a norm-set dedicated to the safeguard and protection of the cultural property of peoples put at risk of threat, *notably*, in the event of armed conflict, in the context of which its jeopardization may occur on the part of the armed groups involved in the territories of the concerned States. As a consequence of such an attitude, there is the existing great commitment of the United Nations and UNESCO in the context of the protection of the cultural heritage possibly jeopardized in the event of international and non-international armed conflicts, which still seem to appear the *main concern* of the international community and international organizations in the field of cultural heritage protection. Evidence of such assumption consist, notably, in the pivotal role played at the global level by the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict ('1954 Hague Convention') adopted by UNESCO in the aftermath of World War II, as well as in the increasing norm-set progressively set up by the UN Security Council and General Assembly for the worldwide safeguard of the cultural heritage endangered by the most recent armed conflicts. As an outcome of such global commitment, dwelling into the study of the 1954 Hague Convention's dispositions, this thesis highlights how, in this context, UNESCO has indeed come up with the setup of a *general obligation*, pending on its States Parties, establishing the duty of preserving from the event of armed conflict *all* the elements of their cultural property possibly endangered by warfare and its consequences. Precisely, reference is made to the provisions entailed in art. 4 of the 1954 Hague Convention, as well as to the conception of the cultural property 'belonging to *any people whatsoever*' as a common source and core value for the whole humankind, as it is stated in the preamble of the treaty. Concerning its nature, and even more in view of its consecration by art. 4 and followings of the 1954 Hague Convention, such general duty of cultural heritage protection in

warfare appears as having progressively reached, at the global level, the value of a *customary norm*. As a matter of fact, it is considered as such in the context of the jurisprudence of the ICTY concerning the massive destruction of cultural heritage occurred in the Former Yugoslavia between 1991 and 1995, in occasion of which the attacks perpetrated by the armed groups in the event of the conflict have been judged as violating customs of international law generally established in the international community, as well as in the context of the more recent Al Mahdi case judged in 2016 by the ICC.

As a consequence of such outcome, it raises the question concerning, indeed, the *effective scope* of such general obligation towards cultural heritage protection established by UNESCO in the context of the 1954 Hague Convention and, more in general, in the safeguarding of cultural inheritance from the threats of war. As a matter of fact, this issue comes even more clear if one considers UNESCO's ultimate purpose of conserving and protecting the world's cultural inheritance in peacetime and in war, and without any discrimination, as it is established by art. 1 its Constitution.

Indeed, it is in the light of the above considerations that this thesis focuses on the fact that, notwithstanding with the above mentioned UNESCO's general attitude towards the protection of worldwide inheritance, the organization appears as having *mainly overlooked*, yet, the opportunity of establishing an equally applicable general norm, as the one entailed within the 1954 Hague Convention, establishing the duty of protection and conservation of all the elements of worldwide cultural heritage possibly threatened, in the territories of States Parties, by *circumstances other* than the event of warfare.

Such assumption may be true, in particular, in view of the study of the effective scope of the norms of reference adopted under the UNESCO aegis with regard to the conservation of cultural heritage *in peacetime* – in particularly consisting, at the current time, in the framework set up by the 1972 World Heritage Convention. Notwithstanding with its 'universal' vocation towards the conservation and promotion of the worldwide cultural heritage of peoples,[621] in fact, the treaty seems as not foreseeing, within the scope of its disposition, *any kind of general obligation* pending on States Parties towards the safeguard of humankind's heritage. Representing, with its 194 States Parties as of October 2020,[622] the most ratified international treaty in the field of cultural heritage protection, the 1972 World Heritage Convention comes as the result of the international community's effort to face the increasing threat to cultural heritage caused "*not only* by the traditional causes of decay, *but also* by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction".[623] To this end, and to protect the worldwide cultural heritage

[621] Which is expressed, above all, in the preamble of the treaty.
[622] See "World Heritage Convention States Parties – Ratification status" available at https://whc.unesco.org/en/statesparties/. Last visit 20 April 2023.
[623] World Heritage Convention, preamble. Emphasis added.

possibly endangered in peacetime, the 1972 World Heritage Convention sets up indeed a series of obligations pending on its States Parties, to which is attributed "the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations" of the cultural heritage situated on their territories pursuant notably to art. 4 of the treaty. However, when it comes to the range of applicability of such obligations, the present research highlights how, notwithstanding with its objective of preventing "the deterioration or disappearance of *any* item of the cultural […] heritage" as it is established in its preamble,[624] the 1972 World Heritage Convention seems as actually not entailing, within its scope, the establishment of an effective global framework for the conservation of *all* the elements of the cultural heritage of humankind possibly endangered in the territories of States, on the contrary consisting in an international instrument applicable for the worldwide protection of cultural heritage *only* in determined circumstances. As a matter of fact, the duties pending on States Parties pursuant to art. 4 appear, also in the light of their interpretation provided by the WHC Operational Guidelines, as *not* entailing any general obligation towards the protection of worldwide cultural heritage pending on States Parties. On the contrary, it seems, such duties appear more as a series of determined, *special obligations*, referring to the necessity of conserving, only, a set of *specific* cultural elements identified by the other provisions of the 1972 World Heritage Convention, in reason of their attributed significance by the international community. In particular, pursuant to the mechanisms set up by the 1972 World Heritage Convention, an adequate international protection and safeguard appears as to be conferred, *only*, to those specific cultural goods and sites identified, by the means of the procedure established by art. 11 of the treaty as well as by the WHC Operational Guidelines, as of "Outstanding Universal Value" for the international community, in reason of their attributed historic, artistic, architectonic or anthropological significance.[625] On the contrary, the 1972 World Heritage Convention seems to mainly overlook, within its framework, the existence of any kind of equally effective international protection to be possibly conferred to those other elements, also part of the cultural heritage of peoples, which, although possibly endangered in the territories of States by circumstances other than conflicts and war, may not be inscribed, at the moment of the threat, in the UNESCO World Heritage List.[626]

In the light of the above, indeed, one may remark how the international community seems, at the current time, as having adopted a rather *reluctant* attitude towards the general conservation of cultural heritage in times of peace, and, notably, towards the protection of those 'non-Outstanding', common

[624] Emphasis added.
[625] "[States] will do all it can to this end, to the utmost of its [their] resources and, where appropriate, with any international assistance and co-operation"; World Heritage Convention, art. 4.
[626] World Heritage Convention, art. 11.

elements of worldwide cultural heritage not inscribed, for different reasons, in the World Heritage List, and nevertheless possibly endangered, in the territories of States, in the absence of war.

Indeed, it is as a consequence of such resisting attitude that one can consider the series of irreversible threats and attacks addressed against the cultural inheritance of humankind, carried out notably in the context of the reiterated acts of intentional destruction of cultural heritage and 'cultural cleansing propaganda' increasingly occurring, in the absence of war, in the territories of States. This consideration may be true, even more, if one acknowledges how such phenomenon is showing no sign of slowing down, as it comes clear, notably, from the most recent episodes of cultural heritage destruction occurred in the United States and Afghanistan in the biennium 2020-2022.

About the feasible causes of such remarkable discrepancy in the current UNESCO norm-set, which, as it has been anticipated, seems as establishing a general obligation of cultural heritage preservation applicable *only* in the event of war, thereby overlooking the issue of ensuring an equal protection, in the hypothesis of threats occurring in peace, to *the same* cultural heritage, this thesis suggests how such *aporia* may have been provoked, notably, by the conception itself of 'cultural heritage' adopted under the UNESCO aegis.

As a matter of fact, and notwithstanding with its rather vast arsenal of international treaties and tools, the UNESCO norm-set does not foresee an established, unique definition for 'cultural heritage' applicable both in peace time and in war and recognized as such by the organization and its States Parties. As for the reasons for the such *aporia* – which are investigated, in the context of the present study, in an interdisciplinary perspective entailing notably studies of legal anthropology and cultural anthropology –, they may lie in the remarkable *universalist* approach adopted in the context of the whole UNESCO governance, as well as, in general, under the aegis of the United Nations, for the definition and regulation of 'sensitive' matters as human rights, culture, and, in particular, cultural heritage. As a matter of fact, it seems, the United Nations have been found as having adopted, through the decades, a rather *Western-oriented* perspective in the field of the enhancement of global issues like rule of law, social justice, and fundamental freedoms. Indeed, it might be as a consequence of such approach that the organization seems as having progressively proposed a one-to-one, unique narrative of such 'critical' themes intrinsically connected with the Euro-North American sensitivity and traditions characterizing the organization's establishment – and, notably, of cultural matters. As for the ultimate reasons of such attitude, possibly, there may be the *composition itself* of the United Nations and UNESCO and, in particular, of their governing bodies. Since their settlement in 1945, the two organizations appear, hence, as having been mainly influenced in their activities by their fonctionnaires and personnel belonging to a Western tradition and therefore sharing, in view of their common cultural background, a determined, unique conception of 'cultural heritage'.

In this context, it appears how such Western bias entailed in the global mechanisms of international organizations – which has been raised, since the adoption of the 1948 Universal Declaration on Human Rights, also by relevant part of the doctrine and, notably, by Martti Koskenniemi – may have played a rather significant role, even more, under the UNESCO aegis and, notably, within the 1972 World Heritage Convention framework.

In view of the above, hence, it comes clear how the choice of not opting, within the UNESCO framework, and, in particular, in the context of the 1972 World Heritage Convention, for the adoption of a pre-established, unique definition for 'cultural heritage', capable of conferring to *all* the elements of worldwide cultural inheritance an equal and encompassing international protection, may derive, precisely, from such *intrinsic Western bias* entailed within UNESCO decisional processes, which appears as unavoidably leading the organization towards the adoption of an *Eurocentric* point of view in the conception of cultural heritage as a 'sensitive' phenomenon. In particular, such evidence comes clear when one delves into the study of the mechanisms set up by the 1972 World Heritage Convention and its WHC Operational Guidelines for the identification of the cultural elements of "Outstanding Universal Value" to be inscribed in the World Heritage List. In this context, such 'biased' UNESCO perspective appears as influencing, in the absence of an established definition of 'cultural heritage' worldwide applicable in the selection processes, the naming of 'Outstanding' cultural elements deserving international protection *ex* art. 4 of the treaty. Pursuant to the WHC Operational Guidelines, in fact, the identification, within the territories of States Parties, of those cultural goods and sites considered valuable "from the point of view of history, art or science", as well as "from the historical, aesthetic, ethnological or anthropological point of view"[627] is completely left to the discretionary evaluations of the World Heritage Committee, which seems to represent the ultimate authority uncharged of establishing the "Outstanding Universal Value" of worldwide elements of cultural inheritance. In other words, according to the 1972 World Heritage Convention, it seems how it is only this latter organ which has the power, together with its Advisory Bodies, to determine what is 'Outstanding' and what is not – and, more importantly, which parts of the world heritage of peoples deserve international protection in case of threat pursuant to art. 4 of the treaty.

As a result of such a framework, and in the light of the above, one can raise the remarkable, still existing, unbalance between 'Western' and 'non-Western' cultural elements inscribed in the World Heritage List, which represent true evidence the rather 'monumental' approach adopted by the World Heritage Committee in the definition of cultural heritage – and the consequential conferral of international protection. About the feasible reasons of such disproportion, possibly, one may consider the inescapable adoption of the 'point the view of the observer' in the context of the 'cultural heritage

[627] World Heritage Convention, art. 1.

selection' processes, which appears as being unavoidably entailed within the evaluations and decisions of every human being or group – as it has also been argued, in the field of anthropological studies, by the two referential authors Franz Boas and Bronislaw Malinowski.

Hence, and most importantly, it is in the light of all the considerations and outcomes illustrated in the above paragraphs that it raises the question, tackled by this thesis as its core issue, concerning the identification of feasible *solutions* or *alternatives* possibly coping with the actual normative void entailed in the current international framework – established, notably, by UNESCO – for the protection of cultural heritage. As a matter of fact, the acknowledged current status of the international norm-set dedicated to the safeguard and conservation of cultural inheritance in war and in peacetime, as well as the actual shortcomings entailed within the United Nations and UNESCO's composition itself, leave open the question concerning the eventual existence, or the possible, progressive, formation, of an *international general obligation*, pending on States, such as to entail the duty of safeguarding and conserving *all* the elements part of the cultural heritage of peoples – considered in all its diversities, *not only* in the event of armed conflict, and irrespective of the attribution of an eventual 'Outstanding Universal Value' established by the World Heritage Committee.

In this sense, this thesis suggests how a possible solution to the above mentioned *aporia*, regarding the current poor capability of the international community of intervening in the context of the worldwide protection of cultural heritage in times of peace, may be provided by the existing international legal framework dedicated to the promotion and protection of human rights – and, in particular, *cultural rights*. As for the reasons of such a suggestion, notably, one may identify the warnings launched, since the first 2000s, by the Special Rapporteur in the field of cultural rights who, insisting on the effective necessity of finding out feasible solutions to cope with the current partial inconsistence of the international cultural heritage framework, insists on the strict interconnection existing between cultural heritage and human right as a tool for States to strengthen their national cultural goods and sites' protection. In detail, the 2016 Report on the intentional destruction of cultural heritage – adopted by the Former Special Rapporteur in the field of cultural rights Farida Shaheed in the aftermath of the 'new wave of iconoclastic propaganda' affecting the globe within the last two decades – insist on the necessity of reinforcing the international community action towards the protection of cultural heritage situated in the territories of States and endangered by intentional destruction, consisting this latter offence of an *international violation of human rights*. Indeed, it is starting from such assumption that one might suggest how a possible alternative to the current 'selective' approach adopted by the international community, and, notably, by UNESCO, in the protection of the cultural heritage of peoples endangered in peacetime might consist in approaching the issue, notably, through the lens of the international instruments adopted through the decades for

the protection of cultural rights as part of the human rights framework, which is composed, in terms of enforceability, also of *binding norms* entailing positive and negative obligations on their States Parties. Such assumption refers, notably, to the provisions entailed in the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), adopted by the UN General Assembly in 1966 and establishing, at its art. 15 para. 1 lett. c), the existence of a human right to take part in cultural life. Ratified by 171 States Parties as of July 2020,[628] the treaty establishes, together with its General Comment No. 21 as it has been adopted by the *ad hoc* Committee on Economic, Social and Cultural Rights ('CESCR'), the existence of a 'human right to culture' to be conceived in its widest sense, together with all its features possibly relevant in the context of a civil society. Particularly relevant for this thesis, art. 15 para. 1 lett. c) of the ICESCR establishes, notably, the existence of a *human right to cultural heritage*, to be ensured *to every person in the world* – considered as an individual, as a group or in association with the others – by the competent States' authorities, which have to act to the maximum of their available resources to guarantee an appropriate and effective enhancement of such fundamental freedom. As for the identification of the general interest underpinning the adoption of such provision, it seems, such obligation towards the protection of worldwide cultural heritage in reason of its centrality in the enhancement of the human right to culture appears as coming as an unavoidable consequence, within the ICESCR framework, of the principles of inviolability of *human dignity* and of respect of diversities. As a matter of fact, art. 15 para. 1 lett. c) of ICESCR and CESCR General Comment No. 21 establish that the right of everyone to have access to its referential cultural heritage is intrinsically connected with the core value of *cultural diversity*, according to which every culture, irrespective of its possibly attributed 'significance' or 'value' for humanity, deserves *equal* and *universal* protection within the global context.

Adopted under the aegis of the United Nations during the Cold War, the above-mentioned norm-set appears, in the light of the present study, as entailing a rather more 'inclusive', *relativist* approach towards the promotion of the human right to culture and, notably, to the conception of 'cultural rights' and 'cultural heritage'. Remarkably, one may note how ICESCR insists on the necessity of ensuring the respect and promotion of the human right to take part in cultural life in virtue of its importance in terms of cultural identity, rather than of its significance from the historic, artistic or aesthetic point of view. As evidence of such approach, notably, one may identify the focus of CESCR General Comment No. 21 on the necessity of protecting the cultural heritage of all peoples conceived both as 'majoritarian' and 'minoritarian' groups, as well as the strict interconnection of such disposition with

[628] For the ratification status of the treaty, see https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/treaty.aspx?treaty=cescr&lang=en. Last access 25 April 2023.

the scope of art. 27 of the International Covenant on Civil and Political Rights ('ICCPR'), consecrating the human right to cultural diversity.

Supporting such assumption in the light of its interdisciplinary feature, this thesis remarks how such rather *relativist* and diversity-oriented approach towards the protection of cultural rights and cultural heritage comes as a consequence of the historical and political circumstances in which the two treaties were adopted. Entered into force in 1976, ICCPR and ICESCR come in fact as the result of the significant negotiations carried out, under the aegis of the United Nations, between the representatives of the United States and USSR which used to promote, in the context of the Cold War, two slightly different approaches towards the protection and enhancement of human rights and fundamental freedoms. It is for this reason, indeed, that the framework set up by ICCPR and ICESCR, notably, in the field of cultural heritage protection seems as not entailing the same, above mentioned, remarkable Euro-American attitude towards the conception and regulation of global 'critical' issues enshrined within the provisions of the UNESCO framework – and, notably, in the 1972 World Heritage Convention. Indeed, it is in the light of such considerations that the above-mentioned norm-set, dedicated to the worldwide enhancement of universal human rights and fundamental freedoms, may represent a rather more effective tool for the international protection of the cultural heritage of peoples if compared to the traditional UNESCO notably dwelling around the 1972 World Heritage Convention. As for the reason of such an assumption, there is the capacity of the global human rights norm-set of ensuring a rather more inclusive, *relativist*, protection of *all* the elements of worldwide cultural inheritance, considered in view of their *identarian* and 'sentimental' value rather than in reason of its possibly attributed artistic, aesthetic or historic significance.

In view of the above, and notwithstanding with the still reluctant attitude of the international community towards the protection of cultural heritage beyond the scope of the above-mentioned UNESCO aegis, it may also be possible to identify several elements in favor of the progressive *integration* between the traditional framework for cultural heritage protection as a common source and the prior named human rights norm-set. Encouraged by part of the doctrine as an 'emerging customary norm' progressively establishing a general obligation, pending on States, towards the protection and conservation of all the elements of the cultural heritage situated in their territories, *both in peace time and in war*,[629] the necessity of protecting worldwide cultural inheritance of peoples as an element of the human right to culture is increasingly approached also by international jurisprudence. As a matter of fact, this thesis shows cultural goods and sites, traditionally considered, notably in the case law of several regional tribunal and in particular of ECtHR, mainly for their economic value, are gaining progressive relevance in the context of the enhancement of human rights

[629] See Chapter III, para. III.II.ii.

in the name of their significance for the concerned community – having this latter tendency been defined by the ECtHR as a '*sujet en évolution*'.[630]

Without prejudice to the above considerations, another rather significant element in favor of the enhancement of the importance of protecting and conserving all the cultural heritage of peoples for reasons *other* than its eventual 'Outstanding Universal Value' or the event of armed conflict has been progressively raised, at the international level, in the context of the gradually establishing global framework for the worldwide promotion of sustainable development. Enshrined within the dispositions of the United Nations 2030 Agenda,[631] the principle establishing the necessity of conserving all the elements of the worldwide cultural inheritance, to transmit them intact to future generations, is entailed in the scope of Goal 11.4 of the document, which declares the importance of "strengthen[ing] the efforts to protect and safeguard the world's cultural […] heritage"[632] in view of its importance for *all* individuals groups and societies, coexisting in the globe in respect of the two principles of multiculturalism and cultural diversity. In the same way, such importance of preserving and enhancing cultural heritage, more than for its acknowledged value from the historic, artistic or architectonic point of view, for its pivotal role in the processes of identity-making and society-building of future generations, appears as having been progressively considered also in the context of the UNESCO framework which, although traditionally devoted to the protection of cultural heritage as an aesthetic or artistic feature of a determined society, seems as progressively entailing within its disposition also a remarkable intergenerational perspective.

In particular, it appears, such principles – which are gaining an increasingly core position within the UNESCO framework since the adoption of the 1997 Declaration on the Responsibilities of Present Generations towards Future Generations – have been progressively included by the organization in the context of the interpretation of the 1972 World Heritage Convention. Such assumption refers, notably, to the adoption of the UNESCO World Heritage Convention Policy for Sustainable Development (2012), which, in virtue notably of the rather vast, *global*,[633] support obtained by the document in the context of the World Heritage Committee, appears as a rather clear sign of a progressively strengthening commitment among the international community towards the protection of cultural heritage in times of peace, which necessitates international protection, in all its diversity,

[630] ECtHR, Ahunbay and Others v. Turkey (Application No. 6080/06), 21 February 2019.
[631] Transforming our World: the 2030 Agenda for Sustainable Development, UN. Doc. A/RES/70/1 (2015), 25 September 2015.
[632] 2030 Agenda, Goal 11.4.
[633] In particular, the present research highlights how the adoption of the document has been enhanced, within the UNESCO context, not only by the 'dominant' Euro-North American component of the World Heritage Committee, rather receiving a balanced support, among others, by Brazil, Cote d'Ivoire, Philippines, and Turkey.

in the name of its capability of enhancing human dignity and providing collective benefits for present and future societies, irrespective with its possible 'Outstanding Universal Value'.[634]

Although consisting, as it comes clear from the present study, in a *progressively emerging* framework currently made up, for its vast majority, basically of non-binding documents and provisions, such new, more inclusive, approach towards cultural heritage conservation such as to ensure, in virtue of cultural elements' pivotal role in the enhancement of cultural rights – notably ex art. 15 para. 1 lett. c) ICESCR – and of their centrality in the sustainable development framework, effective international protection to all the parts of the cultural heritage of peoples in spite of its diversity, seems as gaining progressive relevance within the global context.

Indeed, and as for the final outcome of this analysis, it is in the light of all the above, and in a perspective *de iure condendo,* that it comes clear the importance of *encouraging*, also in view of the emerging doctrine and jurisprudence progressively acknowledging the existence of a general interest towards cultural heritage protection, *such emerging new*, relativist, 'human oriented' approach towards the protection of cultural inheritance, which may actually confer, in a gradual way, a *more inclusive and effective* protection to worldwide cultural heritage. As a matter of fact, in view of the considerations carried out in this thesis as well as of the worldwide events currently affecting cultural heritage worldwide, it appears how the existing normative void unavoidably caused by the actual fragmentation of the international UNESCO framework for cultural heritage protection is *in concreto* continuously damaging not only the elements of the cultural heritage of people conceived as 'common sources' and property, but also, and even more, those peoples and communities which are affected by such attacks in the context of the enhancement of their human right to culture – in the name, other than of art. 15 of ICESCR, of the 'humanist' and 'identarian' value attributed to cultural heritage, since the adoption of its Constitution in 1945, by UNESCO itself.

In this sense, and above all, this thesis identifies its main and final outcome in the actual necessity of recognizing the need of *strengthening* the international community action, and, notably, the existing framework established under the aegis of United Nations and UNESCO, for the worldwide protection of all the elements of the cultural heritage of peoples, appearing this latter, in the light of all the above, as a pivotal component of the enhancement of human rights and sustainable development.

Such assumption may gain even more relevance, notably, in view of the most recent episodes of intentional destruction of cultural heritage repeatedly occurring, since the first 2020s, in several areas of the world, which appear as progressively jeopardizing the cultural inheritance of worldwide communities and peoples thereby provoking irreversible losses, for both present and future generations. As a matter of fact, it is undeniable how the gradual but continuous deterioration and

[634] UNESCO World Heritage Convention Policy for Sustainable Development, para. 4

disappearance of goods and sites part of the worldwide cultural heritage, which is currently endangered, in the absence of war as well as in peacetime, by continuous threats and attacks, has been worldwide recognized, at the global level, as *urgently necessitating* a significant reinforcement of the international community's action for the worldwide protection of cultural inheritance, in the name of the latter's importance for civil society. In the same way, such necessity of *strengthening the global action*, and in particular the activity of States and international organizations as they have been called up in the context of the adoption of the 2016 Report on the intentional destruction of cultural inheritance, appears as even more relevant in view of cultural heritage's intrinsically entailed, although progressively recognized *in concreto*, core relevance in the affirmation and the enhancement of the fundamental values of human dignity and identity, to be ensured and conferred to present and future generations in a progressive, intergenerational perspective.

Bibliography

Chapters in volumes

Abouddahab, 'Protection du patrimoine culturel et droits de l'homme' in Nazfiger and Scovazzi (ed. by), *The cultural heritage of mankind* (Nijhoff, 2008), pp. 251-296

Ackerly, *Universal Human Rights in a World of Difference* (Cambridge University Press, 2008)

Adams and van der Vijven (ed. by), *Non-Western Identity* (Springer, 2022)

Albericus Gentili, *De Jure belli libri tres* (1612)

Alland, *The Artistic Animal: An Inquiry to the Biological Roots of Art* (New York, 1977)

Anghie, 'Colonial Origins of International Law' in Laws of the Postcolonial', in Darian-Smith and Fitzpatrick (ed. by), *Laws of the Postcolonial* (University of Michigan Press, 1999), pp. 39-73

Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004)

Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (University of Minnesota Press, 1996)

Arnaud (ed. by), *Dictionnaire encyclopédique the théorie et de sociologie du droit* (Paris LGDJ, 1988)

Balladore Pallieri, *I "principi generali di diritto riconosciuti dalle Nazioni civili" nell'art. 38 dello Statuto della Corte Permanente di Giustizia Internazionale dell'Aja* (Torino, 1931)

Barral and Dupuy, "Principle 4: Sustainable Development through Integration", in Vinuales, (ed. by), *The Rio Declaration on Environment and Development: A Commentary* (Oxford: Oxford University Press, 2015)

Barreto, 'Imperialism and Decolonization as Scenarios of Human Rights History,' in Barreto (ed. by) *Human Rights from a Third World Perspective: Critique, History and International Law* (Cambridge Scholars Publishing, 2013), pp. 140-171

Beyerlin, "Sustainable Development" in *Max Planck Encyclopedias of International Law*, Peters and Wolfrum (ed. by), Oxford Public International Law (Oxford University Press, 2023)

Blake, 'Cultural Heritage and Human Rights' in Blake, *International Cultural Heritage Law* (Oxford University Press, 2015), pp. 1-22

Blake, 'Cultural Heritage Law: Contextual Issues', in Blake, *International Cultural Heritage Law* (Oxford University Press, 2005), pp. 1-22

Blake, 'On defining the cultural heritage', in Connoly (ed. by), *Cultural Heritage Rights* (Routledge, 2015), pp. 34-57

Blake, 'Safeguarding Intangible Cultural Heritage', in Francioni and Vrdoljak (ed. by), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press, 2020), pp. 347-370

Blake, Lixinski (ed. by), *The 2003 UNESCO Intangible Heritage Convention. A Commentary* (Oxford University Press, 2020)

Boas, *Race and Democratic Society* (New York, 1945)

Boer, 'The Environment and Cultural Heritage', in Francioni and Vrdoljak (ed. by), *The Oxford Handbook of International Cultural Heritage* Law (Oxford University Press, 2020), pp. 318-348

Bonafé and Palchetti, 'Relying on General Principles in International Law', in Brolmann and Radi (ed. by), *Research handbook on the theory and practice of international lawmaking* (Research handbook on international law, 2016)

Bories, *Le patrimoine culturel en droit international. Les compétences des Etats à l'égard des élements du patrimoine culturel* (Pedone 2011)

Bourdieu, *La noblesse d'État. Grandes écoles et esprit de corps* (Paris, Minuit, 1989)

Brumann, ‘The Best of the Best: Positing, Measuring and Sensing Value in the UNESCO World Heritage Arena’, in Niezen and Sapignoli (ed. by), *Palaces of Hope. The Anthropology of Global Organizations* (Cambridge University Press, 2017), pp. 245-265

Burke, *Reflections on the Revolution in France* (Raleigh N.C.: Alex Catalogue, 1998)

Cannizzaro, *Diritto internazionale* (Giappichelli 2022)

Cannone, ‘La Convenzione UNESCO del 1972 sulla tutela del patrimonio mondiale culturale e naturale’ in *La tutela dei beni culturali nell’ordinamento internazionale e nell’Unione Europea* (EUM 2020), pp. 83-96

Caracciolo, ‘Il Caso Al Mahdi: Responsabilità Penale Internazionale per Crimini di Guerra e Distruzione Intenzionale del Patrimonio Culturale’ in Triggiani, Cherubini, Ingravallo (ed. by), *Dialoghi con Ugo Villani* (Cacucci editore, 2017), pp. 109-118

Carducci, ‘Articles 4-7, National and International Protection of the Cultural and Natural Heritage’, in Francioni with Lenzerini (ed.by), *The 1972 World Heritage Convention. A Commentary* (Oxford Commentaries on International Law, 2008), pp. 103-117

Cassaniti, and Menon (ed. by), *Universalism without Uniformity: Explorations in Mind and Culture* (Chicago, IL, 2017; online ed., Chicago Scholarship Online, 24 May 2018)

Chamberlain, *War and Cultural Heritage: An Analysis of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and Its Two Protocols* (Leicester, 2004)

Chechi, ‘The Cultural Dimension of Climate Change: Some Remarks on the Interface between Cultural Heritage and Climate Change Law’ in von Schorlemer and Maus (ed.by), *Climate Change as a Threat to Peace: Impact on Cultural Heritage and Cultural Diversity* (Peter Lang AG, 2014), pp. 161-198

Chevallier, *Le droit en procès* (ed. by) (Paris Puf, 1984)

Ciciriello, ‘L'ICCROM, l'ICOMOS e l'IUCN e la salvaguardia del patrimonio mondiale culturale e naturale’, in Benvenuti and Sapienza (ed. by), *La protezione del patrimonio mondiale* (Giuffrè 2007), pp. 239-253

Condorelli, ‘Conclusioni generali’ in Benvenuti and Sapienza (ed. by), *La Tutela Internazionale dei Beni Culturali nei Conflitti Armati* (Giuffré, 2007), pp. 371-390

Condorelli, Fonti (Dir. Int.), *DDP*, vol. III, (2006)

Conforti and Iovane, *Diritto internazionale, XII edition* (Editoriale scientifica, 2021)

Conforti, *Diritto Internazionale* (Editoriale Scientifica, 2018)

Cornu, *Le droit culturel des biens. L’intérêt culturel juridiquement protegé* (Bruylant, 1996)

Corradetti, *Relativism and Human Rights: A Theory of Pluralistic Universalism* (Springer, 2009)

Cowell, *Defensive Relativism: The Use of Cultural Relativism in International Legal Practice* (University of Pennsylvania Press, 2023)

Crowder, *Isaiah Berlin: Liberty, Pluralism and Liberalism* (Key contemporary thinkers ed., 2004)

David, *Les grands systèmes de droit contemporains* (Paris Dalloz, 1974)

de Mulinen, *Handbook on the Law of War for Armed Forces* (ICRC, 1989)

Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, 2004)

Donders, 'Foundations of Collective Cultural Rights in International Human Rights Law', in Jakubowski (ed. by) *Cultural rights as collective rights: An International Law perspective* (Brill Nijhoff 2016), pp. 87-112

Dorough and Wiessner, 'Indigenous Peoples and Cultural Heritage', in Francioni and Vrdoljak (ed. by), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press, 2020), pp. 407-429

Drazewska, *Military Necessity in International Cultural Heritage Law* (Brill Nijhoff, 2022)

Droubi and d'Aspremont (ed. by), *International organisations, non-State actors, and the formation of customary international law* (Manchester University Press, 2020)

Dupuy and Kerbrat, *Droit international public* (Paris: Dalloz, 2010)

Dworkin, 'Military Necessity and Due Process: The Place of Human Rights in the War on Terror' in Wippman and Evangelista (ed. by), *New Wars, New Laws?* (Transnational, 2004), pp. 53-73

Dworkin, *Justice for Hedgehogs* (Belknap Pr., 2013)

Dworkin, *Taking Rights Seriously* (London Duckworth, 1978)

Elias, *The Civilizing Process: The History of Manners and State Formation and Civilization* (Oxford Blackwell, 1994)

Eriksen, 'Between universalism and relativism: a critique of the UNESCO concept of culture' in Cowan, Dembour and Wilson (ed. by), *Culture and Rights. Anthropological Perspectives* (Cambridge University Press, 2012), pp. 127-148

Featherstone, *Global Culture: Nationalism, Globalization and Modernity* (London: Stage, 1990)

Ferchichi, 'La Convention de l'UNESCO concernant la protection du patrimoine mondial culturel et naturel', in Scovazzi and Nazfiger (ed. by), *The Cultural Heritage of Mankind – Le patrimoine culturel de l'humanité* (Brill Nijhoff, 2008), pp. 455-486

Ferguson, *The History of Civil Society* (1767)

Finkielraut, *La defaite de la pensée* (Paris Gallimard, 1987)

Finnis, *Natural Law and Natural Rights*, second edition (Oxford University Press, 2011)

Fitzmaurice (ed. by), *Treaty Interpretation and the Vienna Convention* (Brill, 2010)

Focarelli, *Diritto internazionale* (CEDAM 2021)

Focarelli, *Diritto internazionale* (CEDAM, 2021)

Francioni and Lenzerini, 'The Future of the World Heritage Convention: Problems and Prospects', in Francioni with Lenzerini (ed. by), *The 1972 World Heritage Convention. A Commentary* (Oxford Commentaries on International Law, 2008), pp. 402-410

Francioni and Lixinski, 'Opening the Toolbox of International Human Rights Law in the Safeguarding of Cultural Heritage, in Durbach and Lixinski (ed. by), *Heritage, Culture and Rights. Challenging Legal Discourses* (Bloomsbury, 2017), pp. 1-7

Francioni, 'A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage', in Abdulqawi (ed. by), *Standard-setting in UNESCO, volume I: Normative Action in Education, Science and Culture, Essays in Commemoration of the Sixtieth Anniversary of UNESCO* (UNESCO, 2007), pp. 221-236

Francioni, 'Culture, Heritage and Human Rights: an Introduction', in Francioni and Scheinin (ed. by), *Cultural human rights* (Brill Nijhoff, 2008), pp. 1-15

Francioni, ‘La protezione internazionale dei beni culturali: un diritto consuetudinario in formazione?’ in Benvenuti and Sapienza, *La Tutela Internazionale dei Beni Culturali nei Conflitti Armati* (Giuffré 2007), pp. 3-34

Francioni, ‘Preamble’, in Francioni (ed. by), *The 1972 World Heritage Convention: A Commentary* (Oxford Commentaries on International Law, 2008), pp. 11-20

Francioni, ‘The Evolving Framework for the Protection of Cultural Heritage in International Law’, in Borelli and Lenzerini (ed. by), *Cultural Heritage, Cultural Rights, Cultural Diversity* (Brill Nijhoff, 2012), pp. 1-25

Francioni, ‘World Cultural Heritage’, in Francioni and Vrdoljak (ed. by), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press, 2020), pp. 250-271

Francioni, *Evaluation du travail normative de l’UNESCO dans le domaine de la culture: la Convention de 1972 pour la protection du patrimoine mondial culturel et naturel. Rapport Final* (Paris, April 2014)

Frigo, *La protezione dei beni culturali nel diritto internazionale* (Giuffré, 1986)

Frulli, ‘Distruzione dei Beni Culturali e Crimine di Genocidio: l'Evoluzione della Giurisprudenza del Tribunale Penale Internazionale per la ex Jugoslavia’, in Benvenuti and Sapienza (ed. by), *La Tutela Internazionale dei Beni Culturali nei Conflitti Armati* (Giuffré, 2007), pp. 253-274

Gaja, ‘General Principles of Law’, in *Max Planck Encyclopedias of International Law*, Peters and Wolfrum (ed. by), Oxford Public International Law (Oxford University Press, 2023)

Gaja, ‘Principi generali del diritto (diritto internazionale)’ in *Enciclopedia del Diritto*, vol. XXXV, (1986)

Gaja, “Does the European Court of Human Rights use its Stated Methods of Interpretation?” in AA.VV., *Divenire sociale e adeguamento del diritto. Studi in onore di Francesco Capotorti* (Giuffré, 2013)

Gamboni, *The Destruction of Art: Iconoclasm and Vandalism since the French Revolution* (1997)

Gell, *Art and Agency: An Anthropological Theory of Art* (Oxford University Press, 1998)

Gobo and Marciniak, ‘What is Ethnography?’, in David Silverman, *Doing Qualitative Research*, (Sage Publications, 2005) pp. 28-41

Gornig, Horns and Murswiek (ed. by), *Kulturgüterschutz – internationale und nationale Aspekte* (Dunker & Humblot, 2007)

Gradoni, ‘L’exploitation des principes généraux de droit dans la jurisprudence des tribunaux pénaux internationaux’, in Fronza and Manacorda (ed. by), *La justice pénale internationale et les décisions des tribunaux ad hoc* (Giuffré, 2003)

Graebner, *Das Weltbild der Primitiven* (Ernst Reinhardt, 1924)

Graebner, *Methode der Ethnologie* (Winter, Heidelberg 1911)

Greppi, ‘La Protezione Generale dei Beni Culturali nei Conflitti Armati: dalla Convenzione dell'Aja al Protocollo del 1999’, in Benvenuti and Sapienza (ed. by), *La Tutela Internazionale dei Beni Culturali nei Conflitti Armat*i (Giuffré, 2007), pp. 75-102

Griffin, *Reaping the Whirlwind: The Taliban Movement in Afghanistan* (Pluto pr., 2000)

Grillo, *Pluralism and the Politics of Difference: State, Culture and Ethnicity in Comparative Perspective* (Oxford Clarendon Press, 1998)

Harris and Johnson, *Cultural Anthropology*, (New York,1983)

Harris, *Antropologia culturale*, (Zanichelli, 1990)

Harris, *Civilization and Its Enemies: The Next Stage of History* (Free Press, 2012)

Harris, *Cows, Pigs, Wars, and Witches: The Riddles of Culture* (New York, 1974)

Harris, *Cultural Materialism: The Struggle for a Science of Culture* (New York, 1979)

Harris, C*ulture, People, and Nature: An Introduction to General Anthropology* (New York, 1971)

Harris, *The Rise of Anthropological Theory: A History of Theories of Culture*, New York: Thomas Y. Crowell Company (Reissued 2001)

Harrison and Huntington (ed. by), *Culture Matters: How Values Shape Human Progress* (Basic Books, 2000)

Hart, *The Concept of Law* (Clarendon law series, 2012)

Hatcher, *Art As Culture: An Introduction to the Anthropology of Art* (Lanham University Press of America, 1985)

Henckaerts and Doswald-Beck (ed. by), *Customary International Law, vol. 1, The Rules* (Cambridge University Press, 2005)

Herskovitz, *Cultural Relativism: Perspectives in Cultural Pluralism* (F. Herskovitz ed., New York Random House, 1972)

Higgins, *Problems and Process: International Law and How we Use It* (Oxford, Clarendon Press, 1994)

Hobbes, *Leviathan* (1651), reprinted by John C. A. Gaskin (ed. by) (Oxford University Press, 2008

Honigmann (ed. by), *Handbook of Social and Cultural Anthropology* (Chicago Rand McNally, 1973)

Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster, 2011)

Iovane, Palombino, Amoroso and Zarra (ed.by), *The Protection of General Interests in Contemporary International Law* (Oxford University Press, 2021)

Jakubowski, 'Cultural Heritage and the Collective Dimension of Cultural Rights in the Jurisprudence of the European Court of Human Rights', in Jakubowski (ed. by), *Cultural Rights as Collective Rights. An International Law Perspective* (Brill Nijhoff, 2016), pp. 155-172

Jakubowski, 'Introduction', in Jakubowski (ed. by), *Cultural Rights as Collective Rights – An International Law Perspective* (Brill Nijhoff, 2016), pp. 1-12

Jaworski, 'Military Necessity and Civilian Immunity: Where Is the Balance?' in Sienho (ed. by), *International Crime and Punishment, Selected Issues*, vol. 2 (University Press of America, 2004), pp. 278-312

Jote, *International Legal Protection of Cultural Heritage*, (1994)

Kant, *The Metaphisics of Morals* (ed. by Mary Gregor, 1996)

Koskenniemi, 'Speaking the language of international law and politics: or, of ducks, rabbits and then some, in Handmaker and Arts (ed. by), *Mobilizing International Law for 'Global Justice* (Cambridge University Press, 2018), pp. 22-45

Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Cambridge University Press, 2006)

Koskenniemi, *The Gentle Civilizer of Nations. The Raise and Fall of International Law 1870-1960* (Cambridge University Press, 2019)

Koskenniemi, *The Politics of International Law* (Hart, 2011)

Kozymka, *The Diplomacy of Culture. The role of UNESCO in Sustaining Cultural Diversity* (Palgrave edition, 2014)

Krieger, 'Chapter 2: Society and Its Environment' in Nyrop and Seekins (ed. by), *Afghanistan: A Country Study* (Peter R. Blood ed., 1986)

Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon, 1989)

Laclau, 'Universalism, Particularism and the Question of Identity' in Rachtmann (ed. by), *The Identity in Question* (Routledge, 1995), pp. 131-156

Layton, *The Anthropology of Art* (Cambridge University Press, 1981)

Lehmann-Haupt, *Art under Dictatorship*, (Oxford, 1954)

Lenzerini, 'Article 12. Protection of properties not inscribed in the World Heritage List', in Francioni and Lenzerini (ed. by), *The World Heritage Convention: A Commentary* (Oxford, 2008)

Lenzerini, 'Fostering Tolerance and Mutual Understanding Among Peoples', in Abduqwavi (ed. by), *Standard-Setting in UNESCO, Volume I: Normative Action in Education, Science and Culture, Essays in Commemoration of the Sixtieth Anniversary of UNESCO* (2007), pp. 187-206

Lenzerini, 'Human Rights: Historical Development and Contemporary Regional Models', in Lenzerini, *The Culturalization of Human Rights Law* (Oxford University Press, 2014), pp. 75-99

Lenzerini, 'Intentional Destruction of Cultural Heritage', in Francioni and Vrdoljak (ed. by), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press, 2020), pp. 75-99

Lenzerini, *The Culturalization of Human Rights Law* (Oxford University Press, 2014)

Lévi-Strauss, *Race et histoire* (Paris: Denoel, 1952)

Li, *Ethics, Human Rights and Culture: Beyond Relativism and Universalism* (Macmillan, 2005)

Locke, *Second Treatise of Government* (1689), reprinted by Crawford Brough Macpherson (ed. by), (Hackett Publishing, 1980)

Machiavelli, *Il Principe* (1532)

Mainetti, 'Diversità Culturale e Cooperazione Culturale Internazionale alla Luce dell'Azione Normativa dell'UNESCO', in Cataldi e Grado (ed.by), *Diritto internazionale e pluralità delle culture. XVIII Convegno Napoli, 13-14 giugno 2013* (Editoriale scientifica, 2014), pp. 421-434

Mainetti, 'Diversité Culturelle à l'UNESCO: Ombres et lumières', in *Approches juridiques de la diversité culturelle* (Academie de droit international de la Hague, 2013), pp. 59-197

Mainetti, 'Diversité culturelle et droit international', in Suter, Bordessoule- Gilliéron, orinne Fournier Kiss (ed. by), *Regards sur l'interculturalité. Un parcours interdisciplinaire* (MetisPresses, 2016), pp. 139-164

Malinowski, *A scientific theory of culture and other essays* (Oxford University Press, 1944)

Malinowski, *A Scientific Theory of Culture and Other Essays Chapel Hill* (N. Carolina: The University of North Carolina Press, 1944)

Malinowski, *Argonauts of the Western Pacific: An account of native enterprise and adventure in the Archipelagoes of Melanesian New Guinea* (Routledge and Kegan Paul, re-edited 2013)

Malinowski, *Crime and Custom in Savage Society* (Routledge, 1926)

Malinowski, *Freedom & Civilization* (London, 1947)

Malinowski, *Magic, science and religion, and other essays* (New York Doubleday, 1948)

Marco Tullio Cicero, *De legibus* (52 b. C.).

Marco Tullio Cicero, *De re publica* (55-51 b. C.)

Mardsen, *The Taliban: War, Religion and the New Order in Afghanistan* (Zed Books, 1999)

Merry, 'Changing rights, changing culture', in Cowan, Dembour and Wilson (ed. by), *Culture and Rights. Anthropological Perspectives* (Cambridge University Press, 2012), pp. 31-55

Merryman, 'Cultural Property Internationalism', in Connoly (ed. by), *Cultural Heritage Rights* (Routledge, 2015), pp. 3-31

Merryman, 'Two ways of thinking about cultural property', in Nazfiger (ed. by), *Cultural Heritage Law* (Edward Elgar Pub, 2012), pp. 120-141

Mondardini Morelli, *Norme e controllo sociale. Introduzione antropologica allo studio delle norme* (Sassari – Iniziative culturali, 1980)

Morphy and Perkins, (ed.by), *The Anthropology of Art: A Reader*, (Malden, 2006)

Nahlik, 'La protection international des biens culturels en cas de conflit armé', in *Collected Courses of the Hague Academy in International Law*, vol. 120 (Brill Nijhoff, 1967), pp. 61-163

Nazfiger, *Frontiers of Cultural Heritage Law* (Brill Nijhoff, 2021)

Nichols, 'The World of Negative Liberty. Reading Isaiah Berlin through Weak Ontology' in Baum and Roert Nichols (ed. by), *Isaiah Berlin and the Politics of Freedom. 'Two Concepts of Liberty' 50 Years Later* (Routledge, 2015), pp. 241-268

Nyrop and Seekins (ed. by), *Afghanistan: A Country Study* (Peter R. Blood ed., 1986)

O' Keefe, 'Cultural Heritage and International Humanitarian Law' in Francioni and Vrdoljak (ed. by), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press, 2020), pp. 75-99

O' Keefe, 'Underwater Cultural Heritage', in Francioni and Vrdoljak (ed. by), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press, 2020), pp. 295-317

O'Keefe, *The Protection of Cultural Property in Armed Conflict* (New York: Cambridge University Press, 2006)

Paul and Firth, *Man and culture: An evaluation of the work of Bronislaw Malinowski*. (London: Routledge, 1957)

Pellet and Müller, "Article 38" in Zimmermann, Tams, Oellers-Frahm, Tomuschat, *The Statute of the International Court of Justice* (Oxford Commentaries on International Law, 2019)

Pellet, *Recherche sur les principes généraux du droit en droit international* (Thèse, 1974)

Pineschi, 'Cultural Diversity as a Human Right? General Comment No. 21 of Committee on Economic, Social, and Cultural Rights', in Borelli and Lenzerini (ed. by), *Cultural Heritage, Cultural Rights, Cultural Diversity. New Developments in International Law* (Nijhoff, 2012), pp. 27-53

Politi, 'La Responsabilità Penale Individuale per Violazione degli Obblighi Posti a Tutela dei Beni Culturali in Tempo di Conflitto Armato' in Benvenuti and Sapienza (ed. by), *La Tutela Internazionale dei Beni Culturali nei Conflitti Armati* (Giuffré, 2007), pp. 197-222

Pollis and Schwab, 'Human Rights: A Western Construct with Limited Applicability', in Pollis and Schwab (ed. by), *Human Rights: Cultural and Ideological Perspectives* (New York: Praeger, 1979), p. 1-18

Popper, *Conjectures and Refutations*, (Routledge, 2002)

Pospisil, A*nthropology and Law: A Comparative Theory of Law* (Harper and Row, 1971)

Potts, *Humanity's Descent: The Consequences of Ecological Instability* (Avan Books, 1997)

Prott and O' Keefe, 'Cultural Heritage' or 'Cultural Property'?' in Nazfiger (ed. by), *Cultural Heritage Law* (Edward Elgar Pub, 2012), pp. 4-41

Prott and O' Keefe, *Law and the Cultural Heritage* (Abingdon Oxon, 1984)

Prott and O' Keefe, *National Legal Control of Illicit Traffic in Cultural Property* (UNESCO, 1983)

Prott, 'Problems of Private International Law for the Protection of the Cultural Heritage', *Recueil des Cours*, vol. V (1989)

Quirico, 'Key Issues in the Relationship between the World Heritage Convention and Climate Change Regulation' in Borelli and Lenzerini (ed. by), *Cultural Heritage, Cultural Rights, Cultural Diversity. New Developments in International Law* (Nijhoff, 2012), pp. 391-412

Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia* (Yale University Press, 2001)

Reichstein, 'Chapter 4: Federal Republic of Germany', in Cleere (ed. by) *Approaches to the Archaeological Heritage* (Cambridge University Press, 2009), pp. 37-47

Remotti, *Temi di antropologia giuridica* (Giappichelli 1982)

Richard A. Wilson (ed. by), *Human rights, culture and context: anthropological perspectives* (London Pluto, 1997)

Rouland, *Legal Anthropology* (The Athlone Press, 1994)

Salerno, Principi generali del diritto (diritto internazionale) in *Digesto*, vol XI, (1996)

Sandis (ed. by), *Cultural Heritage Ethics. Between Theory and Practice* (Open Book Publishers, 2014)

Sands, 'Sustainable Development: Treaty, Custom, and the Cross-fertilization of International Law' in Alan Boyle and David Freestone, *International Law and Sustainable Development* (Oxford University Press, 1999)

Sapienza, 'I meccanismi e strumenti per l'esecuzione delle Convenzioni sulla tutela dei beni culturali e il ruolo dell'UNESCO', in Benvenuti and Sapienza (ed. by), *La Tutela Internazionale dei Beni Culturali nei Conflitti Armati* (Giuffré, 2007), pp. 185-196

Sax, *Playing darts with a Rembrandt: Public and Private Rights in Cultural Treasures* (University of Michigan Press, 1999)

Scerni, *I principi generali di diritto riconosciuti dalle Nazioni civili nella giurisprudenza della Corte Permanente di Giustizia Internazionale* (CEDAM, 1932)

Schultz and Lavenda, *Antropologia culturale* (Zanichelli, 2010)

Schultz and Lavenda, *Core Concepts in Cultural Anthropology* (Oxford University Press, 2019)

Schultz and Lavenda, *Cultural Anthropology: A Perspective on the Human Condition* (Oxford University Press, 2017)

Scovazzi and Guido Camarda (ed. by), *The Protection of the Underwater Cultural Heritage. Legal Aspects. A Conference held in Palermo and Siracusa (8-10 March 2001)* (Giuffré 2002)

Scovazzi, 'Underwater Cultural Heritage', in Wolfrum (ed. by), *Max Planck encyclopedia of public international law* (Oxford University Press, 2010), pp. 130-137

Scovazzi, *Le patrimoine culturel de l'humanité*, (Centre d'étude et de recherche de droit international et de relations internationales (Académie de droit international de La Haye, 2005)

Shelton (ed. by), *Anthropology Art and Aesthetics* (Oxford, 1992)

Sherman, *Worthy Monuments: Art Museums and the Politics of Culture in Nineteenth Century France* (1989)

Shweder *Relativism and Universalism: A Companion to Moral Anthropology*, Didier Fassin (ed. by) (2012)

Spencer, *A System of Synthetic Philosophy*, (1862)

Stavenhagen, 'Cultural Rights and Human Rights: A Social Science Perspective', in Pitarch, Speed and Leyva-Solano (ed. by), *Human Rights in the Maya Region* (Duke University Press, 2008), pp. 27-50

Sumner, *Folkways. A Study of the Sociological Importance of Usages, Manners, Customs, Mores, and Morals* (Perlego, 2008)

Taylor and others, *Multiculturalism and the 'Politics of Recognition'* (Princeton University Press, 1992)

Thomas Aquinas, *Summa Theologiae* (1265 – 1274)

Tylor, *Primitive Culture: Researches into the Development of Mythology, Philosophy, Religion, Art, and Custom* (Cambridge University Press, 2012)

Van den Berghe, *Age and Sex in Human Societies: A Biosocial Perspective* (Belmont, Calif: Wadsworth Pub. Co, 1973)

Van den Berghe, *Intergroup Relations: Sociological Perspectives* (New York: Basic Books, 1972)

Van den Berghe, *Man in Society: A Biosocial View* (New York: Elsevier, 1975)

Vanderlinden, *Le pluralisme juridique* (Bruylant, 2013)

Venturini, 'La necessità militare e la protezione dei beni culturali', in Paolo Benvenuti and Rosario Sapienza (ed. by), *La Tutela Internazionale dei Beni Culturali nei Conflitti Armati* (Giuffré, 2007), pp. 319-324

Vico, *La scienza nuova* (1975)

Virally, 'Le rôle des "principes" dans le développement du droit international', in *Recueil d'études de droit international en hommage à Paul Guggenheim* (Geneva: Institut universitaire de hautes etudes internationales/Facult de Droit de l'Université de Genève, 1968)

Vrdoljak (ed. by), *The cultural dimension of human rights* (Oxford, 2014)

Vrdoljak, 'Human Rights and Culture in International Law', in Lenzerini and Vrdoljak (ed. by), *International Law for Common Goods: Normative Perspectives on Human Rights* (Culture and Nature, 2014), pp. 139-175

Walasek, *Bosnia and the Destruction of Cultural Heritage* (Routledge, 2005)

Wolfrum, "Common Heritage of Mankind", in *Max Planck Encyclopedias of International Law*, Peters and Wolfrum (ed. by), Oxford Public International Law (Oxford University Press, 2023)

Young, *Malinowski: Odyssey of an anthropologist, 1884–1920* (Yale Univ. Press, 2004)

Zhang, *American Civilization Portrayed in Ancient Confucianism* (Algora Publishing, 2003)

Contributions in periodic reviews and e-journals

Acconciamessa, 'Public-Interest Litigation before the ECtHR: Towards a Human Rights Approach to the "Universal" Protection of Cultural Heritage?' (2022), *Ordine internazionale e diritti umani* 189

Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34 *NYU Journal of International Law and Policy* 513

Aykan, 'Saving Hasankeyf: Limits and Possibilities of International Human Rights Law' (2018) 25 *International Journal of Cultural Property* 11

Balcells, 'Left Behind? Cultural Destruction, the Role of the International Criminal Tribunal for the Former Yugoslavia in Deterring it and Cultural Heritage Prevention Policies in Aftermath of the Balkan Wars' (2015) 21 *European Journal of Criminal Policy and Research* 1

Boas 'The Methods of Ethnography' (1920) 22 *American Anthropologist* 4

Bostian, 'Cultural relativism in international war crimes prosecutions: The International Criminal Tribunal for Rwanda' (2005) 12 *ILSA Journal of International and Comparative Law* 1

Bourdieu, 'La force du droit. Éléments pour une sociologie du champ juridique' (1986) 64 *Actes de la recherche en sciences sociales* 1

Bowden, 'The Colonial Origins of International Law: European Expansion and the Classical Standard of Civilization' (2005) 7 *Journal of the History of International Law / Revue d'histoire du droit international* 1571

Brightman 'Forget Culture: Replacement, Transcendence, Relexification' (1995) 10 *Cultural Anthropology* 4

Brilmayer and Chepiga, 'Ownership of Use? Civilian Property Interests in International Humanitarian Law' (2008) 49 *Harvard International Law Journal* 2

Casaly, 'Al Mahdi before the ICC. Cultural Property and World Heritage in International Criminal Law' (2016) 14 *Journal of International Criminal Justice* 4

Claeys, *"The "Survival of the Fittest" and the Origins of Social Darwinism" 2000, 61 Journal of the History of Ideas 2*

Cohen, 'Human Rights and Cultural Relativism: The Need for a New Approach' (1989) 91 *American Anthropologist* 1014

Cohen, 'Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization' (2008) 36 *Political Theory* 578

Crema, 'Is the intention of the parties at the heart of interpretation? Some news about subsequent practice from The Hague' (2014), *SIDIBlog*

De Sena, "Dignità umana in senso oggettivo e diritto internazionale" (2017) 3 *Diritti Umani e Diritto Internazionale* 1

Domaratzki, Khvostova and Pupovac, 'Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse' (2019) 40 *Human Rights Review* 423

Donders, 'Do Cultural Diversity and Human Rights Make a Good Match?' (2010) 61 *International Social Science Journal* 15

Dormann, 'The Protection of Cultural Property as Laid Down in the Roerich Pact of 15 April 1935' (1993) 2 *Humanitäres Völkerrecht* 6

Draper, 'Military Necessity and Humanitarian Imperatives' (1973) 129 *Military Law and Law of War Review* 51

Drazewska, Hasankeyf, the Ilisu Dam, and the Existence of "Common European Standards" on Cultural Heritage Protection' (2018) 2 *Santander Art and Culture Law Review* 89

Dworkin, The Model of Rules I (1967) 35 *The University of Chicago Law Review* 1

Fois, "La tutela internazionale dell'identità culturale: diritti collettivi od obblighi degli Stati?" (2014) 1 *Ordine internazionale e diritti umani* 685

Francioni and Lenzerini, 'The Destruction of the Buddhas of Bamiyan and International Law' (2003) 14 *European Journal of International Law* 619

Francioni, 'Au-delà des traites: l'émergence d'un nouveau droit coutumier pour la protection du patrimoine culturel' (2008) 5 *EUI Working Papers* 2008

Friedmann, "The uses of 'general principles' in the development of international law" (1963) 1 *American Journal of International Law* 57

Frigo, 'Cultural Property v. Cultural Heritage: A 'Battle of Concepts' in International Law?', (2004) 86 *International Review of the Red Cross* 1

Frulli 'Are Crimes Against Humanity More Serious than War Crimes?' (2001) 12 *European Journal of International Law* 2

Frulli, 'Advancing the Protection of Cultural Property through the Implementation of Individual Criminal Responsibility: the Case-Law of the International Criminal Tribunal for the Former Yugoslavia' (2005) 15 *Italian Yearbook of International Law* 1

Frulli, 'The Criminalization of Offenses against Cultural Heritage in Times of Armed Conflict: the Quest for Consistency' (2011) 22 *The European Journal of International Law* 1

Gradoni, "Regole di interpretazione difficili da interpretare e frammentazione del principio di integrazione sistemica" (2012), 3 *Rivista di Diritto Internazionale* 93

Graebner, 'Kulturkreise und Kulturgeschichten in Ozeanien' (1905) 28 *Zeitschrift für Ethnologie* 37

Griffiths, 'What is Legal Pluralism?' (1986) 18 *The Journal of Legal Pluralism and Unofficial Law* 24

Hatch, 'The Good Side of Relativism' (1997) 53 *Journal of Anthropological Research*

Higgins, 'Anti-Essentialism, Relativism and Human Rights' (1996) 19 *Harvard Women's Law Journal* 89

Huntington, 'The Clash of Civilizations?' (1993), 3 *Foreign Affairs* 65

International Law Commission, Draft conclusions on identification of customary international law, 2018, *Yearbook of the International Law Commission*, vol. II, Part Two (A/73/10)

Kim, 'Changing Climate, Changing Culture: Adding the Climate Change Dimension to the Protection of Intangible Cultural Heritage' (2011) 18 *International Journal of Cultural Property* 259

Koskenniemi and Nouwen, 'The Politics of Global Lawmaking: A Conversation' (2021) 32 *European Journal of International Law* 4

Koskenniemi, 'Imagining the Rule of Law: Rereading the Grotian 'Tradition' (2019) 30 *European Journal of International Law* 1

Lattanzi, 'Alcune Riflessioni in merito alle Sentenze nei Casi Karadžić e Mladić', in occasion of 'Diritto Internazionale e Valori Umanitari: Giornata di Studio in Onore di Paolo Benvenuti', University of Roma Tre, 19 December 2017

Layton, 'Art and Agency: A reassessment' (2003) 9 *Journal of the Royal Anthropological Institute* 5

Lenzerini, 'The UNESCO Declaration concerning the intentional destruction of cultural heritage: one steps forward and two steps back' (2003) 13 *The Italian Yearbook of International Law* 1

Mac Coubrey, 'The Nature of the Modern Doctrine in Military Necessity' (1991) 251 *Military Law and Law of War Review* 52

Maus, 'Hand in hand against climate change: cultural human rights and the protection of cultural heritage' (2014) 27 *Cambridge Review of Cultural Affairs* 4

Mazower, 'An International Civilization? Empire, Internationalism and the Crisis of the Mid-Twentieth Century' (2006) 82 *International Affairs* 553

Merry, 'Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)' (2003) 26 *Political and Legal Anthropology Review* 1

Merryman, 'Two Ways of Thinking about Cultural Property' (1986) 1 *American Journal of International Law*, 839

Meskell, 'UNESCO's World Heritage Convention at 40. Challenging the Economic and Political Order of International Heritage Conservation' (2013) 54 *Current Anthropology* 4

Messer, 'Anthropology and Human Rights' (1993) 22 *Annual Review of Anthropology* 63

Meyer, *'Travaux Préparatoires for the UNESCO World Heritage Convention'* (1976), 2 *Earth Law Journal* 45

Mezey, 'The Paradoxes of Cultural Property' (2004) 107 Columbia Law Review

Moravcsik, 'Explaining International Human Rights Regimes: Liberal Theory and Western Europe' (1995) 1 *European Journal of International Relations* 157

Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *International Organization* 217

Morphy, 'Art as a Mode of Action: Some Problems with Gell's Art and Agency' (2009) 14 *Journal of Material Culture* 1

Mucci, 'Short and Quickly Delivered, yet Quite Full of Meaning: the International Criminal Court Judgment about the Intentional Destruction of Cultural Heritage in Timbuktu' (2016) 8 *Italian Journal of Public Law* 2

Nesi, 'Consiglio di Sicurezza e Giustizia Penale Internazionale', in occasion of 'Diritto Internazionale e Valori Umanitari: Giornata di Studio in Onore di Paolo Benvenuti', University of Roma Tre, 19 December 2017

O'Keefe, 'The "Right to Take Part in Cultural Life" under Article 15 of the ICESCR' (1998) 47 *International and Comparative Law Quarterly* 4

Ossorio, 'The Human Genome as Common Heritage: Common Sense or Legal Nonsense?' (2007) 35 *Journal of Law, Medicine and Ethics* 425

Perot Bissell V, 'Monuments to the Confederacy and the Right to Destroy in Cultural-Property Law' (2019) 128 *The Yale Law Journal* 1157

Romainville, 'Le droit de participer à la vie culturelle en droit constitutionnel comparé' (2014) 29 *Annuaire International de Justice Constitutionnelle* 567

Ross, 'A Critique of Alfred Gell' (2008) 74 *Art and Agency Oceania* 1

Rossi, 'The Al-Mahdi Trial before the International Criminal Court: Attacks on Cultural Heritage between War Crimes and Crimes against Humanity' (2017) 11 *Diritti Umani e Diritto Internazionale* 1

Salmon, 'Ethical Considerations in Anthropology and Archaeology, or Relativism and Justice for All' (1997) 53 *Journal of Anthropological Research* 47

Samnøy. 'Human Rights as International Consensus: The Making of the Universal Declaration of Human Rights 1945–1948' (1993), Chr. Michelsen Institute (CMI Report R 1993:4)

Schill, "Enhancing international investment law's legitimacy: conceptual and methodological foundations of a new public law approach" (2011) 52 *Virginia Journal of International Law* 1

Scovazzi, 'La Dichiarazione sulla distruzione intenzionale del patrimonio culturale' (2006) 21 *Rivista giuridica dell'ambiente* 551

Scovazzi, 'La Prima Sentenza della Corte Penale Internazionale in tema di Distruzione di Beni Culturali' (2017) 11 *Diritti Umani e Diritto Internazionale* 1

Shao, 'What We Talk about When We Talk about General Principles of Law' (2021) 20 *Chinese Journal of International Law* 219

Shone, 'Cultural Relativism and the Savage: The Alleged Inconsistency of William Graham Sumner' (2004) 63 *The American Journal of Economics and Sociology* 3

Tesòn, 'International Human Rights and Cultural Relativism' (1985) 25 *Virginia Journal of International Law* 689

Vernon, 'Between Universalism and Particularism: Historiographical Concerns in the History of Anthropology' (2003) 7 *Journal of African American Studies* 2

Villegas, 'On Pierre Bourdieu's Legal Thought' (2004) 1 *Droit et societé* 57

Wangkeo, 'Monumental Challenges: The Lawfulness of Destroying Cultural Heritage during Peacetime' (2003) 28 *The Yale Journal of International Law* 183

Ward, 'Social Darwinism' (1907) 15 *American Journal of Sociology* 5

Watenpaugh, 'Cultural heritage and the Arab Spring: war over culture, culture of war and culture war', (2016) 5 *International Journal of Islamic Architecture* 2

Wright, 'The Politicization of Culture' (1998) 14 *Anthropology Today* 1

Yee, "Article 38 of the ICJ Statute and applicable law: selected issues in recent cases" (2016) 7 *Journal of International Dispute Settlement* 2

International treaties and protocols

Constitution of the United Nations Educational, Scientific, and Cultural Organization

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field

Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land
Convention (III) relative to the Treatment of Prisoners of War
Convention (IV) relative to the Protection of Civilian Persons in Time of War
Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land
Council of Europe, Delphi Convention on the Offences Relating to Cultural Property
Council of Europe, European Convention on Human Rights
Council of Europe, European Cultural Convention
Council of Europe, Faro Convention
Council of Europe, Granada Convention for the Protection of Architectural Heritage in Europe
Council of Europe, the European Charter of the Architectural Heritage
Council of Europe, Valletta Convention for the Protection of the Archaeological Heritage of Europe
International Covenant on Civil and Political Rights
International Covenant on Economic, Social and Cultural Rights
International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10, A/56/10 (2001)
International Law Commission, Third report on general principles of law by Marcelo Vàsquez-Bermùdez, Special Rapporteur, A/CN.4/753 (2022)
International Law Commission, Third report on identification of customary international law, Sir Michael Wood, Special Rapporteur, A/CN.4/682 (2015)
Nuremberg International Military Tribunal Statute
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts
Protocol Additional to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict
Regulations annexed to the II Hague Convention on War on Land
Regulations annexed to the IV Hague Convention on war on Land
Rome Statute of the International Criminal Court

Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict
Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments
UN General Assembly, Convention on the Rights of the Child
UN General Assembly, Rio Declaration on Environment and Development
UN General Assembly, Universal Declaration of Human Rights
UNESCO 1978 Recommendation for the Protection of Movable Cultural Property
UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage
UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict
UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage
UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage
UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and
UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions
UNESCO Convention on the Protection of Underwater Cultural Heritage
UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage
UNESCO Declaration on Race and Racial Prejudice
UNESCO Mexico City Declaration on Cultural Policies
UNESCO Recommendation on Participation by the People at Large in Cultural Life and their Contribution to it
UNESCO Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property
UNESCO the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict.
UNESCO Universal Declaration on Cultural Diversity
UNESCO, Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage
Vienna Convention on the Law of Treaties

United Nations and UNESCO other relevant documents

A/RES/2657
Transforming our World: the 2030 Agenda for Sustainable Development, UN. Doc. A/RES/70/1 (2015)
U.N. Doc. A/RES/55/243 (2001)

U.N. Doc. A/RES/55/243 (2001)
U.N. Doc. WHC-0I/CONF.208/24
UN Doc. A/RES/71/256 (2017)
UN. DOC A/RES/66/288 (2012)
UN. Doc. A/66/187 (2011)
UN. Doc. A/68/266 (2013)
UN. Doc. A/69/216 (2014)
UN. Doc. A/71/317
UN. Doc. A/CONF/. 48/PC.9 (1975)
UN. Doc. A/HRC/25/49
UN. Doc. A/RES/42/427 (2015)
UN. Doc. A/RES/65/166 (2010)
UN. Doc. A/RES/66/208 (2012)
UN. Doc. A/RES/68/223 (2014)
UN. Doc. A/RES/69/230 (2015)
UN. Doc. A/RES/70/214 (2016)
UN. Doc. S/RES/827 (1993)
UNESCO Doc. WHC-02/CONF.202/25
WHC Operational Guidelines for the Implementation of the World Heritage Convention, WHC.21/01

Relevant international tribunals' case law

ECtHR Demir and Baykara v. Turkey, 2008
ECtHR, Ahunbay and Others v. Turkey, 2019
ECtHR, Beyeler v. Italy, 2000
ECtHR, Chapman v. United Kingdom, 2001
ECtHR, Debelianovi v. Bulgaria, 2007
ECtHR, Enea v. Italy, 2009
ECtHR, Golder v. the United Kingdom, 1975
ECtHR, Kozacioglu v. Turkey, 2009
ECtHR, Potomska e Potomski v. Poland, 2005
ECtHR, Ruspoli and Morenes c. Spain, 2011
ECtHR, Sejdić e Finci v. Bosnia Herzegovina, 2009

ECtHR, Winterstein and Others v. France, 2013
ECtHR, Yordanova and Others v. Bulgaria, 2012
Extraordinary Chambers in the Courts of Cambodia, Pre Trial-Chamber, Decision on Ieng Sary's Appeal against the Closing Order, 2011
IACtHR, Moiwana Village v. Suriname, 2005
IACtHR, Saramaka People v. Suriname, 2005
IACtHR, Sawhoyamaxa indigenous community v. Paraguay, 2006
IACtHR, Yakye Axa community v. Paraguay, 17 June 2005
ICC, Prosecutor v. Ahmad Al Faqi Al Mahdi, 2016
ICC, Situation in the Democratic Republic of the Congo in the case of Prosecutor v. Thomas Lubanga Dyilo, 2006
ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbajan), 2023
ICJ, Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), 1964
ICJ, Boundary Dispute between Argentina and Chile concerning the Frontier Line between Boundary Post 62 and Mount Fitzroy, 1994
ICJ, Federal Republic of Germany v. Denmark, 1969
ICJ, Federal Republic of Germany v. Netherlands, 1969
ICJ, Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951
ICJ, United Kingdom of Great Britain and Northern Ireland v. Albania, 1949
ICTY, Prosecutor v. Blaskic, 2000.
ICTY, Prosecutor v. Jokic and Strugar, 2004
ICTY, Prosecutor v. Kordic and Cerkez, 2004
ICTY, Prosecutor v. Tadic, 9 October 1995
New York Courts of Appeal, Riggs v. Palmer, 1889
US Supreme Court, Texas v. Johnson, 1990
US Supreme Court, Virginia v. Black, 2003
Virginia Supreme Court, Taylor v. Northam, 2021