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"Societies today are multi-ethnic, multireligious and multicultural. This is a richness, not a threat. But, we need to ensure that every community feels that their identity – their culture – is being respected."

| *António Guterres*

"Legal regulation in cultural matters is generally a product of the West, with its traditional top-down models of shaping and administrating the spheres of art and culture."

| *Andrzej Jakubowski*

Introduction

This White Paper is not an academic research report *per se*, and does not claim to be exhaustive. It is the result of a collective reflection involving academics from across the world, with a recognized expertise in cultural heritage law, and interviewed specialists who have a more practical understanding of current and future challenges in the field of cultural heritage. The steering committee firstly identified themes that seemed to constitute the challenges of tomorrow for international cultural heritage law; on this basis, it interviewed specialists of various profiles. The White Paper intends to be a source of proposals for further studies in international law. In particular, it is intended to feed the discussions that will take place during the year 2023 on the occasion of the celebration of the 150th anniversary of the International Law Association (ILA/ADI).

The steering committee chose the topic of cultural heritage, as it is one of the major challenges facing humanity in the 21st century. This White Paper covers two main questions: Is the legal protection currently granted to cultural heritage satisfactory under international law? What kind of legal solutions can be provided to the foreseen and unforeseen changes affecting cultural heritage?

From the outset, this White Paper addresses the current state of international cultural heritage law (Part I). It then analyses, through interviews conducted by the steering committee, the challenges that must be met by the regulation and governance of cultural heritage in the following decades (Part II). Based on these analyses, the third part proposes further research and practical avenues to address the identified challenges (Part III).

1.

state of the art

International Law and its legal experts seldom deal with the topic of Cultural heritage, given its fundamental non-legal nature and the difficulties met by the legal reasoning to grasp this concept. Cultural Heritage is also a sensitive issue which can be interpreted in multiple ways and is therefore often manipulated. Cultural heritage may be involved in multidimensional situations: humanitarian, commercial, investment, human and group's rights, environmental, digital, etc. Given these features, providing a coherent legal understanding of cultural heritage is, in itself, a complicated task. For this reason, finding a common international vision for its legal framework is even more difficult.

Cultural heritage is a broad concept as it may cover a number of different objects and forms of expression of human creativity: works of art, archaeological objects, archives, relicts, museums, monuments, groups of monuments, urban landscape, underwater shipwrecks, folklore, traditions, ways of life, etc. Cultural heritage can be movable, immovable, or intangible. However, International Law does not provide for a unique standard definition of cultural heritage to clearly enable its identification. Current international law is rather focused in providing the key criteria to enable the identification of specific types of objects, which would fall under a specific type of protection, as foreseen in a particular instrument. These criteria mainly relate to the particular cultural significance and importance of the relevant objects or forms of expression. Their cultural significance must be assessed from at least two levels. On the one hand, from the local, regional, or national community's point of view. The anchoring of cultural heritage is a key issue; it gives meaning to heritage and brings it to life, possibly allowing it to evolve. On the other hand, for Humanity as a whole: pieces of cultural heritage endow a specific mission for Humanity both for the present and for the future (forthcoming generations, historic construction of our collective memory, etc.). Cultural heritage can be used for cultural practices by both a close or a wide circle; e.g., a temple which is considered cultural heritage can be both a place of worship and a tourist attraction.

Given its composite nature and the diversity of the issues to address, cultural heritage is a sum of various assets that deserve protection. The history of the international law of cultural heritage is that of successive steps towards a broader perception of what cultural heritage is, and towards a more comprehensive set of rules. The answers to the questions of what deserves to be distinguished, and how it should be preserved, are gradually being provided. The current features of the international legal framework dealing with cultural heritage have gradually evolved over the last two centuries. The succession of historical steps

and the gradual addition of new sources of law, actors and themes have resulted in an artichoke-shaped legal system. It aims at protecting cultural identities, which are located if the heart of the system, and each leaf stands for one dimension of human cultures.

The rules of international law began to address the issue of the protection of works of art during wartimes in the 19th Century, based on the development of new scientific disciplines (archaeology, museology, ethnography, cultural anthropology) and on a Western legal tradition of property rights that draws a line between the movables and the immovables. Given the origin of the people involved in the drafting of the first international instruments, the first sets of rules focused exclusively on the material elements of heritage (i.e., focusing on 'property'). The notion of 'cultural property' was thus first dealt with by the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflicts, which used an restrictive fragmented approach to listing cultural heritage. Initially, it was dedicated to the distinction of 'cultural property' from ordinary goods and its protection, and it was primarily based on administrative law and organs. Strikingly, it is firs in the field of armed conflicts that international rules have been designed; later, the first criminal responsibilities have been recognized.

After the Second World War, a general dynamic emerged in the field of cultural heritage law, promoting its protection in times of peace and war. The first international legal instruments on the protection cultural heritage were elaborated under the auspices of UNESCO. UNESCO, established in 1945, was the first multilateral organization with a cultural mandate. As part of this mandate, UNESCO's standard-setting activities have been prosperous, as it has been the forum for the negotiation and adoption of six multilateral treaties, fourteen recommendations and three declarations in the field of cultural heritage. Other sources progressively contributed to the existing legal framework. Some regional organizations such as the Council of Europe have clear cultural heritage concerns and policies, which led them to propose new treaties and adopt soft law instruments. Bilateral treaties, national laws and regulations and other types of agreements can be added to the list.

In 1972, the notion of cultural property evolved and the road was open to new non-material perspectives: with the World Heritage Convention in 1972, the expression 'cultural heritage' appears. From then, it has turned to be the most usual and inclusive wording, which enables to stress the sustainable development dimension of cultural heritage and separates it from other kinds of properties by shedding light on its multiple di-

mensions. The road was also open to the protection of the intangible dimensions of culture. In addition, the necessity has been progressively identified to understand cultural issues in a collective rather than only in an individualistic manner ; and the notion of cultural heritage evolved to include intangible elements, which were addressed by the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. This need to take into account the collective dimension of cultural issues has been gradually assessed (for instance, through the 2007 UN Declaration on the Rights of Indigenous Peoples).

Other dimensions coming from other fields of law have progressively been added. Intellectual property law, environmental and sustainable development laws, law of the sea, outer space law, commercial law, criminal law, etc., also address direct or indirectly cultural heritage issues. They usefully supplement the legal framework so that the various dimensions of cultural heritage are more fully encompassed. The recent development of human rights interpretations and initiatives helps protecting further facets of cultural heritage and to do so through other methods and bodies. Today, the exponential development of cross-cutting thematic and areas that concern cultural heritage constitutes a challenge to the homogenization of an international law of cultural heritage.

examples of relevent treaties (in chronological order):

- 1946 Inter-American Convention on the rights of the author in literary, scientific and artistic works
- 1949 Geneva Convention relative to the Protection of Civilian Persons in Times of War
- 1954 Hague Convention on the Protection of Cultural Properties in Case of Armed Conflict and its Two Additional Protocols
- 1954 European Cultural Convention of Paris
- 1966 International Covenant of Economic, Social and Cultural Rights
- 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies
- 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property
- 1972 Convention Concerning the Protection of World Cultural and Natural Heritage

- 1976 OAS Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations
- 1981 African Charter on Human and Peoples' Rights
- 1986 Berne Convention for the Protection of Literary and Artistic Works
- 1992 Valetta Convention for the Protection of the Archaeological Heritage of Europe
- 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects
- 1998 Rome Statute of the International Criminal Court
- 2001 Convention on the Protection of Underwater Cultural Heritage
- 2003 Convention for the Safeguarding of the Intangible Cultural Heritage
- 2004 UN Convention against Transnational Organized Crime and Protocols Thereto
- 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions
- 2005 Convention of the Council of Europe on the Value of Cultural Heritage for Society (Faro Convention)
- 2006 Charter for the African Cultural Renaissance
- 2017 Nicosia Convention on Offences relating to Cultural Property
- 2020 Artemis Accords. Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes

examples of unilateral acts adopted by international organizations:

- 1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations
- 1960 UNESCO Recommendation concerning the Most Effective Means of Rendering Museums Accessible to Everyone
- 1962 UNESCO Recommendation concerning the Safeguarding of Beauty and Character of Landscapes and Sites
- 1968 UNESCO Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works

- 1972 UNESCO Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage
- 1976 UNESCO Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas
- 1979 Model Provisions for National Laws on the Protection of Creation of Folklore (UNESCO/WIPO)
- 1980 UNESCO Revised Model Provisions for National Laws on the Protection of Expressions of Folklore
- 1993 UN Human Rights Commission Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples
- 2003 UNESCO Charter on the Preservation of Digital Heritage
- 2003 UNESCO Declaration concerning the International Destruction of Cultural Heritage
- 2007 UN Declaration on the Rights of Indigenous Peoples
- 2011 UNESCO Recommendation on the Historic Urban Landscape
- 2015 UNESCO Recommendation concerning the protection and promotion of museums and collections, their diversity and their role in society
- 2017 Scheme and Model Bill for the Protection of Cultural Heritage Within the Commonwealth
- 2017 Recommendation CM/Rec(2017)1 of the Council of Europe on the "European Heritage Strategy for the 21st Century"
- 2021 African Union Draft Model Law on the Protection of Cultural Heritage

The International law of cultural heritage faces two kinds of challenges today. First, there is a need to renew its justification (non-state actors such as indigenous communities, legal persons, etc.; development of soft-law sources; new narratives). Second, practitioners call for a new vision of cultural heritage. On many topics, its current legal framework may have reached its limits. For instance: how can the restitution and return of cultural property be legally solved? Does the digitalization of cultural heritage require a new legal framework? How could a coordinated legal answer be framed to the numerous effects of climate change on cultural heritage? Is there an outer space cultural heritage, and what is it made of? This is a key moment for cultural heritage law, and possibly the time for its regeneration. International lawyers should pay attention to these issues.

2.

the challenges for cultural heritage

The International legal framework on cultural heritage is mainly dedicated to its protection, its conservation, and its promotion. It uses different means to cope with a patchwork of threats. The spectrum of challenges lying ahead for cultural heritage is miscellaneous. Behind this complex picture, it must be kept in mind that in any case, the main issue is to prevent irreparable loss of cultural heritage. The loss of its specific value and meaning to human beings creates enormous damages. The permanent loss of an element of cultural heritage affects the very value attributed to it by the community to which it belonged and damages the integrity of the said community or group, but also that of Humanity as a whole. Such a loss may be the consequence of human actions and/or of natural phenomena.

The coming decades appear to place cultural heritage in the midst of challenges that recently emerged as a result of radical societal, political, environmental, and technological changes. As a consequence, cultural heritage has to cope with the changes these cumulative phenomena imply. A prioritization may have to be made between cultural heritage protection and other issues, and probably also amongst cultural heritage elements themselves. The usual rationales of cultural heritage protection by international law may prove unsuitable. Its traditional definition and regime prove not easy to globalize and do not answer to every situation. The Anthropocene, established in the 25th International Geological Congress of Cape Town in 2016, explains many of the current and future challenges. It follows that reaching the Sustainable Development Goals may endanger the balance between environmental and cultural protection on the one hand, and economic development in the other hand.

2.1. cultural heritage and human challenges

The main feature of cultural heritage is its human grounding. Cultural objects and intangible cultural heritage are created by human beings, dedicated to human beings and indispensable to them. As a matter of consequence, the protection of cultural heritage is affected by many current trends affecting the place of human beings in the universe, and their status within their states or in the international law system.

2.1.1. The Threats to Human Rights

The Universal Declaration of Human Rights states that *'everyone has the right to freely participate in the cultural life of the com-*

munity, to enjoy the arts and to share in scientific advancement and its benefits'. It further states that 'everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'. This establish a linkage between cultural heritage and human, which has gradually been deepened, in particular by UNESCO (see for instance the 2001 Universal Declaration on Cultural Diversity, the 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, the 2003 convention for the Safeguarding of the Intangible Cultural Heritage, and the 2005 Convention on the Protection and the Promotion of the Diversity of Cultural Expression), and by the UN Special Rapporteurs. The human rights perspective stresses the need for an approach to the protection, restoration, and preservation of cultural heritage that takes into consideration the respect for cultural rights by all. This implies, for instance, a role for indigenous communities and minority groups in the production and maintenance of intangible cultural heritage. Regardless of the effectiveness of these instruments, the question of the link between cultural heritage and human rights has to be more explicitly and precisely designed.

The Protection of Cultural Identity

At a first glance, the issue of cultural identity appears to be addressed by international law, such as by the UNESCO conventions of 2003 and 2005, and by the protection of human cultural rights, which precisely tends to protect identities. Several international human rights instruments of binding and non-binding nature allow for the protection of cultural identity of certain minorities or of indigenous populations. However, a number of issues are yet to be solved. For instance, the members of certain communities do not always have the freedom to either embrace their community's culture or discard it. Regardless of the position of the United Nations Human Rights Committee, some states still propose their own definition of cultural communities without taking into account individual cultural self-determination, and sometimes persecute community members by denying them the right to willful participation to cultural life. The latter situation can be exemplified with the case of the Rohingya of Myanmar.

The current increasing migration trends and their treatment by the States of various regions also generate many challenges to individual cultural self-determination and the right to willful participation in cultural life. Climate migrations, in particular, may create real issues and the protection of the cultural heritage

of the disappearing states may be a very difficult task, be it for intangible or for tangible assets. Refugees and asylum seekers established in a host state are not necessarily part of a minority or indigenous group of some kind. In these circumstances, what cultural rights can they be granted that would enable them to enjoy their tangible and intangible heritage? Refugees and asylum seekers are often expected to adapt to the cultural life of the host state. Moving their cultural goods for purpose of protection may not be easy, and preserving their intangible cultural heritage seems rather impossible. To what extent is it possible to guarantee them a choice to participate or not in the cultural life of the community of origin and that of their host community? Is it necessary to enact new appropriate human rights international instruments or to develop innovative interpretations of existing human rights conventions? One of the main issues is to guarantee these persons the freedom to participate or not in the cultural life of their community of origin established in the host state, and enjoy their intangible cultural heritage by maintaining important practices and forms of expression. These asylum seekers and refugees are vulnerable to migrant interpersonal networks that can exert a hold on them. Are the pre-existing policies of governance and management of religious and ethno-religious diversity by the host state adapted to these growing issues? In particular, are refugees and asylum seekers satisfied with or vulnerable to faith communities accessing public life in western societies, and are they losing their original cultural heritage? The original cultures of refugee and asylum seeker communities are often translated and adapted to the social context of the host state, which adds an element of complexity to the regimes of cultural diversity. The need to recognize the existence of a cultural heritage of the exiled or the refugee needs to be addressed.

Digitalization and Cultural Heritage

The use of '*contribution-ware*' in the preservation of cultural heritage creates tensions between the protection of human rights and that of cultural heritage. *Contribution-ware* is a digital technology that allows users to give access to their personal data stored in their smartphones in exchange for digital tokens that are akin to credits, which can then be traded only once for cultural goods or services using a smartphone application. The technology is market-oriented and allows good and service providers to adapt their offer to the profiles of the consumers. When applied to cultural heritage, *contribution-ware* allows the authorities or private actors in charge of cultural heritage to adapt their methods of preservation or of defining cultural heritage. The extensive processing of mass amounts of perso-

nal data through *contribution-ware* carries the risk of infringement to the right of the data subject: the rights to personal data protection and to privacy.

This technology is currently only used in China but Russia is considering its use as well. In September 2021, the Chinese technology multinational Tencent teamed up with the Dunhuang Academy to digitalize the landmark wall paintings of the Mogao Cave, which is a UNESCO World Heritage site located in the Gansu province. Marketed as a charity project to optimize the preservation of the site, it actually relies on *contribution-ware* technology that may infringe on the rights to personal data and to privacy of users. For the moment, the risk seems relatively contained; vigilance is nevertheless warranted. In China, cryptocurrencies have been banned there since January 2022, and since then, the regulation of NFTs has become increasingly thorough. Acts were passed during the year restricting the ability to issue and purchase tokens in the field of security, loans, insurance, and precious metals. Even art-related tokens cannot be resold on the secondary market and there are many restrictions on gifts of art-related tokens. For instance, the company Tencent had to commit itself not to resell NFTs on the secondary market. If the regulation seems to be driven more by fiscal goals and the fight against speculation on digital transactions, it also has positive side effects for the protection of personal digital data. Indeed, before this period of extensive regulation, Tencent's NFTs platform, 'Magic Core', had previously the name of buyers engraved on each token traded.

2.1.2. The Hindrances for a Better Recognition of Group Rights

The Human Rights' general challenge to enhance the recognition and protection of groups' rights has important implications in the field of cultural heritage. By itself, cultural heritage belongs to a group, be it a small cultural group, a national community, or Humanity. Consequently, an effective protection of cultural heritage depends on an effective protection of the human rights of peoples, or other cultural communities. The lack of a proper identification of those cultural communities is a first limit to the development of international law: the definition of people, and those of minorities and autochthonous peoples lack clarity and generality under international law today. The rising concern about the fate of indigenous peoples adds new questions, in particular as they emerge as international actors and make their claims public; traditionally, international law only dealt with minority cultural rights, through the usual individual-vision of

human rights. Is a change of perspective possible today, and how could it be achieved?

The Claims for a Renewed Function for Cultural Communities

The competition between states for exclusive ownership over common cultural sites or tokens for the purpose of tourism and commercialization has led them to try to protect the cultural heritage of indigenous groups or minorities through intellectual property law, at the expense of cultural heritage law. Examples can be given of the extensive use of WIPO's instrument in South-East Asian states and its relation to intangible cultural heritage. States are not enabling cultural communities to fully participate in the protection of their cultural heritage. In the region, local communities find themselves deprived of the capacity to secure intellectual property rights over their traditional cultural expressions and have to make do with compensation mechanisms for the extensive use of their cultural expressions. By way of example, the revised 2014 Indonesian copyright law mandates either the state and local authorities to set up an inventory of traditional cultural expressions and to ensure their protection and conservation. However, this translates into the central and decentralized government authorities charging foreign operators for license fees, generally without participation of the local community concerned. Although the communities of origin are supposed to hold collective rights on the traditional cultural expressions, the revised 2014 Indonesian copyright law merely recognizes their ability to safeguard, develop and preserve these cultural expressions. The law makes the national government the copyright holder of traditional and religious expressions of local minorities, especially animists. The same can be said regarding agricultural knowledge of traditional communities in Indonesia. Article 7 of the 2000 law on Plant Variety Protection recognizes that the traditional communities can be owners of plant varieties although the implementation decrees specify that these communities are represented by the state authorities in charge of registering the varieties and concluding agreements with third party users.

Another issue linked to the appropriation of cultural heritage relates to patrimonial approach to culture and the rigidity of cultural institutions, inherited from the colonial period. This specifically relates to the lack of participation of relevant communities in the making and preservation of museum collections that house cultural goods originating from these communities. A growing number of curators are concerned with the lack of cooperation between museum institutions and indigenous peoples, or more broadly with communities of origin. Such a

cooperation is required to facilitate an accommodating transplant of their culture in a foreign context. Most western museums do not have the political and administrative capacity to fully embrace this new inclusive approach to museum collections.

The claims for restitution and return of cultural property also raises questions regarding the function of cultural communities. The issue is growingly raised by the inclusion and participation of non-state actors, such as natural or legal persons, individuals, but also minorities and indigenous groups. The inclusion and participation of minorities or of indigenous groups in the restitution or return procedure is described as adequate when representatives of such communities are invited to the restitution or return ceremonies organized within museum institutions. The ethnological museums in Berlin or Vienna occasionally invite representatives of the indigenous communities whose cultural heritage they exhibit. This was also recently done in Benin on the occasion of the restitution of goods by France. However, this is mostly a fortuitous occurrence, as it is only made possible thanks to anthropologists who temporarily act as curators. For it to become an institutional policy, it would be necessary to include these communities in the governing and scientific bodies of the museums (as in National Museum of Rio in Brazil).

Coping With Cultural Appropriation

Cultural appropriation mainly relates to issues of intellectual property and genetic resources, traditional knowledge and 'folklore'. The latter being more often referred to as traditional cultural expressions and includes for instance music, dance, art, designs, names, signs, and symbols. It therefore relates to intellectual property rights (copyrights and related rights) and patents in the creative industries and its impact on traditional medicine, traditional agricultural knowledge and plant varieties, or traditional cultural expressions. Traditional resources, knowledge and cultural expressions extracted from their original context are then reused in manners unfit to the significance they are given in their context of origin (recent examples from the WIPO's website relate the trademark Nike or Christian Dior).

According to the WIPO: '*existing intellectual property laws exclude traditional cultural expressions from protection and relegate them to the public domain, making them vulnerable to appropriation and undermining the customary laws and rules that regulate access to and use of them in a customary context*'. A limited number of legal instruments can help neutralize or mitigate the effects of cultural appropriation (the Unesco 2003 Convention, the UN 2007 Declaration on the rights of ID, the 2010 WIPO

document on the *Protection of Traditional Cultural Expressions/ Expressions of Folklore: Revised Objectives and Principles*).

However, the issue of cultural appropriation persists given that the legal concept is not universally defined, and that some states only participate in one of the two normative frameworks (either WIPO or UNESCO). The WIPO wants 'to reshape the intellectual property landscape' in the light of art. 31 of the UN 2007 Declaration ('*Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge, and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures*'). This would allow indigenous groups to access 'legal means to exercise effective control over their traditional cultural expressions'. In addition, the WIPO Intergovernmental Committee leads the negotiations on another international legal instrument meant to provide 'balanced and effective intellectual property protection for traditional cultural expressions'. This would facilitate 'extending moral rights to traditional cultural expression'.

There is a current lack of harmonization between the two normative frameworks (*see* WIPO 2018 document on *the Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis*). The protection of traditional cultural expressions is already guaranteed by a set of international obligations in relation to literary and artistic productions, performances of traditional cultural expressions, designs, secret traditional cultural expressions, and indigenous and traditional names, words, and symbols. Seven gaps have been identified in the protection of traditional cultural expressions by the WIPO and have to be dealt with. For instance, many traditional cultural expressions are mere imitations or recreations of pre-existing pieces, and therefore cannot be protected as conventional copyright works. The protection of these assets will therefore remain a real challenge.

2.1.3. Nowadays Cultural Violence

Cultural heritage is witnessing the evolution of violence and threats to peace within and outside armed conflict. It is facing recent situations which call for a consolidated protection. Cultural heritage is used as a weapon, and it is the victim of violent acts. In many circumstances, it happens to be the gordian knot for broader situations, as cultural destructions are highly symbolic and instrumentalized.

Identifying Contemporaneous Kinds of Violence Against Cultural Heritage

The issue of damage to cultural heritage is at the origins of cultural heritage law, with the Hague conventions of 1899 and 1907, and the 1954 Convention on the protection of Cultural Property in the Event of Armed Conflict. The protection in times of armed conflict remains central, as evidenced for example by the destruction of the mausoleums of Timbuktu in 2012 or that of the Mosul Museum in 2015. The fact that the attack against this site was launched a day after its inscription on the World Heritage List shed lights on the rather counterproductive nature of this inscription. On the other hand, the violence done to cultural heritage now goes beyond the framework of armed conflicts and can also be inflicted in times of peace. The destruction of the Buddhas of Bamiyan in 2001, which occurred in peacetime, is an example. Some attacks are also at the intersection of two issues, as they are carried out by insurgency movements that are otherwise seen as terrorist groups. The incorporation of the fight against international terrorism in the law of international peace and security, following the adoption of various resolutions by the UN Security Council in 2001, fuels the dual nature of this kind of violence against cultural heritage. These attacks aim both at destroying cultural heritage for political purposes and at financing the criminal and insurgency organization by illicit trafficking of cultural goods. The destruction of the Timbuktu mausoleums in May 2012 and of the Mosul Museum by the Islamic state on February 26, 2015 attest to this.

As for collective and coordinated violence that occurs outside periods of armed conflict, some of it is not related to terrorism. Violence against cultural heritage can otherwise be the result of individual or group political activism in relation to environmental or racial issues for instance. Tensions over values are increasingly seen as antagonistic. Statues of Stalin have been toppled and quickly vanished within the space of the former USSR since 1991. Many acts of violence notably relate to the 'cancel culture' movement, which emerged in American academia and is resonating in other social spheres and other parts of the world. This movement can be a threat to cultural diversity in that it promotes the compartmentalization of identity and supports the destruction of tangible elements of cultural heritage, with the debunking of statues representing controversial historical figures. On the other hand, it can be also perceived as a chance to redraw the ethics of the national or international cultural heritage. This political radicalization of society poses a challenge to the effectiveness of international norms related to the protection of cultural heritage. How can this protection be

effective when the populations of the states are not willing to accept it as is?

Among the future or new trends in violence against cultural heritage, how to address attacks on digitized elements of cultural heritage? Insofar as museum collections are increasingly digitized, there is a growing risk that these collections will be the object of digital piracy aimed at the destruction of digitized collections or may be the object of ransomware. In May 2019 the Asian Art Museum of San Francisco was targeted in a ransomware attack though the museum managed to thwart the attack. Does the question of the protection of digital or digitized cultural goods differ? Some cultural assets are digital in nature, others were instead digitized; all of them deserve protection.

The new trends in violence can also concern, in a potential future, outer space cultural heritage. A potential colonization of the Moon or the destruction capacity of space satellites may, in the future, be considered as a threat to the protection of outer space cultural heritage. Controlling and sanctioning such acts may prove very complicated.

New Uses of Cultural Heritage During Armed Conflicts

Cultural heritage happens to be manipulated during armed conflicts. Growing challenges and new practices have to be addressed in that regard, given the modern causes and new forms of armed conflicts. There are sources protecting cultural heritage during armed conflicts. These numerous standards may not prove adequate to certain situations. Non international armed conflicts drive less rules than international ones. Moreover, the current legal framework does not take into account the growing demand for a protection which would also embrace intangible cultural heritage. In addition, new technological developments also give way to new kinds of challenges. The NFT 'Museum of War' launched in March 2022 in Ukraine is part of the state's policy of funding the war effort using cryptocurrencies. The digital museum consists of a database subject to storing NFTs, each implementing a unique work of art of diverse nature and representing a day of war in Ukraine. Although the rules of international Law state that cultural heritage cannot remain protected if it is used for military purposes, such recent initiatives aiming at supporting war efforts may raise questions.

Addressing the Need for a More Inclusive Criminalization of Violence Against Cultural Heritage

The effects of the destruction of intangible cultural heritage are mainly managed in terms of civil procedure related to intellectual property laws. Why should material cultural properties be the only ones to benefit from criminal protection? There seems to be an imbalance between the protection of tangible and intangible cultural property in criminal matters. What about the harm caused to communities who see elements of their intangible cultural heritage displayed in museum collections without their consent? Should the solution be solely one of compensation? Should it not also be criminalized in the same way as those aiming at damaging elements of the cultural heritage of certain nations, communities, or minorities? These questions extend, for example, to the issue of cultural appropriation by the fashion market or by pharmaceutical companies, among other fields.

The refusal to recognize ethnocide or cultural genocide is a manifestation of the difficulty of criminalizing intentional damaging of intangible cultural heritage. It results from the incapacity to move beyond the dichotomy between tangible and intangible cultural heritage. As long as elements of cultural heritage – both tangible and intangible – are not considered in themselves, but as mere extension of persons or groups, the notion of cultural genocide or ethnocide will be hardly recognized in practice. Yet, the acceptance of forced transfer of children from one group to another as a charge for genocide pleas in favor of the recognition of cultural genocide, in addition to physical and biological genocide. Explicit reference to the notion of cultural genocide – or *ethnocide* – can merely be found in *soft law* instruments, such as the 1981 San José Declaration or, according to the ILA 2010 interim report, the 2007 UN Declaration on the rights of indigenous peoples. This shows how important the criminalization of the destruction of elements of cultural heritage is for minorities and indigenous groups. By way of example, one can refer to the 1996 Report of the Special Rapporteur of UNHRC for Afghanistan, stressing that the illicit traffic of Afghan cultural objects amount to cultural genocide. One can also refer to the destruction of the Iraqi, Syrian and Libyan cultural heritage by ISIS as 'cultural genocide' by the former Director general of UNESCO Iirina Bokova. So far, it is mostly non-governmental organizations that describe the persecution of indigenous populations as cultural genocide, for instance in Burma or in Tibet, notably because they want to stress the destruction of the intangible cultural heritage and the human rights perspective.

2.2. cultural heritage and its environmental context

Cultural heritage is at stake with manifold challenges that come from its environmental context. Some are related to the need to take into account natural and human-made disasters, while others relate to the forthcoming issues of climate change. Under every circumstance, each piece of cultural heritage lives in a particular environment, some of them depending totally on it; as a matter of consequence, imagining cultural heritage in new locations, outside its usual places, may also drive new issues to address.

2.2.1. Human Activity and Cultural Heritage

Human activity can affect tangible and intangible cultural heritage in a variety of ways. Infrastructure construction projects or unplanned urbanization may endanger cultural heritage sites and may affect the cultural value originally assigned to them. In November 2020, the British Transport Minister approved a plan to drill a road tunnel that would be passing within less than 200 meters of the megalithic site of Stonehenge. Similarly, the Giza plateau in Egypt is in the immediate vicinity of an urban area that has been nibbling away at the western end of the Nile Valley.

Improper construction planning can affect both urban heritage sites and natural landscapes. This can be induced by forthcoming growing human density, which in turn calls for unbridled urban planning policies, particularly in terms of tourism development. This poses several problems: how to reconcile the right of local populations to decent housing when these urban planning policies can lead either to deprive them of their homes and relocate them, or to diminish the affective value of their homes? Who decides which stakeholders are allowed to participate in the cultural life of their country, region, or community?

One upcoming issue regarding the protection of cultural landscapes relates to the interaction of the latter to renewable energy transition, such as hydropower or photovoltaic power plants, or wind farms. The development of these renewable energy installation projects comes with new challenges. The main one being the presumed negative impact of these installations on the heritage value of cultural landscapes, such as sea windmill farms. In this respect, the question to address is how to include the preservation of cultural landscapes within the renewable energy transition and how to make sure one will not obstruct the other.

The destruction of cultural heritage due to industrial and urban planning activities of human societies can also induce pollution of various nature, which puts in danger the protection of the cultural heritage. The mining industry can affect the lifestyle of certain minorities. For instance, in May 2022 the Canadian Nunavut Impact Review Board notified the federal northern affairs minister that the expansion project of the iron mining lease on Baffin Island would have 'significant adverse ecosystem effects' on marine and land wildlife central to Inuit culture with regards to land use and food. The melting ice caps open the Arctic to a so-called 'white gold rush' for mineral extraction in the region. This kind of problem will increase as we are entering the Anthropocene Epoch.

Pollution can also affect the cultural value of sites. It is remarkable that cultural heritage sites are often threatened by the accumulation of waste, sometimes caused by the affluence of tourists. The history of the inscription of Fujisan on the World Heritage List is one example. The site did not provide human waste management and treatment, which prevented its inscription before 2013.

Human-induced threats can also be related to the toxic contamination of a natural environment essential to the preservation of elements of tangible and intangible cultural heritage. One of the future challenges in relation to the protection of the environment is the contamination of the environment with highly toxic agents. The bodies of Greenland Inhabitants contain the highest concentration of industrial chemicals and pesticides ever found in a human being. According to Arctic Monitoring & Assessment Program, a working group of the Artic Council, the level of PCBs and mercury in the umbilical cords of newborns and in breast milk are 20 to 50 times higher in Greenland Inuit towns than in Western and Asian cities. This directly threatens the way of life of the Inuit, especially their food traditions. Environmental pollution by toxic chemicals can also affect cultural heritage sites. This is again the case in Greenland, with the development of mining activity near the agricultural site of Kujataa, which testifies to the cultural history of Inuit and Icelandic hunter and agricultural communities that settled in the area throughout history. The mining projects related to gas, petrol and uranium ores affects the preservation of the site in that it risks polluting the ground and poisoning the inhabitants. This is aggravated by the use of mercury in mining activity and the release of radioactive components into the air near the site.

The increasing in tourist traffic can also affect a cultural site and cause its destruction. A good example of such threat is that of Nan Madol, the Ceremonial Center of Eastern Micronesia built

between 1200 and 1500 CE. The affluence of tourists modifies the topography of the land and results in the making of unplanned trails. This damages the waterways of the site, increases the presence of silt, and facilitates the growth of the mangroves. In the end, this weakens the blocks of the sites, which can eventually collapse.

2.2.2. New Environmental Contexts for Cultural Heritage

The coming decades will probably put cultural heritage in the midst of spatial challenges that emerged recently and are expected to grow. These relate to both terrestrial issues associated with climate change and to the ambitions of States with respect of outer space.

The Forth-Coming Challenge of Climate Change

The impact of climate change on cultural heritage is already noticeable in some regions of the world. For instance, in the Pacific Islands the rising temperatures, heavy rains and other climate disruption together with natural disasters, such as volcanic eruptions, disrupt the culture economy based on tourism. This also affects the sustainability of intangible cultural heritage. The disappearance of tangible pieces of cultural heritage is a real and urgent danger. The changes in cultural practices as a result of environmental evolutions are also a very important risk to address; the case of the Sami is significant in that respect. Their lifestyle is linked to the climate of the place they live in, so that they are endangered as a people because it is changing.

Intense climatic conditions are to be more and more frequent. Global warming will accelerate the recombination of some previously autonomous natural disasters, which can create new threats to cultural heritage. Giant wildfires, intense flash floods and mudslides can eventually affect tangible and intangible cultural heritage. In Pakistan, the rapid melting of high mountain glaciers and the 2022 monsoon have been causing severe flooding in areas with cultural heritage sites (among others: the river valley between Islamabad and Lahore; Archaeological Ruins at Moenjodaro, and Historical Monuments at Makli, Thatta, both being on the World Heritage List). This kind of disaster scenario can easily extend in the near future to other countries located at the foothills of the Himalayas or along the rivers that have their source there. Cultural heritage will also go on suffering of the frequency and length of drought periods.

Cultural heritage will also shortly be endangered by the rise in the sea levels. Climate change constitutes a risk to costal and historic urban landscape; according to the 2011 History Urban Landscape Recommendation, 90% or historic cities and urban sites are coastal, which put them at risk of flooding from rising sea levels and heavy storms. In 2005, the states parties to the World heritage convention identified nine cultural sites threatened by rising sea levels. The phenomenon dramatically accelerated in the past two decades. In 2014, more than 130 World heritage sites were already listed as endangered by this phenomenon. Some coastal sites are particularly vulnerable, such as Kilwa Kosowani in Tanzania.

Following the failure to adopt a normative instrument at UNESCO in 1983 dedicated to the protection of cultural properties against natural disasters, few binding instruments have been able to provide answers to the practical challenges. The protection of cultural heritage refers to the preservation of buildings, furniture, or intangible expressions of cultural identities. Therefore, protecting cultural heritage against the forthcoming natural phenomena implies a range of actions and resorting to diverse sources. But only a few rules relate to the protection of cultural heritage in the event of rising sea levels, when the phenomenon is expected to happen at a large scale in the years and decades to come. In the field of intangible cultural heritage, starting 2016 safeguarding soft law mechanisms have developed towards an increasing awareness of natural risks (among which are the *Operational Directives for the implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage*). It is worth noticing that these mechanisms make no clear mention of sea level rise for instance. Most cultural heritage sites however do not meet the 'outstanding universal value' criterion and cannot benefit from the World heritage list protection that provides them the 1972 Convention protection.

Outer Space Policies: A Challenge for Cultural Heritage

The question of the preservation of outer space cultural heritage has emerged in the last decade. Non-functional space vehicles, such as obsolete satellites, have become coveted objects of space nations and new space firms. The purposes are diverse: scientific (research purposes, or when it comes to assess the resilience of satellite components exposed to outer space radiation), technological (when it comes to upgrading defective and discarded satellite devices), or recreational and touristic. Additionally, space landing sites on the moon or on Mars are the object of tourist and scientific projects elaborate by the new space firms or by competing space nations. The lack of a dedi-

cated law to address those new challenges is becoming an issue. What do we plan do to with the traces of human presence in the outer space?

All this accounts for the need for protection of these spatial objects and sites from any hegemonic or monopolistic ambitions. Some existing multilateral treaty provisions may offer paths to protection, such as the Antarctic Treaty System, the Moon Treaty, or the Outer Space Treaty. Some international powers have also taken action in anticipation of China's and India's space ambitions. For instance, NASA published its 2011 Recommendations to Space-Faring Entities in an attempt to protect lunar landing sites and artifacts against attempts of appropriation and exploitation. The most ambitious proposals, however, relate to extending cultural heritage law to technological artifacts and outer space sites. Section 9 of the Artemis Accords mentions that question, as the signatories "intend to preserve outer space heritage" and try to cooperate to foster the development of multilateral rules in that respect.

The effective implementation of this project, however, poses more challenges than it solves. Some amount to conceptual issues. To what extent does the analogy with cultural heritage really work? Other questions may be raised regarding the possible legal regime to frame. The accumulation of space jetsam in earth orbit raises the question of the selection of objects worthy of protection and the technical modalities of this protection. Would it really be possible, as suggested by some experts, to move the protected objects out of the earth's orbit to 'store' them in outer space? If so, which modalities of preservation and tourist exploitation can be considered? Moreover, these ambitions are already undermined by the current projects of exploitation of lunar or Martian resources by the States parties. One must wonder whether an outer space cultural heritage law could be instrumentalized for the appropriation of artifacts or sites by states or groups of states, or even by private groups, in seeming contradiction with the principles set forth in the Treaty on outer space.

Additionally, the sake of cultural sites and artefacts on earth can depend on the use of space technologies, which may be used either to protect or to destroy them. The use of data collected by satellites can prove highly productive for the conservation of archeological sites, for instance. This would imply a further cooperation with all the stakeholders and raise the question of the cooperation of private actors not necessarily concerned by international law rules.

Finally, methodological questions have to be addressed. A regime for the protection of outer space cultural heritage would

require multilateral cooperation among all the space powers. However, the current tensions between the major space nations raise the question of the credibility of such an undertaking at a universal scale.

2.3. cultural heritage and contemporaneous economic challenges

Cultural heritage has both a cultural and an economic nature. Cultural properties are considered as economic goods and participate in the market (*see* for instance the European Court of Justice decision CJCE, *Commission vs. Italy,* case 7/68, Rec. 617, 10 December 1968); the intangible elements of cultural heritage have a market value when they become patents or goods for the cultural industries. This Janus nature requires an imbalance favorable to the protection of the core specificity of those goods - which is their cultural nature. In that regard, both the development of sustainable development requirements and novelties of the economic world happens to create new challenges for today and for the future.

2.3.1. Balancing Sustainable Development and Cultural Heritage

The notion of sustainable development was defined at the 1972 UN Stockholm Conference on the Human Environment and in the 1987 Brundtland Report (*Our Common Future,* Report of the World Commission on Environment and Development), but the balance it proposes between environmental protection (and by extension that of cultural heritage) and economic development remains uncertain. It is thus urgent to clarify the notion of sustainable development and the extent of its normativity. Evolutions may have worked in favor of economic development, which is presented in the SDGs under the heading of the fight against poverty. Poverty is an obstacle to the promotion and protection of cultural heritage. But economic development may also endanger pieces of cultural heritage, for instance because of the development of mass tourism, or as it emaciates cultural diversity. This imbalance has led scholars and practitioners of international law to speak of "the dark side of sustainable development", which under the guise of fighting poverty leads to the promotion of economic development that is ultimately unsustainable. Thus, caution can be exercised with regard to the 2021 G7 Rome Declaration on Cultural heritage and economic growth. G7 states are assuming jurisdiction in the field

of cultural heritage protection that risk circumventing existing international frameworks and producing normative standards that are less protective than those of UNESCO conventions.

The overexploitation of natural resources and of cultural heritage as a commercial and tourism resource for economic and social development has given rise to tensions related to sustainable development, environmental protection and the diversification of international cultural heritage actors. The commodification of culture notably in relation to the tourism industry in developing countries does not ensure a sustainable approach to heritage protection. It lacks the necessary capacity to cope with natural disasters, global warming, and its consequences (such as pandemics). The economic growth achieved thanks to the tourism industry can damage the preservation of heritage. These commodification practices turn out to be counterproductive in that they weaken the tourism sector and generate economical incomes used to promote and preserve cultural heritage

2.3.2. Thinking Cultural Diversity in a Digital World

Cultural Diversity: New Challenges in a More Digitalized World

Some consider that digital technology is central to re-assess the respective role of experts and communities of origin in the determination and preservation of cultural heritage. Yet, this is open to debate. The digitization of African collections, including those housed in African institutions, is an example. Digitalization is presented as an adequate instrument of sustainable development. The implementation of NFTs on the digitized objects may allow museum institutions to secure a financial flow for cultural development programs. However, cultural activists, particularly in Africa, have emphasized the unequal access to digital technology between Western and developing countries. The digitization of African collections undertaken by the museum collections of former colonial powers accentuates this inequality. The choice of the objects to be digitized is a matter of museum policy. Therefore, what choice is given to the communities of origin of these objects, especially when the objects continue to carry spiritual value for the community of origin?

Is the use of digital ledger technology such as blockchain suitable to cultural heritage preservation, or does it endanger cultural

policies? The reliability of digital cultural heritage ledgers is based on an original criterion compared to digital currencies: while the latter refer to a monetary value like bitcoins, those are based on *contribution-ware* described above. This technology is advertised as a way to allow the tourism sector to offer its consumers the opportunity to participate in determining the value of cultural heritage, thus identifying sites or goods worth of preservation. The processing of user's personal data is a source of income and allows the development of cultural goods for the tourism sector. However, the use of this kind of software risks eroding the link that a national or local community maintains with an element of the cultural heritage to which it is attached. For now, this technology seems to be applied to Chinese world heritage sites (the Mogao Caves), without an assessment on its possible effects: is it about consolidating the sense of belonging of the site to the Chinese national community, or rather to the international community?

New Realities and Concerns of the Art Market

Numerous actors of the Art Market are largely standing outside the scope of many international rules, or are not directly concerned by them: galleries, art dealers, auction houses, art advisors, brokers and other intermediaries, other professionals advising clients on transactions, etc. All those are key actors in the fight against trafficking and need to be more involved. There are growing ethical expectations, which call for more transparency in the transactions, and in the acquisition and detention policies of the different stakeholders. Both the international civil society and the UN Security Council policy regarding financing terrorism call for a new behavior. Soft law instruments are already fostering more ethical practices (International Code of Ethics for Dealers in Cultural Property, UNESCO, 1999; Code of Ethics for Museums, International Council of Museums, revised in 2006; Responsible Art Market Initiatives and their Directives on anti-money laundering best practices, etc.); are they a sufficient tool in that regard?

In a more digitalized world, the international legal framework is weakened in many aspects, and it needs to be updated. The development of online sales, particularly since the Covid Pandemic, is broadening the audience of the sales and the number of potential actors of the art market. This democratization calls for a different approach. The art market actors being not only easy-to-identify specialists, the knowledge of international rules by the actors of the art market is limited, and unethical behaviors may increase, or be more difficult to track and detect. The security of the transactions is also a more difficult goal to meet

for online sales. In a nutshell, the current legal situation appears less suitable to new realities.

The growing market of Non-Fungible Tokens also lacks a dedicated legal regime. By applying the usual rules relating to the e-commerce and to blockchain technologies, many specificities of cultural heritage are not taken into account. When the NFT deal with a picture of a cultural heritage item, two different protection approaches need to be developed, as they raise different issues. The NFT regime should also distinguish between the ordinary tokens, and those that happen to concern works of art or pieces of cultural heritage. When these NFT come from tangible cultural heritage, designing a separate set of rules and approach may prove relevant. More generally speaking, the digitalization is a continuous challenge for cultural heritage law, as no proper rules are applicable. As the use of common rules for these situations prove inadequate in many regards, a dedicated legal regime may favor a better security in transactions.

3.

the questions for international law of tomorrow

The assessment of both contemporary and future challenges of cultural heritage has proved particularly heterogeneous. It includes issues of human rights, new forms of violence against cultural heritage, environmental challenges to cultural heritage, and economic and commercial issues. Many of these challenges are cross-cutting questions that cannot be distinguished in practice. For instance, human rights issues related to the preservation of traditional lifestyles, to the protection of cultural identities, or to the participation of cultural communities, cannot be considered in a vacuum, without consideration for economic and commercial issues related to the preservation of cultural diversity, the inclusion of cultural communities in the art market, or the purposes assigned to digital technologies. In the same way, these economic or human rights consideration are inextricably linked to the relationship between the environment and cultural heritage. This finding raises the question of how to articulate these interdependent challenges and, more importantly, how to address them. A prioritization does not seem easy to frame. Stabilizing an order of priority may sound opportune; but it is not necessarily achievable, at least not at a global scale, and can be counterproductive. As a result, it would be necessary to find legal comprehensive means that articulate the answers to different threats and enable decompartmentalizing the legal techniques and tools available.

International law needs to be enhanced so as to live up to the current and future challenges. To meet that end, two paths should be followed contemporaneously. The first one concerns the strengthening of the existing set of rules. In many regards, it should become more adequate to the new context. The second method is that of renewing and modernizing the way of thinking and framing cultural heritage law.

3. 1. enhancing the current legal system

The existing legal framework provides many sets of rules whose effectiveness and universal implementation often prove to be the main limit to a genuine protection of cultural heritage. Using the potentialities of these sets of rules to the full and adapting them to new situations is a key concern for international law.

Enhancing Cultural Heritage law requires ensuring the effectiveness of their core principles, and precising the rules in order to facilitate compliance thereto. It is also necessary to extend their scope and provide the necessary means for actors to fulfill their obligations.

3.1.1. Ensuring the effectiveness of international principles

Concluding and ratifying treaties or recognizing a customary rule is not enough. Their mere existence does not guarantee an effective implementation and a genuine protection of cultural heritage. What is additionally required is a better follow-up process for the enactment of general international rules, a more detailed and practicable legal framework, and effective monitoring mechanisms to ensure compliance from the stakeholder. This notably applies to the field of armed conflict. Although a set of international hard law rules deals with those situations (The Hague Convention and its two protocols), in many cases they are not effectively applied or observed by all the parties to an armed conflict. States, be them a party to the main international law instruments, may have other priorities, face particular difficulties in meeting their obligations or may not mind breaking the rules. Some legal obligations may also prove impossible to implement, for instance because they do not fit with the actual situation state parties may be facing, or because they are too challenging given state parties' financial, institutional and human means. A better effectivity for international rules could also be fostered in the field of human rights protection, as some recognized human rights facilitate the preservation of cultural tangible and intangible heritage (the right to participate in cultural life, the right to family life, etc.). Yet, their potential usefulness in that regard has not immediately been considered. As an example, human rights standards relating to the right to participate in cultural life are for instance not sufficiently mobilized in the fight against cultural appropriation. This issue is mostly dealt with by WIPO standards using soft law means, without international human rights instruments being called upon as a remedy (the 1996 International Covenant on Civil and Political Rights, the UNESCO 2003 and 2005 Conventions, the 2007 UN Declaration on the Rights of Indigenous Peoples, the European Framework Convention for the Protection of National Minorities, the Inter-American Convention on Human Rights, the African Convention on Human and Peoples' Rights, etc.).

3.1.2. Specifying the Rules of International Law

Most international law instruments are diplomatic agreements providing little details on their implementation mechanism. If some obligations have been largely specified thanks to additional guidelines, others remain quite vague, or depend on states' action. The current law of the World Heritage has been designed thanks to texts adopted following the Convention itself, such

as the *Operational Guidelines for the Implementation of the World Heritage Convention.* These are regularly revised, but still need further updates to take into account new challenges (be it the sea-level rise or the possible digitalization of a World Heritage site). Other texts also require such precisions to be fully effective.

The direct effect in domestic law of those international texts is required to ensure that the principles and provisions thereof are fully effective. Municipal laws are a key element in that regard. Even when specific legislations or regulations exist, they do not necessarily refer to the international treaties or the United Nations Security Council resolutions at stake. These practices enable the state parties to remain fully independent, and to maintain ambiguity about the scope, the content, and the binding effect of the rules of international law (see the examples of French law 2016 *Loi relative à la liberté de la création, à l'architecture et au patrimoine,* and United States law: 2016 *Protect and Preserve International Property Act*). In the fields of international humanitarian and criminal law for instance, the importance of national implementation of international principles appears to be an issue. Article 28 (Sanctions) of The Hague Convention (1954) provides that States parties *'undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon all persons, of whatever nationality, who commit or order to be committed a breach of the present Convention'.* This indicative approach has not been fruitful, as varying states' implementations were possible, and the Second Protocol (1999) has been usefully complementing that provision with an international list of serious violations. Its 4th Chapter provides more specifics and thus makes the criminal aspects more effective. Art 16 of the Second Protocol (1999) provides that *'each Party shall take the necessary legislative measures to establish its jurisdiction over offenses set forth in Article 15'.* This provision requires an effective implementation to ensure the adequate transposition of these offences and criminal law technics in domestic laws. The international law toolkit has to be used to its full potential. For instance, is there a national offense in the law of each party to this Protocol for 'using cultural property under enhanced protection of its immediate surroundings in support of military action" is required. To be efficient as a provision, it also has to be effectively recognized by foreign countries...

3.1.3. Enlarging the scope of international law sources

The scope of current international law sources is not broad enough to encompass a wide situations and actors. Many situations remain unresolved in law, as the scope of many legal principles is neither universal nor adapted to every elements of cultural heritage or to each situation. Firstly, the geographical extension of the rules of international law should be broader. Secondly, these rules should be contemplated in a comprehensive manner.

First, not all rules apply to all States. This predicament favors international trafficking and often deprives illicit exports of a clear international legal solution. Wider adherence to the rules of international law is required. Multilateral treaty-rules concerning cultural heritage must achieve universality. This is the purpose of the UNESCO conventions, which precisely aim at protecting the cultural heritage of Humanity (1972, 2001 Convention, etc.), the cultural heritage of great importance for all peoples of the world, which should receive international protection (1972, 1954 Convention). Those sources are naturally conceived as worldwide instruments. The UNIDROIT 1995 Convention, as a uniform-law treaty, should also be universally implemented to meet its ends properly and reduce the difficulties raised by the diversity of national approaches. However, a real matter of concern relates to the lack of consistency in ratification practices, for instance regarding the movables. The 1995 Unidroit Convention has only 53 States parties.

Many practical obstacles exist to wide spreading the Conventions' scope. In the case of the Pacific Islands for instance, the implementation process happens to be slow. Although the World heritage convention was ratified by Fiji in 1990 it was only in 2013 that the first Fijian site was added to world heritage list (*i.e.,* the colonial port town of Levuka). As for the 2003 convention, ratified in 2010, the Fijian authorities have yet to determine their priorities. National legislative reforms are also a long way off and the enactment of implementation decrees can suffer delays. But cultural heritage agents of the Pacific Islands states stress that provisions of unratified conventions or of conventions that are not yet transposed in national legislation and regulation are nonetheless taken into account by state and regional agencies.

To meet a wider adherence to international law rules, actions are possible to increase the number of ratifications: specific lobbying and awareness-raising actions, technical and financial assistance to certain states. The UNIDROIT organizes bilateral meetings with ministers of culture or justice of African States precisely in order to convince them to become new Parties to

the Convention. In that regard, particular attention should be paid to the situation of some states which lack the necessary means to come to the ratification process, or to fulfil the pre-requisites for ratifying a treaty, or to meet their obligations once they have become parties (reporting obligations for instance). Fortunately, regional solidarities have already emerged to enable some states to acquire the necessary means for a national ratification and enforcement of some instruments. This is what the Pacific states have done in order to prepare their ratification of UNESCO Conventions. For example, the Intergovernmental Pacific Regional Culture Strategy for the Council of Pacific Arts and Culture published a Regional Cultural Strategy for the past decade 2010-2020, in which the ratification of international instruments related to the protection of cultural heritage was a main objective requiring a unified strategy.

The effects of diverse international cultural law instruments have been immediate or even anticipated (e.g., the 1970 Convention was considered by a German Federal Court as expressing an international public order, even if the Federal Republic of Germany was not a Party to that Convention at the time: 1972 case *Allgemeine Versicherungsgesellschaft v E.K.*, BGHZ 59, 83). A wide adhesion to many of the solutions of the two universal treaties exists which should give birth to formal legal recognition, in order to create general international law rules.

Customary rules of international law are scarce and barely complete the treaty approach in providing answers to actual cases. Having more customary rules implies combining evidence of states practices and clarifying states' will - which proves to be the most sensitive issue. An academic work on these aspects would prove very relevant to get to a better understanding of the reasons for states' restitutions and returns for instance. So would also be oral declarations or written statements by states' officials and organs, aiming to bring out or crystallize customary rules thoroughly. Judges may be a key actor in fostering the recognition of new customary rules; This is what the Italian Consiglio di State did in a case concerning the Venus of Cyrene (2018): relying on the prohibition of the use of force and the right to self-determination, it identified a general principle of international law for return in case of a military occupation. General principles of law should therefore be developed, through the emergence of common legal principles in most national legal systems. The potential techniques for the expansion of cultural heritage international law are manifold.

Secondly, in order to broaden the current scope of the international law of cultural heritage, its sources need to be understood in a broader and comprehensive way in order to encompass new situations. For instance, international law instruments should take into account the new digital tools, and use them for better protection, while limiting their possible side effects. The digitization of museum collections is perceived as an appropriate tool to facilitate the harmonization of procedures for the restitution of stolen or illicitly exported cultural property, as well as the return of cultural goods taken during colonial time. The digitalization of African collections within western museum institutions is increasingly presented as a solution to the problem of the return of cultural objects. These digital tools nevertheless carry with them new tensions. The choice of objects to be digitized is not a technical matter, but a political choice of the curators. Digital tools or temporary loans can be intermediate solutions to restitution claims when both parties are willing to keep at least a copy of a cultural good. The use of blockchain technology can clarify the rights of the various stakeholders in commercial transactions on cultural goods. It could for instance facilitate the identification of the *bona fide* purchaser and support the harmonization of statutes of limitation and compensation regimes for restitution. NFTs would also contribute to this evolution by allowing the state or community of origin of a cultural object to secure an exclusive property right on the digital token that represents the tangible or intangible object stored in a museum collection abroad. Digital applications and tools can also be a useful means to help for rebuilding a building or a site (see the reconstitution of Palmyra) or for identifying which objects, in the art market, may have an illicit origin. All these new technological opportunities should be taken into account by the legal framework; this would for instance prevent the breach of property rights and of cultural heritage protection in times of war.

A comprehensive interpretation of some treaties or other international law sources would also help finding new solutions. For instance a serious revision of the World Heritage Convention would be required to extend its scope to locations standing outside states' jurisdiction in order to enable a universalist protection to outer space cultural properties; for the time being, it is, as all multilateral treaties regarding cultural heritage, clearly territory-based. The Underwater Cultural Heritage Convention need to be amended instead of comprehensively interpreted, in order to enable it to also protect elements of recently sunk cultural heritage. One could argue that preventing key cultural heritage elements from preserving their status as cultural heritage and protected as such after undergoing sea-level rise is

an interpretation of the convention that 'leads to a result which is manifestly absurd and unreasonable'. But this would mean skipping the age requirement, which makes this solution hazardous. Article 1 of the 2001 Convention ought better to be amended to include this new and forthcoming scenario.

It is worth noticing that the *ratione temporis* scope of some treaties might also be widened, as an exceptional means to protect important cultural assets for human history. Such an approach would favor further ratifications of the 1995 UNIDROIT Convention, as it would enable former colonial states to claim for the return of the cultural objects that come from their territory.

3.1.4. Making international law more accessible and well-known

As far as state parties are concerned, both national institutions and international actors and judges need to get a better knowledge of the rules of international law. This is not an easy task. The Pacific Islands states case sheds light on the need to make international law more accessible and well-known, and on the current barriers to overcome. The low or slow ratification rate of universal treaties (process still pending regarding the 1954, 1970 and 1995 conventions) is largely due to the lack of governmental expertise in this area. Expertise within the government is slow and funding requests from governmental departments for legal consultancy is hard to obtain. This may bring difficulties as the need to protect autochthonous cultural heritage in particular is not unanimously recognized.

Disseminating knowledge of the international rules means informing cultural actors of the applicable rules and of their precise rights and duties, as shown in several instances. Museums have to perfectly know what kind of preparatory behavior they are supposed to adopt before an international armed conflict. There is also a lack of awareness in the practice of referencing to international law instruments, for instance in the case of the famous World Heritage Convention, judges being also be affected by this risk. The training of cultural stakeholders should also be supported and systematized. In the Republic of Fiji, for instance, some state agents who received training in the cultural industry abroad have been assigned to the Ministry of education to go back to teaching without taking advantage of their new skills. The Secretariat of the Pacific Community tried to tackle this issue in its regional cultural strategy for 2010-2020, which contains guidelines on human resources development plan and on the cultural industry. Some key actors happen to opportunely learn international law rules thanks to foreign

actors, even in an accidental way. So did the Fiji Military Forces who have learned international humanitarian law rules regarding cultural property accidentally, thanks to their participation in peacekeeping operations.

Private actors and stakeholders should also be considered as needing more expertise in the field of cultural heritage law. During armed conflicts, for instance, it is necessary to find ways of helping non-state actors to meet international law rules and standards if they so choose; in that regard, the opportunity for them to benefit from an international assistance, be it from a single foreign state, should be discussed and a balance between diplomatic and legal arguments should be set.

Fully involving the art market actors in the fight against traffics, illicit exports and imports is a real legal and mindset challenge that has to be addressed by international institutions and rules. Can new methods of identification or education contribute to a more effective protection of online sales by involving the art market actors themselves? In all fields of cultural heritage law, more expertise is required, which should be created by UNESCO, UNIDROIT, WIPO, or by other international organizations, non-governmental organizations, academics, so on and so forth. Non-specialists should be better informed of both the specific challenges and the rules of cultural heritage law. There is a need for new policies, mechanisms and maybe institutions in that regard. Some initiatives have already been taken that should serve as examples for other international law instruments. The UCAP project (Unidroit Convention Academic Project) facilitates the study of the UNIDROIT Convention ; it is an online platform of shared materials from diplomatic conferences, commentaries, national implementation materials, case-law, scholarly articles and professional materials that aim at facilitating the operational effects of the 1995 Convention and clarify its interactions with the other normative instruments at stake. This project aims at assisting lawyers, judges, Governments, and art market players; it is part of a lobbying policy fostering current international law rules which sounds appropriate. Such actions should be fostered, also in other fields of cultural heritage law. Another initiative of this kind was undertaken by WIPO to facilitate the dissemination of best practices among various stakeholders regarding the issue of cultural appropriation. Currently, concepts of misappropriation and of misuse are being used by the WIPO within the framework of its program on *IP and traditional cultural expressions.* However, these two concepts overlap only partly with the notion of cultural appropriation. The WIPO is therefore only engaged in awareness-raising acti-

vities with professionals and the wider public. This includes promoting four principles for non-appropriating behavior (especially in the field of fashion). These principles can be associated with the notion of 'ethics' applied to the commodification of culture. This is soft law and can help change practices in this regard, though it does not in itself affect existing international and state IP norms. Some examples of fruitful collaboration between the fashion industry and holders of TCEs relate to the use of 'Dutch-African' wax print fabrics or of caribou parka in Canada by western fashion companies.

3.1.5. Deepening International Cooperation

International cooperation is also required, for instance regarding movable cultural heritage's movement or reactions to international disasters. From the 1960s' onwards, international cooperation has been the key aspect of the protection of the World Heritage, and a significant step in building a cultural heritage multilateral law. It should remain an important path towards effective protection, although multilateralism is currently challenged. Instead, bilateral agreements and treaties providing more substance to the universal law framework are now flourishing. In the case of the 1970 UNESCO Convention which has 141 States parties the implementation of the Convention is sometimes channeled through second degree bilateral agreements between both States Parties or between the latter and third states to the convention.

Another way to deepen international cooperation would be to adopt a more inclusive vision and involve new actors. More than normative instruments what is required is a set of institutions and technical tools. A sub-state practice is under development, which involves the New York Antiquities Trafficking Unit and foreign counterparts This institution cooperates with foreign judicial and police authorities; its existence impacts the market in New York and provokes a slight move to other places. More initiatives of this kind are thus required. The coordination of sub-state entities proves efficient, as it has been the case of the direct involvement of American Museums in concluding restitution agreements with the Italian State (MFA of Boston, Getty of Los Angeles, Cleveland Museum of Arts, MET of New York). Other initiatives have to be encouraged. Some cities – such as Glasgow – are developing their own restitution and return policy; their example may be followed, in particular when a central Governmental decision appears difficult. Private actors should also be included in future international cooperation initiatives. This is particularly true of owners of private museum

collections in relation to the issue of restitution or return of cultural property. For the time being, there is a mismatch between the legal framework and reality in this regard. Discussions, and negotiations on best practices in return and restitution are mainly concerned with public collections and inter-state collaboration. But private owners, who are less affected by the attempts to regulate this field, are numerous; a legal framework would prove helpful to solve many cases.

Generally speaking, precise and practicable procedural tools are required to enhance judicial and criminal cooperation. For instance, UNIDROIT would benefit from accessing specialized databases to cope with the lack of information on case law. It also collaborates with UCAP in the framework of small technical workshops and projects seems to be of a paramount importance given the lack of information sharing regarding the practical problems states parties are now facing in the implementation of the 1995 Convention.

To face the challenges of climate change, natural disasters and pandemics, similar *ad hoc* innovative techniques involving sub-state actors should prove also adequate, as it is a way to bypass the lack of state's consent or the incapacity to provide an answer to some new challenges that require important financial and legal means. As concrete solutions are required and multilateralism techniques seem troubled, the odds are that both an inter-states and more innovative public-private kinds of partnership would prove very useful.

3.2. rethinking cultural heritage law

In addition to promoting the effectiveness and usefulness of existing international law rules and instruments to the full, there is a need to rethink cultural heritage law in order to meet current and future challenges. A revival of cultural heritage international law should move beyond its initial paradigms: anthropomorphism, a clear dividing line between culture and nature, patrimonialism. It would aim to reduce some of its main features that are subject of much criticism: westernalism and state-centrism. It may enable international law rules to evolve towards universality. To meet that end, at least partially, it is necessary to resolve the fragmentation of international law, to work on a new definition of cultural heritage, and to change the rationale of cultural heritage law.

3.2.1. The Need for a Less Fragmented Normative Approach

In order to meet a larger efficiency of the legal system and provide a strongest and widest protection to cultural heritage in all situations, a more inclusive and integrated approach is required from international rules and actors. The current state of the law is that of a fragmented set of rules fraught with gaps, overlaps and potential contradictions. Two paths can be followed to change that state of the art: to better articulate current legal instruments, and to foster a better integration of cultural heritage law into general international law.

Towards Greater Cohesion in Cultural Heritage Law

A main issue to address when rethinking cultural heritage law is that of overcoming its piecemeal nature. Diversity exists among international law rules, and most instruments work in silo. There are numerous legal instruments, each being applicable only to some kinds of cultural elements, identified according to autonomous sets of definitions. The number of international legal sources comes from an object-based approach, each text or rule being dedicated to certain kinds of cultural heritage supports or situations. The instruments of multilateral law being diverse, double legal standards may occur. Some elements of cultural heritage remain in uncertain legal situations. A dual view over one and the same element of cultural heritage may result in an incompatibility between two competing legal solutions. For instance, indigenous knowledge on natural elements remains at the crossroad between medical technologies, cultural intangible heritage and new forms of technologies; this does undermine the definition of a single and unified legal regime. This situation can lead to different and contradictory approaches. Fragmentation may also lead to grey areas deprived of protection. The international humanitarian rules, and consequently international criminal jurisdictions (*see* the *Pavle Strugar Case* before the ICTY), do not straightforwardly consider the inscription of a cultural good on the World Heritage List. The legal categories proposed (special protection according to Art.8 of the 1954 Hague Convention, enhanced protection according to Article 10 of its Second 1999 Protocol) are specific to the law of war, and have not met with much success, contrarily to the 1972 World Heritage Convention. Therefore, it would be appropriate to establish a more coherent international legal framework.

The states' jurisdiction in defining their own cultural heritage leads to multiple cases of positive conflicts of law: a single element of cultural heritage can be considered as national heritage

by two or more states, and international law does not provide a rule of conflict to solve the issue that will be addressed by national judges or other entities. A coordinated approach would make it possible to limit trafficking and avoid forum shopping.

It is worth noting that the current legal pluralism partially comes from cultural heritage pluralism itself. It is not mainly driven by the 'differing pursuits and preferences that actors in a pluralistic (global) society have' (Martti Koskenniemi to the International Law Commission, A/CN.4/L.682 and Add.1*, 2006). Many international treaties and soft law instruments have been prepared within the same international organization, the UNESCO, and some bilateral or regional instruments are also supporting multilateral ones. In such a context, a way towards more unity may not be an impossible task. An umbrella treaty drawing bridges between every multilateral treaty in order to fill up the gaps could be imagined.

To a certain extent, uniform law can also be a solution. In particular, it appears necessary to solve the issue of incompatibilities between the Romano-Germanic and Common law traditions. This notably concerns the age-old problem of harmonizing the legal regimes related to the return of stolen or illegally exported goods. The issue relates mainly to the difficulties of harmonizing the domestic laws with respect to the situation of the *non-domino* purchaser of a stolen or illegally exported object. Schematically, common law countries will protect stolen owners or rightful possessors rather than the new *bona fide* purchaser. However, there are exceptions. Conversely, countries of Romano Germanic legal tradition will better protect commercial transactions and the purchaser. These differences are significant in terms of compensation of the *bona fide* purchaser.

Some international organizations have proposed a few avenues regarding the development of uniform rules, all related to capacity building. UNIDROIT has had capacity building events during the past years, mostly with Africa and with the support of UNESCO field offices. It consists of online courses organized with the *École du Patrimoine Africain* (Benin) or with other partners (such as UNESCO, Interpol, Qatar, ICCROM, etc.). Bilateral online meetings have also been organized with states that have set up a legal framework to proceed with the ratification of the 1995 UNIDROIT convention and subsequent implementation of its provisions.

Human rights may also be part of the solution and drive the piecemealed framework of rules towards a more unified legal regime. They encompass the several forms of cultural heritage and can offer clues towards a better protection for every ma-

nifestation of a cultural identity, and as a matter of consequence for every piece of cultural heritage. The efforts of the last two Special Rapporteurs of the Human Right Council to embrace the heritage question are a very important step and open a path to follow. It would be meaningful for cultural heritage legal protection if a better recognition of cultural rights were reached, and if the right to participate in cultural life and the less recognized right to cultural identity were strengthened: every element of cultural heritage could then benefit of this protection.

Towards a Less Isolated Cultural Heritage Law

Cultural heritage law should not remain isolated in international law, and mostly considered as a *lex specialis* and a *lex* for specialists. It is at the crossroads between human rights, economic, environmental, digital and geopolitical issues, and the rules addressing each of these questions should not remain isolated. The genesis of some of the instruments of cultural heritage law proves this ontological diversity. UNESCO has finally been the organization in charge of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, but it has consulted the WTO, the OMPI and the CNUCED beforehand, in an attempt to reconcile cultural and commercial considerations. The UNIDROIT has been tasked by UNESCO to draft a new treaty that would be complementary to the 1970 one. The United Nations Security Council has been addressing cultural heritage issues and expanded its definition of peace and its jurisdiction as an international peacekeeping organ when it considered the protection of cultural and archaeological heritage and the need to prevent extensive trafficking coming from a theater of war. A unified answer to the financing of terrorism by Libyan and Syrian artefacts is requested by the Security Council of the United Nations who *'recalls that (...) States shall ensure that no funds, other financial assets or other economic resources are made available, directly or indirectly, by their nationals or persons within their territory for the benefit of ISIL and individuals, groups, entities or undertakings associated with ISIL or Al-Qaida'* in accordance with its previous resolutions. The question of cultural heritage often cannot be addressed individually, and lawyers from humanitarian, economic laws, for instance, should pay more attention to it. Dealing with cultural heritage often requires a balance between diverse interests, such as those of sustainability and those of economy. Cultural heritage protection is often unbalanced with what is considered as an economic imperative for development. For an example of this issue, see the aforementioned question of the balance between sustainable development and cultural heritage, which led some scholars to speak of 'the dark side of sustainable development'. The

latest example of this is the 2021 Rome Declaration of the G7. Borrowing the line between sustainability and economy would imply new limitation and control rules, and a renewed definition of the criteria for cultural heritage protection.

A better porosity of the different branches of international law should be reached in order to improve legal protection. A fruitful dialogue should be created as each international law branch solutions may be inspired from another one. The stakeholders in the other fields of law (the FAO or the World Bank for instance) should also be aware of cultural heritage's rules, and their knowledge of cultural heritage law should be developed for its specific rationale to be better taken into account. Conversely, cultural heritage law should benefit of the example of other international law fields. Initially, the effects of climate change on cultural heritage were not addressed before the *Operational Guidelines for the Implementation of the World Heritage Convention* were amended. Nowadays, the World Heritage law is increasingly influenced by climate change law and disaster law. But this first step has to be carried on: unfortunately, these do not really take into consideration the distinctive features of cultural heritage.

To achieve this goal of a less fragmented and isolated international cultural heritage law, education on key features and unified principles should be promoted. One option would be to draft specific guidelines for all international actors – perhaps under the auspices of UNESCO – on *how to deal with cultural heritage*. Another option could be the adoption of a framework convention of non-binding implementation instruments, regularly adapted to new issues and particular fields – but multilateralism is not an easy path at the time being.

3.2.2. The Need for a Renewed Conception of Cultural Heritage

The notion of cultural heritage should be modernized and adapted to the current global realities. The conception of cultural assets has evolved throughout the 20th century. The initial protection dedicated to specific tangible movables and immovables was piecemealed and changing. It referred for instance to 'buildings dedicated to religion, art, science, (...) historic monuments', or 'municipalities, (...) institutions dedicated to religion, charity and education, the arts and science' (Articles 27 and 56 of the Regulations respecting the Laws and Customs of War on

Land, Annex to the Convention (IV), The Hague, 18 October 1907). The 'cultural property' notion was introduced in 1954 by the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and later it has broadened its scope towards the protection of 'cultural heritage' meaning both tangible and intangible heritage. Nonetheless, it has always been dependent on states' will for qualification and by the way protection.

During the first half of the 21st Century, two main trends would enable a revolution in the concept of heritage, but also in the techniques for identifying what needs to be preserved. Cultural heritage's identification and legal regime should be defined in a more inclusive way. One of the next necessary steps is to go beyond westernalism, and to open more systematically cultural heritage international rules to other realities.

Such a new approach would enable international protection to reach a wider representativeness, as it would respect non-western attachment to culture. The vision of culture is mainly based on that of 'heritage'; but this is not representative of every cultural identity and practice. The World Heritage List has been largely criticized for not being representative of diversity of cultures, and for being too focused on western and European cultures. A new policy and the protection of intangible heritage by the Convention for the Safeguarding of the Intangible Cultural Heritage have only partially solved this issue by enabling some countries to have more cultural properties internationally recognized and protected. In order to avoid having Governments bear all the burden of such strategic choices of deciding what to protect – and leaving this tricky question exclusively to political considerations -, both the help of experts and the participation of cultural communities would be required. Participation therefore needs to be strengthened to enable a better representativeness of all the continents in the heritage lists (for instance the World Heritage one), and of all the cultural communities within the state. Cultural communities should be consulted on the definition of what requires protection (*see* the *Final Report on Participation in Cultural Heritage at the Global Level*, and the *Resolution* of the ILA Committee on Participation in Global Cultural Heritage Governance).

Protecting cultural heritage also requires some thought on what history do we want to preserve. Cultures naturally evolve. What moment do we want to capture? If the sea-level rise causes some seacoast cultural sites to evolve, the age criteria for qualifying them as underwater cultural heritage (2001 Convention) may not be relevant as it does not allow them to be considered in their new natural environment. A new pragmatic approach

is required in this regard, in order to take into consideration the changes affecting elements of cultural heritage. The movement of cultural property affects its use, and to some extent its meaning African masks shoved into the Western art market carry a dual reality as they remain cultural heritage assets and also become a commodity for sale. Because of their history, some objects are now linked to two or more cultures or countries. Be this is legitimate or not, international law should take into account that complexity.

Moreover, the current approach of cultural heritage can also be questioned, as it fixes a cultural reality at a certain time and precludes taking into consideration new realities. Do technological and industrial evidence and souvenirs of human presence in outer space and on celestial bodies constitute a cultural heritage of human history that international law should explicitly protect? Needless to say, it may deserve a particular legal treatment, as the movables at stake are not meeting the usual criteria of age criteria, nor do they deserve an esthetical specificity. Astronauts shall be regarded as "envoys of mankind in outer space" (Outer Space Treaty, 1967, Art. V), what they leave in space should be considered as pieces of cultural heritage of Humanity and should deserve a specific status.

To what extent can the cultural heritage notion extend to traces of an industrial past? To what extend is *cultural* heritage definition evolving when protecting the remembrance of catastrophes that have been emblematic of Human History (Hiroshima Peace Memorial (Genbaku Dome) are on the World Heritage List, and the Ukrainian Government was preparing an application for Chernobyl)? How should we considered satellites and other human-made objects in outer space? Are these assets elements of heritage and do we need to provide a new conception of heritage, or should we broaden the scope of the current definition?

The current concept of cultural heritage should also be enlarged to include other realities. Anthropomorphism should be avoided in the conception of cultural heritage, as culture and nature often prove to be intertwined; a cultural landscape, for instance, is both cultural and natural, and deserve both protections. Even natural sites are a human-made category. Culture and nature should not be taken separately and be subject to separate legal rules and legal justifications. The protection of mixt properties of the World Heritage List are a first step. But it is not enough, as the two dimensions are so frequently intertwined. More inclusiveness implies taking into account the cultural and sometimes spiritual link that some communities have with nature and some natural sites or elements.

A further step towards a new conception of cultural heritage could be to take into account more explicitly the intangible dimension that is part of every cultural asset and is precisely *the* key-element for its cultural heritage dimension. Losing that intangible nature means becoming an ordinary good, site or practice. What matters and deserves protection is primarily the intangible dimension. This appears clearly in criminal law, as the criminal intention *(mens rea)* that needs to be established precisely depends on the intention to destroy the culture of the enemy. The debate over the recognition of a cultural genocide qualification in the 1948 Genocide Convention and the interpretation of the law by the judges afterwards clearly shows the difficulty and the inappropriate to isolate the tangible from the intangible. When dealing with restitution and return issues, consideration for the magic or transcendental dimension of some cultural objects would also prove appropriate, as relocating them may have deprived them from their spiritual dimension and cultural usefulness, transforming them from living cultural assets to historical and esthetical objects of an only tangible nature. Should international law take into account this change in signification to offer appropriate solutions, and consider the intangible dimension of every cultural asset in order to limit the practices that diminish their meaning and cultural value?

This approach cannot be without limits. A more defensive stance could also be taken with respect to certain items. The characteristics of cultural heritage items will have either to be reassessed, or to undergo a paradigmatic shift. The features of elements of cultural heritage and works of art is questioned. In some respects, the development of NFTs endangers the specificity of cultural heritage, as the copy of a work of art may challenge its uniqueness; does it require a proper legal category or should the cultural heritage's notion be enlarged? The growing uses of traditional knowledge and medicines for business purposes are also challenging the very definition of cultural assets, eroding the lines between the commercial, cultural and natural dimensions of heritage.

Given the manifold challenges at stake, the way to adopt a new approach to cultural heritage is not easy to conceive. Most of the required changes happen to be normative, but governance is also at stake. This concerns international institutions, the governments, the judges, and may entail a right of inspection within States. In many aspects the international law of human rights should be considered as a model. A new universal convention that would propose an inclusive definition of cultural heritage and replace the old ones would not be easy neither to draft, nor to adopt. Common guidelines by UNESCO for the

interpretation of all its conventions and legal instruments may be a more realistic way towards the large renewal of that approach. This should be combined with a more bottom-up approach, including other stakeholders.

Only by abandoning a far too conservation-focused pattern of conservation and by including a bottom-up approach should the protection of cultural heritage be that of what either the cultural communities themselves or the international community wish to have in place at any given time. Such a change in perspective is necessary to eliminate the current drawbacks. Therefore, both the definition of cultural heritage properties and of the identification techniques of those deserving of protection have to change in order to reduce the cons of the current situation and enable the international law of cultural heritage to achieve greater representativeness.

3.2.3. The Need to Renew the Fundamentals of Cultural Heritage Law

Towards a Multilevel Stakeholder Governance

As other fields of international law, cultural heritage law may require a new vision. First and foremost, that change in perspective would imply a better porosity to new actors and dynamics of international relations and rulemaking. The interstate vision of international relations cannot constitute the only ground for the modern protection of international cultural property anymore. A multilevel stakeholder governance is required. More attention should be paid to private actors and new forms of normativity. The multilateral dimension is not always the more convenient to design new rules, be it because of a lack of general agreement or because regional or local solutions can prove more adequate. In the field of returns and restitutions, for instance, the interests at stake used to be mainly described by referring to the opposite interests of sources nations and market nations (*see* JH Merryman: "Two Ways of Thinking About Cultural Property", *AJIL* 1986; and: "Cultural Property Internationalism", *International Journal of Cultural Property* 2005). Nowadays, the emergence of many new actors renders this traditional line inaccurate. The ILA Lisbon Resolution (2022) opportunely

calls for a new paradigm in cultural heritage governance, aiming at strengthening the participation of cultural communities. Experts should also be enabled to play a larger role to counterbalance States' will in favor of a more universal and objective protection.

The proposal for new solutions from under-states actors may play an important role in the development of a global administrative law for cultural heritage: cities, museums, and private actors can create their own legal solutions, and for instance continue fulfilling their functions as actors for restitutions. Some of the most appropriate responses to the effects of climate change on cultural heritage, for instance, may come from the creativity and resilience of cultural communities themselves. Whatever the paths towards may be, the function of non-State actors has to be better taken into account by international rules and driven by it. They can intervene either as lawmakers, as beneficiaries of norms, or to facilitate their implementation. Such an evolution, if added to the growing role for non-state actors, would make international law of cultural heritage look like a global law for cultural heritage.

Towards a New Discourse for Cultural Heritage Law

The new face of cultural heritage law should also include other narratives. This would enable it to be more inclusive, and faithful to reality. Firstly, westernalism should be overcome and the opportunity to follow more post-colonial studies approach should be examined. A newly balanced solution has to be found to the dialectical interplay between universalism and particularism in the protection of cultural heritage. Ontologically, cultural heritage has a double grounding: *'each society's cultural heritage has begun to be seen as forming part of the common heritage of mankind'* (UNESCO for 1984-1989 Draft Medium-term plan). A new equilibrium is now required that would not necessarily balance universalist aspirations with national but also with local ones.

Secondly, international protection of cultural heritage could also overcome the exclusiveness of sovereignty or property rights to foster a larger inclusiveness to the parties involved in the protection of cultural heritage, thanks to the definition of cultural heritage and a reference to the commons. The shared part of every piece of cultural heritage calls for a specific legal regime. Some paths forward have been made while creating transborder regimes and categories, but the situation of cultural heritage in contested or transborder zones remain unsatisfactory. Human

rights law was initially not familiar with the issues at stake, but now begins to take into account this need while enlarging cultural right's protection of cultural heritage through collective interpretations of the rights.

Alternative Paths for Cultural Heritage Protection

Finally, enabling the development of a new way of thinking about cultural property implies the development of specific legal techniques and solutions. Introducing a multilateral renewed law of cultural heritage may be too idealistic in the short term. Regional and bilateral treaties can be a solution, at least temporarily, to create a new dynamic. A possible method to achieve harmonization is to develop interstate bilateral agreements. All bilateral cultural cooperation agreements concluded by Italy contain clauses stipulating that for the purposes of restitution, the contracting parties will proceed in accordance with the principles set out in the 1970 UNESCO convention and the 1995 UNIDROIT convention, even in the absence of ratification from the part of the contracting state. The aim is therefore to extend the normativity of these two conventions beyond the scope of state parties, such as Germany or Austria with respect to the 1995 UNIDROIT convention.

Additionally, other paths may be taken to foster a more effective protection of cultural heritage against the current and forthcoming challenges. Some do not rely solely on legal techniques. When formal instruments are not enough to provide answers to concrete cases, diplomacy happens to fill up the legal gaps, with unpredictable but pragmatic solutions. Most of the demands for return of cultural heritage are resolved thanks to *ad-hoc* solutions. Diplomatic channels should not be underestimated. The multiplication of international law fora can also be a key as it would easily enable states to come to an agreement on the growing functions of non-state actors.

Last but not least, some practical solutions can provide a key when the production of new legal rules appear complicated. NFTs can notably offer new solutions to the implementation of the obligation to return stolen or illicitly exported cultural property, but also to claim for the return of cultural property confiscated during colonial times. The digitization of the property held in a private or public western collection can result in implementing a NFT on this digital simulation of the said property. The original holder of the property, whether it be the state, an individual, or a local community, could then recover property rights over the digital object and generate income from it, so that the physical property could remain in the wes-

tern collection. The reverse solution is also possible: the property can be physically returned to its original holder, allowing the western collection to maintain a digital copy in its collection. Therefore, digitalization of cultural heritage items enables two entities to simultaneously secure some form of ownership over it, and solve diplomatic and inter-personal debates. This cannot be achieved, however, without a proper legal framework.

annex 01

persons interviewed

list of interviewed people

(by alphabetical order)

- Hirad Abtahi, First Legal Adviser of the Presidency of the International Criminal Court, The Netherlands
- Dalee Sambo Dorough, Assistant Professor of International Relations, University of Alaska Anchorage, Chair of the Inuit Circumpolar Council-Alaska
- Adi Meretui Ratunabuabua-Divialagi, Chair of Blue Shield Pasifika, Fiji
- Giuditta Giardini, New York County District Attorney's Office, Consultant- Antiquities Trafficking Unit, United states of America
- Marlene Losier, Legal expert in cultural and celestial properties,Principal, Losier González PLLC, United States of America
- Roger M. O'Keefe, Professor of law at Milano Bocconi University, Italy
- João Pacheco de Oliveira, Professor of anthropology at the National Museum of Rio de Janeiro. Curator of the National Museum's ethnographic collections, Brazil
- Marina Schneider, UNIDROIT Senior Legal officer and treaties depositary, Italy
- Alexandra Xanthaki, Professor of Law at Brunel University London, UN Special Rapporteur in the field of cultural rights, United Kingdom
- Huo Zhengxin, Professor of Law at the China University of Political Sciences and Law, Member of the China Law Society, Vice Chairman of Law Committee of China Society of Museum, Chin

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