

# Human rights and illicit trade in cultural objects

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[C]ultural heritage is an important component of the cultural identity of communities, groups and individuals, and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights [...]<sup>1</sup>

## 1. Introduction

Movable cultural heritage is not bounded nor shielded by national territorial borders. Applicable domestic laws are of limited import without the cooperation of other states and the international community. Despite a century of domestic legal protection of movable cultural heritage in many states,<sup>2</sup> widespread non-compliance and lack of enforcement has been the norm rather than the exception.<sup>3</sup> However, the tide is turning. States formerly reluctant to ratify cultural heritage treaties have done so, signalling their acceptance of the importance of multilateral action in this field.<sup>4</sup> Enforcement of such laws is viewed as part of the reinforcement of good governance, rule of

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<sup>1</sup> Declaration concerning the Intentional Destruction of Cultural Heritage (Intentional Destruction Declaration), General Conference Resolution 32C/33, 17 October 2003.

<sup>2</sup> G. Hill, *Treasure Trove in Law and Practice from the Earliest Time to the Present Day* (Clarendon Press, 1936).

<sup>3</sup> See N. Brodie, M. M. Kersel, G. Luke and K Walker Tubb, *Cultural Heritage and the Antiquities Trade* (Macdonald Institute, Cambridge, 2006).

<sup>4</sup> In respect of treaties specifically covering illicit trade of movable cultural heritage, as of June 2011 the Convention for the Protection of Cultural Property in the Event of Armed Conflict ('1954 Hague Convention'), (The Hague, 14 May 1954, in force 7 August 1956), 249 UNTS 240; Protocol for the Protection of Cultural Property in the Event of Armed Conflict (*HPI*), (The Hague, 14 May 1954, in force 7 August 1956), 249 UNTS 358; Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (*HP II*), (The Hague, 26 March 1999, in force 9 March 2004), 2253 UNTS 172; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention), (Paris, 14 November 1970, in force 24 April 1972), 823 UNTS 231; and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT Convention) (Rome, 24 June 1995), ILM, vol. 34(1995), p. 1322.

law and human rights in the international and domestic spheres.<sup>5</sup> This new found international cooperation has emerged within the context of developments in human rights law which have necessarily redefined and informed initiatives to combat the illicit traffic of cultural goods.

The protection of human rights and movable heritage has been steeped in the national realm and domestic laws. Yet, their effective protection and promotion cannot be confined to the state. The gradual articulation of the symbiosis between cultural heritage and human rights, particularly cultural rights, has led to efforts to further clarify the nature of the obligations owed by states (and non-state actors) in respect of protection of movable heritage, which have been bolstered by implementation and enforcement measures. It has also expanded the right-holder beyond the state – to individuals and groups.

This chapter seeks to outline recent developments in the human rights law and international law for the protection of cultural heritage which manifest this interrelation as it pertains to movable heritage. In the first part, I examine existing specialist conventions and treaty provisions covering movable cultural heritage during armed conflict, belligerent occupation and peacetime to outline the obligations of states and non-state entities. I consider how these instruments have evolved to make them amenable to human rights concerns. In the second half, I analyse the increasing interplay between human rights norms and efforts to combat damage, destruction and illicit transfer of movable heritage to highlight the expansion of right-holders beyond the state – to individuals and groups. This emerging synergy between cultural heritage and human rights law reinforces the enjoyment of a range of human rights, advances ‘social cohesion’, and reinforces enforcement mechanisms.

## **2. Specialist cultural heritage instruments**

The primary motivator of relevant international instruments during armed conflict and peacetime is the protection of cultural heritage of universal and national importance respectively. These treaties betray a bias toward the rights and obligations of states and international transfer of movable heritage. However, increasingly these seemingly divergent aims are bound by the importance of cultural heritage for individual and collective enjoyment of human rights across and within states. This shift is necessarily recalibrating the obligations of states and application of these existing instruments. Protection has expanded to cover armed conflict and peacetime, internationally

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<sup>5</sup> ECOSOC Res. 2003/29, 22 July 2003, Prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property; ECOSOC Res. 2004/34, 21 July 2004, Protection against trafficking in cultural property; and GA Res. 64/78, 7 December 2009, Return or restitution of cultural property to their countries of origin, UN doc. A/Res/64/78.

and within states. Reflective of the opprobrium with which such acts are increasingly held by the international community, there has been a concerted effort to criminalise such acts. International cooperation is directed, therefore, not only at restitution of illicit removed cultural objects but enforcement through criminal and civil proceedings.

In this first part, I focus on the obligations on states and non-state actors for the protection of movable heritage, including prevention of its illicit transfer, in leading international instruments. First, there is an analysis of the legal obligations concerning the removal and restitution of cultural goods during armed conflict and belligerent occupation in international humanitarian and international criminal law. Then, there is an examination of the specialist and generalist treaties affording peacetime protection. Given the complex and fluid nature of armed conflicts and occupation and the movement of cultural goods, as the instruments themselves and subsequent jurisprudence makes manifest, these various treaties and their attendant obligations are entwined.

## **2.1 Protection during armed conflict and belligerent occupation**

### **2.1.1 International humanitarian law**

International humanitarian law affords protection to movable cultural heritage during international and internal armed conflict and belligerent occupation, periods when the threat of destruction, damage and illicit transfer escalates. The interrelationship between these international humanitarian law standards for the control of illicit transfer of cultural property and human rights has been stressed by the international bodies since the 1970s.<sup>6</sup> Particular developments in international humanitarian law, including extension to internal armed conflicts, the articulation of peacetime safeguarding measures and prosecution of perpetrators, have contributed to the gradual reinforcement of the importance of curbing removal and facilitating return of movable heritage for the enjoyment of human rights.

The obligation to respect cultural property generally during armed conflict is contained in the Regulations annexed to 1899 Hague II Convention and 1907 Hague IV Convention (Hague Regulations).<sup>7</sup> The International Military Tribunal at Nuremberg found that the Regulations were

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<sup>6</sup> See GA Resolutions on Restitution or Return of Cultural Property from GA Res. 3187, 18 December 1973 to GA Res. 64/78, 7 December 2009; and Human Rights Council res. 6/1, 27 September 2007 entitled 'Protection of cultural rights and property in situations of armed conflict'.

<sup>7</sup> Article 27, Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague, 29 July 1899, in force 4 September 1900), 187 *Parry's*

customary international law by 1939.<sup>8</sup> The provision does not specifically cover movable heritage. Rather, it obtains protection if it formed part of or was housed within ‘buildings dedicated to religion, art, science, or charitable purposes, historic monuments’. The protection is subject to the proviso of military necessity.<sup>9</sup> Such general protection of cultural heritage, including movable heritage, is vitally important to controlling the illicit trade in cultural goods. It is essential to reinforce that illicit trafficking often commences with illicit acts of damage and destruction of monuments, sites and collections from which these ‘objects’ are originally removed. It is counterproductive to simply focus on subsequent acts of transfer.

Likewise, the Hague Regulations’ prohibition against ‘all seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science’ contained under the section covering belligerent occupation has been replicated in later instruments to encompass armed conflict also.<sup>10</sup> They remain an important fount of protection for movable heritage. This wording has become the template directly or indirectly used in the statutes of contemporary international or internationalised criminal tribunals,<sup>11</sup> domestic laws and military

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*CTS* (1898–99) 429, *AJIL Supp.*, vol. 1 (1907), p. 129 (1899 Hague II); and Article 27, Convention (IV) respecting the Laws and Customs of War on Land, and Annex (The Hague, 18 October 1907), 208 *Parry’s CTS* (1907) 77, and *AJIL Supp.*, vol. 2 (1908), p. 90 (1907 Hague IV).

<sup>8</sup> Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946 (42 vols, 1947-1949), vol. I, at pp. 253-254; and *AJIL*, vol. 41 (1947), p. 172, at pp. 248-249. This status was reaffirmed more recently by the International Court of Justice (ICJ): *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, p. 226, at p. 256; and *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, p. 136, at p. 172; and the International Criminal Tribunal for the former Yugoslavia (ICTY): *Prosecutor v. Dario Kordić and Mario Čerkez, Trial Judgment*, Case No. IT-95-14/2-T, ICTY (26 February 2001), paras 359-62; and *Prosecutor v. Miodrag Jokić, Trial Judgment*, Case No. IT-01-42/1-S, Trial Chamber I, ICTY (18 March 2004), para. 48.

<sup>9</sup> This requirement has been delimited by *HPH*, Article 6.

<sup>10</sup> Article 56, 1907 Hague IV.

<sup>11</sup> Article 3(d) Statute of the International Criminal Tribunal for the Former Yugoslavia, GA Res. 827 of 25 May 1993, amended by GA Res. 1166 (1998), 1329 (2000), 1411 (2002), 1431 (2002) 1481 (2003), 1597 (2005) and 1668 (2006), 1775 and 1789 (2007) and 1800 (2008)(ICTY Statute); Article 4, Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), SC Res. 955 of 8 November 1994 as adopted and amended to SC Res. 1901(2009); Articles 8(2)(b)(international conflicts), and 8(2)(e)(iv)(not international armed conflicts), Rome Statute of the International Criminal Court (ICC Statute), 17 July 1998, in force 1 July 2002, UN doc. A/CONF. 183/9; 2187 UNTS 90; Article 3, Statute of the Special Court for Sierra Leone, in Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (SCSL Statute), SC Res. 1315 of 14 August 2000, 2178 UNTS 138, 145; UN doc. S/2002/246, appendix II; Article 9 (jurisdiction includes grave breaches of the 1949 Geneva

manuals.<sup>12</sup> It too is considered part of customary international law.<sup>13</sup> Jurisprudence elaborating upon this provision is considered below.

Additional Protocols I (*API*) and II (*APII*) to the Geneva Conventions reaffirm this general protection for cultural heritage and extends it to international and non-international conflicts.<sup>14</sup> Contained within Chapter III of *API* covering civilian objects, Article 53 prohibits attacks on historic monuments, works of art and places of worship which ‘constitute the cultural or spiritual heritage of peoples.’ This phrase is replicated in Article 16 *APII* relating to non-international armed conflicts. The provision covers movable and immovable heritage.<sup>15</sup> While Article 53 operates without prejudice to the obligations contained in the 1954 Hague Convention and other humanitarian law instruments, it appears that the definition of cultural heritage covered by it is distinguishable from the 1954 Convention.<sup>16</sup> The word ‘peoples’ was intended to ‘transcend[] national borders’ and ‘problems of intolerance’.<sup>17</sup> The inclusion of the additional words: ‘or spiritual’, means that it covers sites ‘independently of their cultural value and express the conscience of the people.’<sup>18</sup>

Article 16 *APII* is a condensed version of the protection afforded in Article 53 *API*. Their *ratione materiae* are identical. *APII* refers to conflict between armed forces of High Contracting

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Conventions), Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, GA Res. 57/228B of 22 May 2003, UN doc. A/RES/57/228B (2003) Annex; Article 6, Law on the Establishment of Extraordinary Chambers in the Court of Cambodia for the Prosecution of Crimes committed during the period of Democratic Kampuchea (ECCC Law), with the inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) .

<sup>12</sup> See Practice relating to Rule 40: Respect for Cultural Property, ICRC, Customary IHL Database, <[http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule40](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule40)> (accessed 25 November 2010).

<sup>13</sup> J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (3 vols, ICRC, 2005), vol. 1, at pp. 132-136 and vol. 2, Part I, at pp. 790-813

<sup>14</sup> Article 53, Protocol Additional I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (*API*) (8 June 1977, in force 7 December 1979), 1125 UNTS 3; and Article 16, Protocol Additional II to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflict (*APII*) (8 June 1977, in force 7 December 1978), 1125 UNTS 609.

<sup>15</sup> Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, (1974-1977) (O.R.), vol.XV, at 277-278, CDDH/215/Rev.1, paras 68-70.

<sup>16</sup> Y. Sandoz *et al.* (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, 1987), at pp. 646-647 and 1469-70. See *Prosecutor v. Dario Kordić and Mario Čerkez*, Appeal Judgment, Case No. IT-95-14/2, Appeals Chamber, ICTY (17 December 2004), para. 91; and *Partial Award: Central Front. Eritrea's Claims* 2, 4, 6, 7, 8 and 22, reproduced in ILM, vol. 43 (2004), at pp. 1249, para. 113.

<sup>17</sup> O.R. vol. XV, at 220, CDDH/III/SR.59, para. 68; and Sandoz *et al.* (above n. 16), at pp. 1469-70.

<sup>18</sup> Sandoz *et al.* (above n. 16), at pp. 646-647.

Parties and dissident armed forces or other organised armed groups which exercise control over part of territory (Article 1).<sup>19</sup> With the preponderance of armed conflicts around the world at any given time being internal, this Protocol covering as it does acts within a state makes a direct link between international humanitarian law and human rights in its preamble.<sup>20</sup> Given its abbreviated nature, *APII* contains the core human rights which are considered non-derogable. It is therefore significant that it contains a provision covering cultural heritage.<sup>21</sup>

Pillage of property generally is prohibited during hostilities under the Hague Regulations (Articles 28 and 47). Condemnation of pillage, including cultural property, has occurred since classical times.<sup>22</sup> The repeated reaffirmation of this prohibition by publicists led to its inclusion in the earliest efforts to codify the laws of war.<sup>23</sup> The Geneva Convention relative to the Protection of Civilian Persons in Time of War (*GCIV*) of 1949, while not providing a dedicated provision for the protection of cultural property, does reaffirm the prohibition against pillaging of property per se (Article 33).<sup>24</sup> This prohibition is reiterated in *API* and *APII*.<sup>25</sup> Its replication and reaffirmation in governing statutes of international and internationalised criminal tribunals,<sup>26</sup> and related state practice has led to acceptance of the prohibition of pillage during international and non-international

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<sup>19</sup> Geneva Convention relative to the Protection of Civilian Persons in Time of War (*GC IV*) (12 August 1949, in force 21 October 1950), 75 UNTS 287, Common Article 3 applies to armed conflict of ‘non-international character occurring on the territory of one of the contracting parties.’ See also Article 1(4), *API*; . Article 1((2), *APII*; and Article 22(3)-(5), *HPII*.

<sup>20</sup> *APII*, Preamble, paras 1 and 2. See Sandoz et al (above n. 16), at p. 1339. See Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Geneva, 3 May-3 June 1972 (second session), Report on the work of the Conference (2 vols with Annexes, 1972), vol. I, at p. 120. Paragraph 4 of the Preamble of *APII* extends the application of the Martens Clause to non-international armed conflicts.

<sup>21</sup> Sandoz et al (above n. 16), at pp. 1340-41.

<sup>22</sup> C. De Visscher, ‘International Protection of Works of Art and Historic Monuments’, in Department of State, International Information and Cultural Series 8, reprinted in *Documents and State Papers*, June 1949, 821, at 823.

<sup>23</sup> Articles 34 and 36, General Order No. 100 by President Lincoln (Lieber Code), 24 April 1863, reproduced in D. Schindler and J. Toman (eds.), *The Laws of Armed Conflicts. A Collection of Conventions, Resolutions and Other Documents*, (Martinus Nijhoff, 3<sup>rd</sup> ed., 1988), p. 8; Article 8, International Declaration concerning the Laws and Customs of War (Brussels Declaration), 27 August 1874, not ratified, *AJIL Supp.*, vol. 1 (1907), p. 96; Article 53, *Manual of the Institute of International Law* (Oxford Manual), 9 September 1880, in Schindler and Toman (eds.), *ibid.*, at p. 36.

<sup>24</sup> 12 August 1949, in force 21 October 1950, 75 UNTS 287.

<sup>25</sup> Article 53, *API*; and Article 4(2)(g), *APII*.

<sup>26</sup> Article 3(e), ICTY Statute; Article 4(f), ICTR Statute; Articles.8(2)(b)(xvi)(international conflicts), and 8(2)(e)(v), Rome Statute; Article 3(f) SCSL Statute; Article 9, Agreement between UN and Cambodia; Article 6 , ECCC Law.

conflicts as customary international law.<sup>27</sup> This prohibition against pillage of property generally was elaborated upon and applied specifically to cultural property with the adoption of the specialist Hague framework.

The present-day, specialist international humanitarian law framework for the protection of cultural heritage during armed conflict and belligerent occupation includes the 1954 Hague Convention, the 1954 Hague Protocol (*HPI*), and the 1999 Second Protocol (*HP II*). The Convention applies to international and non-international armed conflicts.<sup>28</sup> In respect of international armed conflicts, if one of the parties is not a High Contracting Party, the treaty obligations remain binding on the High Contracting Parties and any other party which declares it accepts and applies the obligations (Article 18(3)).<sup>29</sup> Each of the parties to the non-international armed conflict is bound to the convention's obligations 'as a minimum' and the Convention's application to such conflicts is recognised as customary international law.<sup>30</sup> The United Nations has indicated its willingness to be bound by this framework.<sup>31</sup>

This dissolution of the divide between international and internal armed conflict is further reinforced by the Hague framework's emphasis on the heritage of 'peoples'. The preamble of the 1954 Hague Convention deliberately refers to 'peoples', rather than 'states'.<sup>32</sup> The definition of cultural property covered by the Convention covers publicly or privately owned, movable and immovable property 'of great importance to the cultural heritage of every people' (Article 1).<sup>33</sup> Read consistently with the preamble, the 'importance' of the cultural object should not be determined

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<sup>27</sup> *Prosecutor v. Tihomir Blaškić*, Trial Judgment, No. IT-1995-14-T, Trial Chamber, ICTY (3 March 2000), para. 743; *Kordić and Mario Čerkez*, Trial Judgment, para. 744; and Rule 52: Pillage, ICRC, Customary IHL Database, <[http://www.icrc.org/customary-ihl/eng/print/v1\\_rul\\_rule52](http://www.icrc.org/customary-ihl/eng/print/v1_rul_rule52)> (accessed 25 November 2010).

<sup>28</sup> Article 19, 1954 Hague Convention; and Article 22, 1999 *HP II*. Cf. *HPI* below.

<sup>29</sup> UNESCO Doc.7C/PRG/7, Annex I, at 5-6.

<sup>30</sup> Article 19(1), 1954 Hague Convention; and *Prosecutor v. Duško Tadić*, Interlocutory Appeal on Jurisdiction Judgment, No. IT-94-1-A, Appeals Chamber, ICTY (2 October 1995), paras 98 and 127.

<sup>31</sup> Secretary-General's Bulletin on the Observance by UN Forces of International Humanitarian Law, 6 August 1999, UN doc. ST/SGB/1999/13, para. 6.6.

<sup>32</sup> Cf. UNESCO Doc.7C/PRG/7, Annex II, at 20. See J. Toman, *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, signed on 14 May 1954 in The Hague, and on other instruments of international law concerning such protection* (UNESCO Publishing 1996), at p. 42, and R. O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge University Press, 2006), at p. 95.

<sup>33</sup> See Toman, *ibid.*, at pp. 45-56; and O'Keefe, *ibid.*, at pp. 101-111.

exclusively by the state where it is located. Rather it extends to the 'people'. This definition also applies to its two protocols.<sup>34</sup>

The 1954 Hague Convention and its regulations extrapolate upon the obligations to respect ('obligation not to do') arising during hostilities are triggered by a declaration of war or an armed conflict between two or more High Contracting Parties, even if not recognised as state of war by one of them.<sup>35</sup> In respect of this obligation, the Convention reinforces the application of the prohibition against pillage specifically to cultural property, with Parties undertaking to 'prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property' (Article 4(3)). In addition, they must not requisition movable heritage located in the territory of another Party. This obligation is not subject to the proviso of military necessity. This formulation was adopted by 1999 UN Secretary-General's Bulletin.<sup>36</sup> Under the Hague Convention, this reconstituted obligation to respect cultural property also encompasses belligerent occupation.

The Hague Regulations prohibit destruction, intentional damage or seizure perpetrated against these institutions, historical monuments, works of art or science, during belligerent occupation (Article 56). There is no exception for military necessity. Also, the occupying power must take all measures they are able to return public order and safety whilst respecting existing domestic laws including those concerning the protection and transfer of cultural heritage (Article 43).<sup>37</sup> The ICJ has stated that this duty means that an occupying power could be held responsible not only for its own acts and omissions but also for failing to prevent others on that territory violating human rights and international humanitarian law.<sup>38</sup> Belligerents violating these obligations will, 'if the case demands', be liable to pay compensation (Article 3).

The obligation to respect contained in the 1954 Hague Convention applies also when there is total or partial occupation of the territory of High Contracting Party even if there is no resistance (Article 18). The Convention also elaborates upon the obligations arising during belligerent occupation specifically (Article 5). The occupying power must cooperate with and support the competent national authorities for the protection of cultural heritage. If it is necessary to take

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<sup>34</sup> Article 1, *HPI*; and Article 1(b), *HP II*.

<sup>35</sup> Article 18, 1954 Hague Convention.

<sup>36</sup> UN doc. ST/SGB/1999/13, para. 6.6: '[...]Theft, pillage, misappropriation and any act of vandalism directed against cultural property is *strictly* prohibited' (emphasis added).

<sup>37</sup> Cf. Article 43, 1899 Hague II.

<sup>38</sup> *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, ICJ *Merits Judgment*, 19 December 2005, at p. 60.



measures to preserve the cultural heritage damaged by hostilities, and the competent authorities are unable to undertake the work, then the occupying power shall take ‘the most necessary measures of preservation’ with their cooperation, where possible. The provision extends to informing insurgent groups of their obligation to respect cultural property.

The obligation is clarified further by Article 9 *HPH*, which encompasses obligations espoused in the 1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations.<sup>39</sup> It provides that the High Contracting Party must prevent and prohibit any illicit export, other removal or transfer of ownership of cultural property;<sup>40</sup> archaeological excavations except when ‘strictly required to safeguard, record or preserve’ cultural property; and changes to the cultural property intended to hide or destroy ‘cultural, historical or scientific evidence’. Archaeological excavations or changes to cultural property in occupied territory shall only (unless circumstances do not permit) be carried out in close cooperation the competent national authorities of the occupied territory. Resolutions reiterating the prohibition against ‘the pillaging of archaeological and cultural property’ have been adopted in various United Nations fora.<sup>41</sup>

This protection afforded movable cultural heritage during occupation is reinforced by *HPI* which articulates the twin obligations of prohibiting export of cultural objects from occupied territory and restitution if it has been illicitly removed.<sup>42</sup> Under the Protocol, a state party which occupies a territory during armed conflict is required to prevent the export of cultural objects from this territory (para.1).<sup>43</sup> If it fails to do so, it is required to indemnify the subsequent *bona fide* purchaser when the objects are returned (para.4). All state parties are required to take into its custody, automatically on importation or on request of the authorities of the occupied territory, cultural objects imported into their territory from any occupied territory (para.2). They undertake to return cultural property which was illicitly exported or which was deposited into protective custody

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<sup>39</sup> Article 32, Part VI of the 1956 UNESCO Recommendation, in *Records of the General Conference, Ninth Session, New Delhi 1956: Resolutions*, (UNESCO, 1957), at p. 40.

<sup>40</sup> Articles 11 and 12 1970 UNESCO Convention; and reports of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation.

<sup>41</sup> For example, UN Commission on Human Rights Resolution 1(XXXIII)A on the question of violation of human rights in occupied Arab territories, including Palestine, 15 February 1977, para. 4(i); GA Res. 46/47, 9 December 1991, Part A, paras 8(h), and 25-26; UN Commission on Human Rights Res. 2005/7 on Israeli practices affecting the human rights of Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, 14 April 2005.

<sup>42</sup> Article 11 1970 UNESCO Convention provides: ‘The export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit.’

<sup>43</sup> See Articles 18 and 19, 1954 Hague Convention concerning transfer of property with special protection and in occupied territory for safekeeping.

during the armed conflict, to the competent authorities of the occupied territory on cessation of hostilities (paras.3 and 5). Cultural property cannot be retained as war reparations (para.3).<sup>44</sup> There is no time limit placed on these obligations.

Whilst not explicitly stated, it is generally assumed that *HPI* applies to international armed conflict.<sup>45</sup> The obligations contained in *HPI* were extended beyond High Contracting Parties when incorporated in condensed form into SC Res.1483 of 2003. This resolution bound all UN member states to ‘facilitate the safe return’ and prohibit trade in cultural heritage illicitly removed from Iraq since August 1990,<sup>46</sup> and it has been reiterated in subsequent annual General Assembly resolutions on the return or restitution of cultural property.<sup>47</sup>

### 2.1.2 International criminal law

The protection afforded to movable heritage during armed conflict and belligerent occupation by international humanitarian law is augmented by international criminal law and its implementation by an array of international and internationalised tribunals since 1945. These proceedings have the two-pronged approach of prosecuting perpetrators of serious violations of these humanitarian law norms and facilitating the restitution of cultural property by way of reparations. The resulting jurisprudence reinforces the link between human rights and protection of cultural heritage.

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<sup>44</sup> For discussion of contrary Russian state practice: Henckaerts and Doswald-Beck, (note 10 above), vol.I, at 137-138; and Practice relating to Rule 41: Export and Return of Cultural Property in Occupied Territory, IV: National Legislation and V. National Case-Law, ICRC, Customary IHL Database, <[http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule41](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule41)> (accessed 25 November 2010).

<sup>45</sup> The *travaux* noted that: ‘Where property has changed hands on the national territory and has not been exported, the case is one for the national legislation alone’: UNESCO Doc.CL/717, Annex IV, 47; and Practice relating to Rule 41: Respect for Cultural Property, ICRC, Customary IHL Database, <[http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule41](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule41)> (accessed 25 November 2010). Cf. L. V. Prott, ‘The Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention) 1954’, in: M. Briat and J. A. Freedberg (eds), *Legal Aspects of International Trade in Art*, (Kluwer Law International, 1996), p. 163 at p. 170. Article V, Intentional Destruction Declaration states: ‘when involved in armed conflict, be it of an international or non-international character, including the case of occupation.’ The GA Resolutions on Return or Restitution are also not clear when they refer to ‘in particular in areas of armed conflict, including territories that are occupied, whether such conflicts are international or internal’: GA Res. 64/78 of 7 December 2009, preamble.

<sup>46</sup> SC Res. 1468, para. 7 (14-0-0), the United States and United Kingdom who were not states parties to *HPI* voted in favour.

<sup>47</sup> For example, GA Res. 64/78, 7 December 2009, preamble.

The clearest articulation of this link is contained in the preamble of the 1954 Hague Convention, which provides that: '[P]reservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection.'<sup>48</sup>

Drafted in the shadow of the experiences of the Nuremberg trials and early human rights instruments, including the Universal Declaration of Human Rights (UDHR),<sup>49</sup> and the Genocide Convention,<sup>50</sup> the preamble reaffirms the importance of cultural heritage beyond states – to people and the international community. Subsequent jurisprudence covering international crimes including war crimes, crimes against humanity (particularly persecution) and genocide when raised in reference to damage or destruction of cultural property, including movable heritage, have reiterated this fundamental premise.

The obligation to prosecute violations of international humanitarian law is contained in the 1907 Hague Regulations, reaffirmed in the 1954 Hague Convention and *APs*, and elaborated upon in *HPII*.<sup>51</sup> Parties to *HPII* must introduce domestic penal legislation (establishing jurisdiction covering individual criminal responsibility including over persons who have not directly committed the act and appropriate penalties) concerning serious violations occurring within their territory or perpetrated by nationals.<sup>52</sup> Serious violations are defined as acts committed intentionally and in violation of the Convention or *HPII*, including theft, pillage or misappropriation of property protected by the Convention.<sup>53</sup> If a Party does not prosecute, then it must extradite to a country that can and which meets minimum standards in international law.<sup>54</sup> Parties must render each other 'the

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<sup>48</sup> Second preambular recital, 1954 Hague Convention.

<sup>49</sup> Universal Declaration of Human Rights (UDHR), GA Res. 217A(III), 10 December 1948.

<sup>50</sup> Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), 9 December 1948, in force 12 January 1951, GA Res. 260A(III), 78 UNTS 277.

<sup>51</sup> See Article 56, 1907 Hague II ; Article 28, 1954 Hague Convention; and Article 85(4)(d) *API*. No grave breaches regime is applicable in respect of Article 16 *APII*, but it can be implied by referring back to Geneva Conventions Common Article 3 in Article 1(1) which requires suppression of violations including criminalisation and universal jurisdiction.

<sup>52</sup> Articles 15(2) and 16(1), *HPII*. See also Article IX, Intentional Destruction Declaration.

<sup>53</sup> Article 15(1), *HPII*. The Summary Report of the Diplomatic Conference records drafters intended this provision to be consistent with Article 85, Additional Protocol I and the Rome Statute. However, serious concerns were raised about the initial draft particularly by the ICRC which questioned the omission of intentional attacks and pillage as war crimes: *Summary Report, Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, (1999), p. 6, paras 26 and 27.

<sup>54</sup> Articles 17 and 18, *HPII*.

greatest measure of assistance' in respect of investigations or criminal or extradition proceedings'.<sup>55</sup> Further, a Party may introduce 'legislative, administrative or disciplinary' measures which suppress the intentional use of cultural property in violation of the Convention or Second Protocol, and illicit export, removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or Protocol.<sup>56</sup>

After the First World War, the Committee on the Responsibilities of the Authors of War and on Enforcement of Penalties for Violations of the Laws and Customs of War (1919 Commission) established during the Versailles Peace Conference included 'pillage' and 'wanton destruction of religious, charitable, educational, and historic buildings and monuments' on its list of war crimes.<sup>57</sup> After the Second World War, the jurisdiction of the International Military Tribunal (IMT) extended to violations of the laws and customs of war including 'plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity'.<sup>58</sup> The *travaux préparatoires* of the 1954 Hague Convention noted that the IMT had 'introduced the principle of punishing attacks on the cultural heritage of a nation into positive international law' and Second World War armistice agreements and peace treaties had provided for restitution of cultural property.<sup>59</sup>

As observed above, the international and internationalised criminal tribunals established since the 1990s have jurisdiction in respect of war crimes relating to cultural heritage and civilian property generally. The most significant for our purposes, the jurisprudence of the ICTY, whilst not dealing extensively with acts concerning movable heritage, has replicated the application and expanded upon the typology of international crimes developed by the Nuremberg military tribunals.<sup>60</sup> Tying these international crimes with acts against cultural property reinforces the interrelation between

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<sup>55</sup> Article 19 *HPH*. It also provides for grounds for refusal of extradition (political crimes or racial, religious etc motivations): Article 20.

<sup>56</sup> Article 21, *HPH*. However, this is without prejudice to the operation of Article 28 Hague Convention.

<sup>57</sup> Reproduced in *AJIL*, vol. 14 (1920), p. 95, at pp. 114-115; and UNWCC, *History of the United Nations War Crimes Commission and the Development of the Law of War* (UNWCC, 1948), at 34.

<sup>58</sup> Article 6(b) of the Charter of the International Military Tribunal, Nuremberg annexed to the Agreement by United Kingdom, United States, France and USSR for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS 279, and *AJIL Supp.*, vol. 39 (1945), p. 257.

<sup>59</sup> UNESCO doc. 7C/PRG/7, Annex I, at 5.

<sup>60</sup> A.F. Vrdoljak, 'Cultural Heritage in Human Rights and Humanitarian Law', in O. Ben-Naftali, *International Human Rights and Humanitarian Law* (Oxford University Press, 2011), p. 250 at pp. 280 ff.

international protection of cultural heritage and human rights generally, and the control of illicit trade in movable heritage specifically.

Mimicking the wording of the Hague Regulations, the indictment of the major German war criminals at Nuremberg charged that as part of their ‘plan of criminal exploitation’, they had ‘destroyed [...] cultural monuments, scientific institutions, and property of all types in the occupied territories.’<sup>61</sup> Alfred Rosenberg headed ‘Einsatzstab Rosenberg’, a programme which confiscated cultural objects from private German collections and occupied territories to fill the regime’s own museums and institutions. The IMT found he was ‘responsible for a system of organised plunder of both public and private property throughout the invaded countries of Europe.’<sup>62</sup> During the early years of the Yugoslav conflicts, the International Law Commission in its 1991 Report on the Draft Code of Crimes Against Peace and Security reaffirmed that ‘wilful attacks on property of exceptional religious, historical or cultural value’ were ‘exceptionally serious war crimes’.<sup>63</sup> This sentiment was reflected and elaborated upon in the subsequent case law of the International Criminal Tribunal for the former Yugoslavia (ICTY). When applying Article 3(d) of the ICTY Statute which replicates Article 56 *Hague IV*, the Trial Chamber in *Hadžihasanović and Kubura* remarked: ‘[W]hile civilian property is afforded general protection under customary international law, special attention is paid to certain property [...] owing to their spiritual value. Because those values go beyond the scope of a single individual and have a communal dimension’.<sup>64</sup>

Even in this more generalised provision covering cultural heritage during armed conflict and belligerent occupation it is not the private property interests of an individual owner that are protected (as may be the case in respect to the prohibition against plunder of private property) but cultural objects importance for a particular group or the international community. This is amplified in respect

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<sup>61</sup> Count Three (War Crimes), Part E (Plunder of Public and Private Property), Indictment, in *Trial of the Major War Criminals* (above n. 8), vol. 1, at pp. 11-30.

<sup>62</sup> in *Trial of the Major War Criminals* (above n. 8), vol. 1 at pp. 95-96, 237 and 287. See also German High Command Trial (Wilhelm von Leeb and Others), US Military Tribunal Nuremberg, 28 October 1948, 12 LRTWC (1949), 1, at 47-48, 124-126 (looting, pillage, plunder and spoliation); and Trial of Karl Lingfelder, Permanent Military Tribunal at Metz, Judgment of 11 March 1947, 9 LRTWC (1949), 67 (destruction of monuments as war crime).

<sup>63</sup> Report of the International Law Commission on the Work of its Forty-Third Session, UN doc. A/46/10/suppl.10 (1991), at 269, noting that this reflects Article 53 *API* and the 1954 Hague Convention. See also UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, 10 February 1993, UN doc. E/CN.4/1993/50, paras 16-17: ‘massive human rights violations’ committed ‘deliberately to achieve ethnically cleansing’ including ‘confiscation of property’ and ‘destruction of mosques’.

<sup>64</sup> *Prosecutor v. Hadžihasanović and Kubura, Judgment*, Case No. IT-01047-T, Trial Chamber, ICTY, (15 March 2006), para. 63.

of attacks on cultural property which fall within crimes against humanity, whether or not it occurs during armed conflict or belligerent occupation.

This evolving body of jurisprudence concerning these international crimes have been vital to reinforcing the aim contained preamble of the 1954 Hague Convention, which has been reaffirmed in the World Heritage Convention,<sup>65</sup> Underwater Cultural Heritage (UCH) Convention,<sup>66</sup> UNESCO's Intentional Destruction Declaration,<sup>67</sup> Intangible Heritage Convention,<sup>68</sup> and Convention on Diversity of Cultural Expressions.<sup>69</sup>

## **2.2. Peacetime protection**

Treaties for the protection of movable cultural heritage adopted in the late twentieth century cover public and private international law principles covering transactions between states and non-state actors. The obligations of states parties arising under these instruments complement and inform the preventative measures undertaken by states pursuant to the 1954 Hague framework. As with international humanitarian law, these peacetime protections have moved beyond a purely statist focus to incorporate the rights and obligations of individuals and non-state groups, increased international cooperation and growing emphasis on enforcement through penal sanctions. Furthermore, as explained in the second part of this chapter below, contemporary interpretations of several human rights norms require states parties to protect and prevent illicit traffic of cultural heritage which is not only of national importance but also of significance to non-state groups, including minorities and indigenous peoples.

### **2.2.1 1970 UNESCO Convention and Intergovernmental Committee on Return or Restitution**

The 1970 UNESCO Convention was the result of a concerted push by countries rich in archaeological sites to obtain multilateral cooperation in the effective enforcement of domestic laws

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<sup>65</sup> Preamble, paras 5 and 6, Convention concerning the Protection of the World Cultural and Natural Heritage (Paris 16 November 1972, in force 17 December 1975), 1037 UNTS 151.

<sup>66</sup> Preamble, para. 1, Convention on the Protection of the Underwater Cultural Heritage (Paris 2 November 2001, in force 2 January 2009), UNESCO doc. 31C/Resolution 24; (2002) 41 ILM 37.

<sup>67</sup> Intentional Destruction Declaration, Preamble, para. 6.

<sup>68</sup> Preamble, para. 6, Convention for Safeguarding of the Intangible Cultural Heritage (17 October 2003, in force 20 April 2006), 2368 UNTS 1.

<sup>69</sup> Preamble, paras 2, 7 and 8, Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Cultural Diversity Convention) (Paris, 20 October 2005, in force 18 March 2007), in *Records of the General Conference, 33<sup>rd</sup> session*, (UNESCO, 2005), vol.I, at p.83.

designed to regulate the export of cultural objects from their territories.<sup>70</sup> Its preamble states that: '[T]he protection of cultural heritage can be effective only if organized both nationally and internationally among states working in co-operation [...]'.<sup>71</sup> The Convention covers public international law obligations and rights between the relevant state parties.

However, the illicit trade in cultural objects often involves violation of the rights of non-states entities like individuals, groups, institutions and so forth. Unless the relevant countries (requesting and holding states) are state parties to the Convention and are willing to represent these interests at the diplomatic level, this treaty is ineffective. Despite its emphasis on state obligations and rights and national culture, the 1970 UNESCO Convention preamble provides that: 'it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export.'<sup>72</sup> Both the UNESCO and UNIDROIT Conventions only apply to transfers of cultural objects of an international character.

The 1970 UNESCO Convention lays down obligations both for state parties for the protection of their cultural property and the mechanisms for the restitution of illicitly removed objects.<sup>73</sup> These include the establishment of national authorities to enable the enactment of appropriate legislation, prepare a national inventory, scientific institutions for protection and preservation, supervise archaeological sites to ensure in situ preservation of objects and future excavations, enforce ethical standards for relevant professionals like curators and art dealers;<sup>74</sup> and promote educational measures (Articles 5 and 10). Also, it requires creation and enforcement of an export licensing scheme (Article 6). States parties must prevent museums and similar institutions acquiring objects which have been illicitly removed from the country of origin, after the Convention has come into force (Article 7(a)). Further, they must prohibit the import of such objects by these institutions if they appear on the

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<sup>70</sup> UNESCO Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property, adopted by the General Conference 19 November 1964, *Records of the General Conference Thirteenth Session*, vol. I: Resolutions, Annex I, p. 155.

<sup>71</sup> Preamble, paras 7 and 8, 1970 UNESCO Convention.

<sup>72</sup> Preamble, para. 4, 1970 UNESCO Convention. See Article 12 which provides that states parties shall respect the cultural heritage 'within the territories for the international relations of which they are responsible', and take appropriate measures to prevent illicit transfer of such property.

<sup>73</sup> Article 1 defined what property is covered by the Convention. It provides that 'cultural property' is 'designated by each State as being of importance'.

<sup>74</sup> See International Code of Ethics for Dealers in Cultural Property, adopted by 30<sup>th</sup> UNESCO General Conference, November 1999.

national inventory of a state party (Article 7(b)(i)). State parties are required to impose penalties or administrative sanctions on persons trying to import such objects (Article 8).

The obligations laid down in the 1970 UNESCO Convention are more onerous and extensive in respect of protective and preventative measures states parties must undertake, compared to those covering restitution. The obligations on state parties in respect of the restitution of illicitly removed cultural objects requires that their competent authorities facilitate the earliest possible restitution of such objects to their rightful owner; and their courts and agencies admit recovery actions made on behalf of the rightful owner (Article 10(b) and (c)). However, restitution claims are highly restricted under the Convention. They must be made by the requesting state party through diplomatic channels, just compensation must be paid to the bona fide purchaser and they bear all other recovery expenses (Article 7(b)(ii)). A ‘special’ regime covers archaeological sites (Article 9).

Shortly after the finalisation of the 1970 UNESCO Convention, the General Conference adopted its first Resolution on Restitution of works of art to countries [which are] victims of expropriation, which set in motion the establishment of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (IGC).<sup>75</sup> Under the original mandate of the IGC, its sole avenue of peacefully settlement of such disputes was confined to promoting bilateral negotiations. In 2005, the IGC’s Statute was amended to encompass mediation and conciliation as modes of settlement.<sup>76</sup> The GA Resolution on Return or restitution of cultural property to countries of origin adopted in December 2009 makes reference to the entire range of conventions and declarations encompassed by international cultural heritage law, placing these instruments squarely within efforts of the international community to provide legal protection for cultural heritage, diversity and human rights.<sup>77</sup>

### **2.2.2 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects**

The UNIDROIT Convention seeks to fill the void left by the 1970 UNESCO Convention by encouraging uniform application of ‘minimum’ private international law rules in such cases.<sup>78</sup> Its preamble acknowledges the deleterious impact of the illicit traffic of cultural objects on ‘the heritage

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<sup>75</sup> GA Res. 3187(XXVIII), 18 December 1973.

<sup>76</sup> UNESCO Doc. 33C/Resolution 44, Article 4, para. 1 of the IGC Statute. Draft Rules of Procedure on Mediation and Conciliation in Accordance with Article 4, paragraph 1, adopted at the IGC 14<sup>th</sup> session, UNESCO Doc.CLT-2007/CONF.211/COM.14/3.

<sup>77</sup> GA Res. 64/78, 7 December 2009.

<sup>78</sup> Preamble, paras 5 and 6, UNIDROIT Convention,



of all peoples, and in particular by the pillage of archaeological sites and the resulting loss of irreplaceable archaeological, historical and scientific information'.<sup>79</sup> Cultural objects covered by the instrument must be important 'on religious or secular grounds, [be] of importance for archaeology, prehistory, history, literature, art or science' (Article 2) and come within a category listed in the Annex to the Convention. The rules laid out in the 1995 UNIDROIT Convention explicitly delineate between the 'restitution' of 'stolen' cultural objects, and the 'return' of 'illegally exported cultural property', that is, contrary to the export laws of the requesting Contracting Party (Article 1, and Chapter III and Chapter II respectively). Drafted and negotiated shortly after the adoption of the draft Declaration on the Rights of Indigenous Peoples by the UN Working Group on Indigenous Populations and Declaration on the Rights of Minorities by the General Assembly (discussed below), the UNIDROIT Convention at several junctures accommodates the communal interest in movable heritage held by 'national, tribal, indigenous or other communities'.<sup>80</sup> So, in contrast to Chapter II claims, only Contracting Parties, that is, states can make claims under Chapter III and not private individuals. However, where the object was created by a member or members of an indigenous or tribal community for traditional use, it shall be returned to the community (Article 7(2)).

### **2.2.3 Convention on the Protection of the Underwater Cultural Heritage**

The 1970 UNESCO Convention is complemented by a specialist legal regime for the protection of underwater heritage: the Convention on the Protection of Underwater Heritage (UCH Convention) and provisions of the UN Convention on the Law of the Sea (UNCLOS). UNCLOS makes reference to underwater heritage but the protection it provides is conflicting and incomplete.<sup>81</sup> State parties have a duty to protect and cooperate in the protection of archaeological or historical objects found 'at sea' (Article 303). Article 149 covers archaeological or historical material found in the seabed, ocean floor and its subsoil beyond the limits of national jurisdiction. Such material will be preserved or disposed of for the benefit of all mankind with preferential treatment being given to the state or country of origin, or of cultural origin, or of historical or archaeological origin.

States parties to the UCH Convention recognise that underwater cultural heritage is threatened by unauthorised activities and effective action needed to be taken to curb such illicit

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<sup>79</sup> Preamble, para. 4, UNIDROIT Convention.

<sup>80</sup> Preamble, para. 3 and Articles 3(8), 5(3)(d), 7(2), UNIDROIT Convention.

<sup>81</sup> Convention on the Law of the Sea (Montego Bay, 10 December 1982), 1833 UNTS 3. See T. Scovazzi, 'The Application of "Salvage Law and Other Rules of Admiralty to the Underwater Cultural Heritage"', in R. Garaballo and T. Scovazzi (eds), *The Protection of Underwater Cultural Heritage – Before and After the 2001 UNESCO Convention* (Martinus Nijhoff, 2003), pp. 20 and 38.

conduct and its preamble specifically refers to the 1970 UNESCO Convention.<sup>82</sup> Its Coordinating States are obliged to prevent looting and other dangers to underwater heritage in the exclusive economic zone and on the continental shelf (Article 10(4)). Such obligations rest on all states parties when objects are located in the seabed, ocean floor and its subsoil beyond the limits of national jurisdiction (Article 12(3)). The ‘Rules concerning activities directed at underwater cultural heritage’ annexed to the Convention reiterate that all efforts should be directed to preserve the material *in situ* and that it should not be the subject of commercial exploitation (Article 2). Disputes arising between states parties are to be referred to the UNESCO for mediation or to International Tribunal for the Law of the Sea (Article 25).

#### **2.2.4 Model treaty for the prevention of crimes infringing against movable heritage**

As in the field of international humanitarian law, there has been greater international cooperation in respect of criminalisation and prosecution of violations of laws relating to protection of cultural heritage during peacetime generally. This includes states previously reluctant to enforce foreign public laws in their domestic jurisdiction.<sup>83</sup> Outside of the UNESCO context, the UN has also been engaged in control of illicit trafficking and restitution of cultural objects through the work of the Economic and Social Council (ECOSOC) and agencies covering crime prevention and criminal justice. In 1990, the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders adopted the Model Treaty for the Prevention of Crimes that Infringe on the Cultural Heritage of Peoples in the Form of Movable Property (model treaty).<sup>84</sup> The General Assembly welcomed its adoption and noted that the main aims of the United Nations in the field of crime prevention were the promotion of effective administration of justice, international co-operation in the fight against international crime, and observance of human rights.<sup>85</sup>

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<sup>82</sup> Preamble, paras 6 and 12I, UCH Convention. See T. Scovazzi, ‘The 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage’, in B. Hoffman (ed.), *Art and Cultural Heritage: Law, Policy and Practice* (Cambridge University Press 2006), p. 285 at p. 289; R. Garabello, ‘The Negotiating History of the Provisions of the Convention on the Protection of the Underwater Cultural Heritage’, in Garabello and Scovazzi, (eds), *ibid.*, at p. 89

<sup>83</sup> See *United States v. Schultz*, 178 F. Supp. 2d 445, 333 F.3d 393 (convicted pursuant to the National Stolen Properties Act Title 18 USC s.2315, certiorari denied by Supreme Court); and *R. v. Tokeley-Parry* [1999] Crim. LR 578.

<sup>84</sup> Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August – 7 September 1990, Report prepared by the Secretariat, (1990), Chapter 1, section B, para. 2; and UNODC, *Compendium of United Nations standards and norms in crime prevention and criminal justice* (2006), p. 202.

<sup>85</sup> GA Res. 45/121, 14 December 1990, Preamble, para. 11.

The preamble of the model treaty states that it is aimed at contributing to bilateral cooperation ‘in combating criminal activities which involve movable cultural property’ through administrative and penal sanctions and restitution mechanisms,<sup>86</sup> as envisaged by the 1970 UNESCO Convention. It covers movable heritage ‘stolen in or illicitly exported from’ another state party after the treaty’s entry into force (Article 1(2) including archaeological materials on land or underwater. Whilst its obligations largely mirror the 1970 UNESCO Convention, states parties would be required to introduce legislative sanctions upon individuals and institutions responsible for, knowingly acquiring or dealing in or entering conspiracies for the illicit transfer of movable heritage, and measures restricting the application of the bona fide purchaser (Articles 2 and 3). In addition, states parties would provide information about relevant laws to an international database. The model treaty is little used and amendments have recently been suggested in the light of the recent escalating uptake of the 1970 UNESCO Convention.<sup>87</sup>

ECOSOC re-emphasised the need for member states to protect their cultural heritage pursuant to existing international instruments, in particular the 1970 UNESCO Convention, the UNIDROIT Convention, and the 1954 Hague Convention and its protocols.<sup>88</sup> The ECOSOC Resolution on Protection against Trafficking in Cultural Property stressed that the entry into force of the UN Convention against Transnational Organized Crime<sup>89</sup> had created a new impetus for international cooperation in this field and ‘lead to innovative and broader approaches to dealing with various manifestations of such crime, including trafficking in cultural property.’<sup>90</sup>

### **3. International human rights law**

Culture and cultural heritage is an intrinsic component of the identity of communities and their constituent members. It can be viewed as both a source of unity and division. Effective protection and promotion of cultural heritage and diversity is increasingly defined in terms of universal human rights, particularly cultural rights, by international and regional human rights tribunals and bodies, particularly for minorities and indigenous peoples. This development reiterates

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<sup>86</sup> Model Treaty, Preamble, para. 2 .

<sup>87</sup> UN doc. E/CN.15/2010/5.

<sup>88</sup> ECOSOC Res 2003/29 of 22 July 2003, Prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property; ECOSOC Res 2004/34 of 21 July 2004, Protection against trafficking in cultural property; and ECOSOC Res 2008/23 of 24 July 2008, Protection against trafficking in cultural property.

<sup>89</sup> UN Convention against Transnational Organized Crime (GA Res. 55/25, 15 November 2000, in force 29 September 2003), 2237 UNTS 319.

<sup>90</sup> ECOSOC Res 2008/23, Preamble, para. 11.

the integral importance of movable heritage and the detrimental effects of the illicit trade in cultural objects. The second half of this chapter details how human rights norms have been referenced in multilateral instruments for the protection of cultural heritage. Then, there is an examination of the relationship between controls on the export of cultural material and specific human rights, namely, the right to property, right to self-determination, right to participate in cultural life, and minority protection.

### 3.1 Human rights in cultural heritage instruments

Reflective of the UNESCO's mandate,<sup>91</sup> specialist instruments for the protection of cultural heritage have made oblique and overt reference to respecting established human rights norms. Explicit references to human rights and fundamental freedoms have become pronounced in instruments finalised in the last two decades. The references arise in the preambular recitals and as saving provisions in the substantive text.

Article 31 of the Vienna Convention on the Law of Treaties provides that preambular recitals are to be used to interpret the substantive provisions of the relevant treaty.<sup>92</sup> Depending on the specific wording of any reference to human rights and fundamental freedoms in the preamble, the obligations contained within the treaty should be read consistently with these accepted norms. The first overt reference to human rights in the preamble of an UNESCO instrument concerning cultural heritage was the Universal Declaration on Cultural Diversity.<sup>93</sup> The opening preambular recital of this instrument reaffirms a commitment to 'the full implementation of human rights and fundamental freedoms' enunciated in the UDHR and other multilateral instruments. It specifically cites the 1970 UNESCO Convention when listing existing UNESCO instruments in the field of cultural diversity and cultural rights.<sup>94</sup> One of the enumerated Main Lines of Action in its Annex II covers policies and strategies for 'combating illicit traffic in cultural goods'.<sup>95</sup>

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<sup>91</sup> Art. 1(1) Constitution of UNESCO, (Paris, 16 November 1945, into force 4 November 1946), 4 UNTS 275 states: 'The purpose of the Organization is to contribute to peace and security by promoting collaboration among nations through ... culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations'.

<sup>92</sup> Vienna Convention on the Law of Treaties (Vienna, 23 May 1969, in force 27 January 1980), 1155 UNTS 331.

<sup>93</sup> Universal Declaration on Cultural Diversity (Cultural Diversity Declaration), adopted by the General Conference on 2 November 2001, UNESCO Doc.31C/Res. 25, Annex I, ILM, vol. 41 (2002), p. 57.

<sup>94</sup> Preamble, para. 4, Cultural Diversity Declaration.

<sup>95</sup> Annex II, Cultural Diversity Declaration.

The UNESCO Intentional Destruction Declaration, adopted by the General Conference in response to the destruction of the monumental Buddhas, in Bamiyan, replicates part of the preamble of the 1954 Hague Convention and notes in its preamble that: ‘intentional destruction may have adverse consequences on human dignity and human rights [...]’.<sup>96</sup> After citing relevant provisions in the ICTY and ICC Statutes, the Declaration reiterates that states must respect international obligations for the criminalisation of gross violations of human rights especially when it involves intentional destruction of cultural heritage.<sup>97</sup>

Likewise the IHC Convention, also adopted by the General Conference in 2003, explicitly refers to the constitutive instruments of the International Bill of Rights in its preamble.<sup>98</sup> It also reaffirms the importance of all UNESCO instruments for the protection of cultural (and natural) heritage for the protection of intangible heritage.<sup>99</sup> The definition of ‘intangible cultural heritage’ covered by this Convention includes ‘instruments, objects and artefacts’ (Article 2(1)). Indeed, the preamble notes that ‘the deep-seated interdependence between the intangible cultural heritage and the tangible cultural and natural heritage.’<sup>100</sup> These elements are replicated in the Cultural Diversity Convention.<sup>101</sup>

These recent cultural heritage instruments are intended to protect and promote of cultural diversity. They were adopted in the context of period of elevated interest in the articulation, reinforcement and enforcement of human rights norms. Yet, these instruments invariably include a ‘saving’ provision which guarantees cultural diversity cannot be invoked as a justification for violation of human rights and fundamental freedoms guaranteed in the International Bill of Rights and regional human rights instruments.<sup>102</sup>

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<sup>96</sup> Preamble, para. 5, Intentional Destruction Declaration.

<sup>97</sup> Para. IX, International Destruction Declaration

<sup>98</sup> Preamble, para. 2, ICH Convention.

<sup>99</sup> Ibid., Preamble, para. 7.

<sup>100</sup> Ibid., Preamble, para. 3.

<sup>101</sup> Preamble, para. 1, Cultural Diversity Convention.

<sup>102</sup> Article 4, Cultural Diversity Declaration (‘No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor limit their scope’); Article 2(1), ICH Convention(‘For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development’); and Article 2, Cultural Diversity Convention (‘No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.’). Likewise, human rights instruments covering cultural rights have incorporated similar provisos. For example, Article 15, International Covenant

As explained below, control of export of cultural objects can encompass one or more human rights norm and fundamental freedom. Where there is more than one right-holder involved it may lead to a conflict in human rights norms. The international community had repeatedly reiterated that ‘all human rights are universal, indivisible and interdependent and inter-related.’<sup>103</sup> However, while there may be no hierarchy or ‘priority’ of human rights norms, as explained below, their articulation in instruments often points a way forward in resolving perceived conflicts.<sup>104</sup>

### 3.2 Specific human rights and movable heritage

Several human rights provisions have been interpreted to encompass protection of movable heritage including: the right to property, right to self-determination, right to participate in cultural life, so-called minority protection, non-discrimination,<sup>105</sup> right to privacy and family life;<sup>106</sup> right to

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on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, in force 3 January 1976, GA Res. 2200A(XXI), 21 UN GAOR Supp. (No. 16), 49, and 993 UNTS 3; and the CESCR has reiterated that: ‘[N]o one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope’: General Comment No. 21, Right of everyone to take part in cultural life (Art. 15, para. 1(a) of the International Covenant on Economic, Social and Cultural Rights), 21 December 2009, UN doc. E/C.12/GC/21, para. 18; UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN Minorities Declaration), GA Res. 47/135, 18 December 1992, Article 8(2); and UN Declaration on the Rights of Indigenous Peoples (UNDRIP), GA Res. 61/295, 13 September 2007, Article 46(2).

<sup>103</sup> Vienna Declaration and Programme of Action, adopted 25 June 1993, UN doc. A/CONF.157/23, ILM, vol. 32 (1993), p. 1661, para. 5; and 2005 World Summit Outcome Final Document, adopted by GA Res. 60/1, 24 October 2005, UN doc. A/Res/60/1, para. 121. See Prott, ‘The International Movement of Cultural Objects’, IJCP, vol. 12 (2005), p. 225.

<sup>104</sup> However, certain human rights (e.g. right to self-determination, prohibition against racial discrimination) are categorized as *jus cogens* norms. In addition, as noted earlier, certain human rights (e.g. Article 18(2) ICCPR) covering the right to freedom of thought, conscience and religion) are non-derogable even during states of emergency or armed conflict: see General Comment No. 22, Article 18 ICCPR, 30 July 1993. UN Doc.CCPR/C/21/Rev.1/Add.4, para.1; GA Res.2675 (XXV), 9 December 1970; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, (note 8 above) at p.240; *Legal Consequences of the Construction of the Wall Advisory Opinion*, (note 8 above) at p.173; and Human Rights Committee, General Comment No.29, Art.4 ICCPR States of emergency, 31 August 2001, UN Doc. CCPR/C/21/Rev.1/Add.11, at para.3.

<sup>105</sup> Article 2 UDHR; Article 2, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, in force 23 March 1976, GA Res. 2200A (XXI), UN doc. A/6316 (1966), 999 UNTS 171; Article 2(2), ICESCR, Article 14, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights or ECHR), 4 November 1950, in force 3 September 1953, ETS No. 5, 213 UNTS 221; Article II, American Declaration on the Rights and Duties of Man (American Declaration), OAS Res. XXX, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OAS/Ser.L/V/I.4 Rev. 9 (2003), AJIL Supp., vol. 43 (1949), p. 133; Article 1(1) American Convention on Human Rights (American Convention), 21 November 1969, in force 18 July 1978, OAS

freedom of expression including receiving and imparting information and ideas;<sup>107</sup> right to education and full development of human personality;<sup>108</sup> and right to freedom of thought, conscience and religion.<sup>109</sup> Only the first four human rights are examined in detail in this chapter.

### 3.2.1 Right to Property

The right to property as a human right, individually or collectively held, is intimately tied to any efforts by states to protect movable heritage and control its transfer. The right to property is enshrined in the Universal Declaration of Human Rights (UDHR) (Article 17), Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (Article 1),<sup>110</sup> American Declaration (Article 21), American Convention (Article 21), and African Charter (Article 15). The right is invariably qualified by the requirements that it shall not be deprived arbitrarily,<sup>111</sup>

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T.S. No. 36, 1144 UNTS 123; and Article 2 African Charter of Human and Peoples' Rights (African Charter), 27 June 1981, into force 21 October 1986, OAU Doc.CAB/LEG/67/3 rev.3, 21 ILM 58 (1982).

<sup>106</sup> Article 12 UDHR; Article 17 ICCPR; Article 8 ECHR, Article V, American Declaration; Article 11 American Convention; and Article 18 African Charter.

<sup>107</sup> Article 19 UDHR, Article 19(2) ICCPR, Article 5 ECHR, Article IV American Declaration, Article 13 American Convention, Article 9 African Charter.

<sup>108</sup> Article 26(2) UDHR, Article 13(1) ICESCR, Article 2 ECHR, Article XII American Declaration, Article 1 American Convention, Article 17 African Charter.

<sup>109</sup> Article 18 UDHR, Article 18(2) ICCPR, Article 9 ECHR, Article III American Declaration, Article 12 American Convention, Article 8 African Charter. The Human Rights Committee's General Comment No. 22 defines right to freedom of thought, conscience and religion broadly to encompass a holistic understanding of cultural heritage, including tangible (buildings of worship, ritual objects) heritage: General Comment No. 22, Article 18 ICCPR, 30 July 1993, UN doc. CCPR/C/21/Rev.1/Add.4, para. 4.

<sup>110</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol No. 1), 20 March 1952, into force, 18 May 1954, CETS No. 9.

<sup>111</sup> Article 17(2) UDHR ('No one shall be arbitrarily deprived of his property'); Article 1 Protocol No. 1 ECHR ('except in public interest and subject to the conditions provided for by law and by the general principles of international law. ...[This] shall not, however in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest', secure payment of taxes, contributions or penalties); Article 21(1) American Declaration ('The law may subordinate such use and enjoyment to the interests of society') and sub-para. (2) ('[...] for reasons of public utility or social interest, and in the cases and according to the forms established by law'); Article 21 American Convention replicates this wording; and Article 14 African Charter ('It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws').

and the provision of just compensation.<sup>112</sup> Only the European Court of Human Rights has interpreted the application of this right specifically in respect to domestic laws for the protection and control of transfer of movable heritage.

Article 1, Protocol 1 ECHR makes a distinction between deprivation and control of property. Deprivation of property is permitted only when it is in the 'public interest', subject to conditions laid down in the relevant domestic laws, and in accordance with 'general principles of international law'. The Court has held that in such cases 'public interest' requires that the deprivation must be for a legitimate purpose, and when achieving this purpose it must strike a 'fair balance' between protection of individual rights and general interests of the community.<sup>113</sup> While there is not express provision for just compensation, it has indicated that this is a relevant consideration in assessing the question of 'fair balance'. Further, it will only find that deprivation of property without compensation is justifiable in exceptional circumstances.<sup>114</sup> The court has also held that measures which restrict an individual's capacity to transfer his or her property, like export controls, are not de facto deprivation because the right-holder can still use and sell the property, subject to qualifications. Export restrictions are defined as controls on the use of property, rather than deprivation.<sup>115</sup>

When examining whether control of property complies with the European Convention, the principles applied by the court in determining whether there has been a 'fair balance' between the enjoyment of individual human rights and the demands of the community are looser. First, the measure must have a legitimate aim. Second, there must be a relationship of proportionality between the measure utilised and the achievement of the aim. While the court has afforded states discretion, or 'margin of appreciation' in determining what is a 'fair balance' between the individual right and

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<sup>112</sup> Article 21 (2) American Declaration; and Article 21(2) American Convention. Article 1 Protocol 1 ECHR makes no explicit reference to just compensation but does refer to 'subject to conditions provided for by law' including domestic constitutional guarantees. Article 14 African Charter similarly makes no explicit reference to just compensation but makes the same reference to 'accordance with the provisions of appropriate laws'. Article 17 UDHR makes no provision for just compensation.

<sup>113</sup> *James and Others v. the United Kingdom*, (App. no.8793/79) ECHR Judgment, February 1986, Series A no. 98, pp. 29-30, (1986) 21 EHRR 483.

<sup>114</sup> *Lithgow and Others v. United Kingdom*, (App. no.9006/80), ECHR Judgment of 8 July 1986, Series A no. 102, (1986) 8 EHRR 329, at 371-372.

<sup>115</sup> *Sporrong and Lönnroth v. Sweden*, (App. no. 7151/75), ECHR Judgment of 23 September 1982, Series A no. 52, (1983) 5 EHRR 35, at 51.



societal demands; it will, however, examine whether the interference was ‘proportionate to the legitimate aim’ and whether the reasons provided to justify it are ‘relevant and sufficient.’<sup>116</sup>

In *Beyeler v. Italy*,<sup>117</sup> the European Court of Human Rights was asked to consider the application of Article 1, Protocol 1 ECHR in respect of restrictions imposed by a state party on the transfer of movable cultural property. The case centred on the application of the right to protect as it related to control rather than deprivation. The Court found that national controls on the transfer of cultural objects was a legitimate aim for the purpose of protecting a state’s cultural and artistic heritage and this complied with Article 1. It also acknowledged that it was a legitimate aim for the state to facilitate public access to cultural objects which were lawfully located in the national territory and belonged to ‘the cultural heritage of all nations’.<sup>118</sup> The Court did not challenge the requirement of notification of transfers nor the right of preemption contained in the Italian relevant domestic law. However, it noted that applicable provisions of the law must be accessible, precise and foreseeable, that is, they not be applied erroneously or arbitrarily. Accordingly, the applicant succeeded because Italy was unable to satisfactorily justify why it had not exercised the right of preemption when it became aware of the applicant’s acquisition, waiting instead several years when he sought to sell the work, and compulsory state purchase resulted in a significant financial loss to him.

The individual right to property may also collide with the right if it is collectively held. The UDHR explicitly recognised the right to property can be held individually ‘as well as in association with others’ (Article 17(1)). Protocol 1 ECHR refers to ‘natural or legal person’ as the right-holder. While the wording of the African Charter is oblique (referring only to ‘the right’), the American Declaration and Convention through the use of individual pronoun appears to refer to an individual right-holder. However, jurisprudence from the African Commission and Inter-American Court in response to claims brought by indigenous communities, have found that the right to property in their respective instruments includes property held communally.<sup>119</sup>

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<sup>116</sup> *Lingens v. Austria* (App. No. 9815/82), ECHR Judgment of 8 July 1986, Series A no. 103, (1986) 8 EHRR 407, at 418, para. 40.

<sup>117</sup> *Beyeler v. Italy* (App. No. 33202/96) (No. 1), ECHR Judgment of 5 January 2000, (2001) 33 EHRR 52.

<sup>118</sup> *Ibid.*, para. 113.

<sup>119</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (Comm. no. 276 of 2003), ACHPR, 4 February 2010, para. 187; *Mayagna (Sumo) Awas Tigni Community v. Nicaragua*, (Judgment) (2001) 79 I/A. Ct H.R. (ser. C), paras 148 and 149; and *Moiwana Community v Suriname (Interpretation of the Judgment on the Preliminary Objections, Merits and Reparations)* (2006), 145 I/A. Ct. H.R. (Ser.C), para. 19.

The collective right to property, including cultural heritage, has been reiterated by the UN Declaration on the Rights of Indigenous Peoples adopted by the General Assembly.<sup>120</sup> As noted above, the UNIDROIT Convention makes specific reference to and accommodates ‘the cultural heritage of national, tribal, indigenous or other communities’.<sup>121</sup> The drafting and negotiations of the convention was coloured by a number of cases involving indigenous and traditional communities’ heritage which highlighted the inadequacies of existing domestic laws and export controls in addressing such objects.<sup>122</sup> The Inter-American Court has laid down criteria for state’s to assess validly held indigenous and private claims to property, and to determine on a case-by-case basis the ‘legality, necessity and proportionality’ of expropriation of privately owned property as a measure to attaining a legitimate aim in a democratic state.<sup>123</sup>

### 3.2.2 Right to Self-determination

States imposing export controls on the transfer of cultural goods maintain that they determine what is in the ‘interests of society’ within their territorial boundaries. The push to ensure the effectiveness of such export controls internationally has often been articulated within the context of the right to self-determination including cultural development.

Legal recognition of the right to self-determination arrived with the UN Charter in 1945.<sup>124</sup> It incorporates it as an aim and purpose of the new organisation and its member states (Articles 1(2) and 55). The UDHR does not specifically refer to a right to self-determination. However, the Declaration on the Granting of Independence to Colonial Countries and Peoples (GA Res. 1514 (XV)), provides: ‘All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their [...] *cultural development*.’<sup>125</sup> Common Article 1 of ICCPR and the ICESCR, which replicates the wording of GA Res. 1514(XV), made it a legally-

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<sup>120</sup> Articles 1, 11 and 12, Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, 13 September 2007.

<sup>121</sup> UNIDROIT Convention, Preamble, para. 3.

<sup>122</sup> For example *Attorney General of New Zealand v. Ortiz* [1984] A.C. 1 (HL); and *Bumper Development Corporation Limited v. Commissioner of Police* [1991] 4 All E.R. 638. See Prott, *Commentary on the Unidroit Convention* (IAL, 1997), p. 19.

<sup>123</sup> *Yakye Axa Indigenous Community v. Paraguay* (Judgment), (2005) 125 I./A. Ct.H.R. (ser.C), paras 146 and 217.

<sup>124</sup> Charter of the United Nations, 26 June 1945, in force 24 October 1945, UNCIO XV, 335; amendments by GA Resolutions in UNTS 557.

<sup>125</sup> GA Res. 1514 (XV), 14 December 1960, 15 UN GAOR Supp. (No. 16), p. 66, 1960 *UN Yearbook* 40, Article 2 (emphasis added). See Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in Accordance with the Charter of the United Nations, GA Res. 2625(XXV), 24 October 1970, 25 UN GAOR Supp. (No. 18), p. 122; (1970) 9 ILM 1292, Principle (e).

binding, ‘human’ right. UN Special Rapporteur Aureliu Cristescu suggested that the right to self-determination as it referred to cultural matters is the ‘right of peoples to choose their cultural system and freely pursue their cultural development’ and ‘regain, enjoy and enrich their cultural heritage’.<sup>126</sup> He added it was imperative that ‘all cultures, in their rich variety, multiplicity, diversity and interaction, form part of the common heritage of all mankind.’<sup>127</sup>

Following GA Res. 1514(XV), several initiatives were promoted as being essential to a people’s cultural development and exercise of the right to self-determination. Among the various demands was a call for the international regulation of the ongoing illicit export, import and transfer of cultural objects, which was finally realised with the adoption of the 1970 UNESCO Convention.<sup>128</sup> The regular GA Resolution on Restitution or Return of Cultural Property to Countries of Origin from 1973 to 2009 have repeatedly reaffirmed the 1970 UNESCO Convention and GA Res. 1514(XV).<sup>129</sup> Article 13(d) of the Convention provides that states parties have an ‘indefeasible right [...] to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property [...] where it has been exported.’

UNESCO instruments and UN human rights bodies have gradually enabled non-state groups to have a voice in national and transnational decision-making processes affecting their enjoyment of cultural rights and cultural heritage. The UNESCO Declaration of the Principles of International Cultural Cooperation enunciated principles concerning the right (and duty) of *peoples* to develop their culture.<sup>130</sup> This link between self-determination and cultural development (including movable heritage) was extrapolated further in multilateral instruments concerning indigenous peoples. International Labour Organisation Convention (No.169 of 1989) concerning Indigenous and Tribal Peoples in Independent Countries acknowledges the collective right of indigenous and tribal peoples to preserve and develop their cultural identity.<sup>131</sup> The UN Declaration on the Rights of Indigenous Peoples acknowledges the right of self-determination of all peoples in its preamble; and makes specific reference to the UN Charter and the two International Covenants. Indigenous organisations

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<sup>126</sup> UN doc. E/CN.4/Sub.2/L.625, para. 31. See Article 1, Charter of Economic Rights and Duties of States, UNGA Res. 3281 (XXIX), 12 December 1974; 29 UN GAOR Supp. (No. 31), p. 50; 14 ILM (1975) 251.

<sup>127</sup> UN doc. E/CN.4/Sub.2/L.625, para. 48.

<sup>128</sup> Ibid, paras 61 and 63.

<sup>129</sup> GA Res. 3187, 18 December 1973 and GA Res. 64/78, 7 December 2009.

<sup>130</sup> See B Boutros-Ghali, ‘The Right to Culture and the Universal Declaration of Human Rights’, in *Cultural Rights as Human Rights* (UNESCO, 1970), p. 73.

<sup>131</sup> See Articles 2(2)(b) and (c), 4, 5, 7, 23, 26-31, ILO Convention (No. 169 of 1989) concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, in force 5 September 1991, 1650 UNTS 383.

have maintained that the recognition of their collective right to self-determination is a prerequisite to their full enjoyment of all human rights, including those pertaining to cultural heritage.<sup>132</sup> The draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples, presented in 1993, state that the protection of indigenous peoples' heritage can only be effective if it is based 'broadly on the principle of self-determination.'<sup>133</sup> The redraft Principles and Guidelines on the Heritage of Indigenous Peoples, tabled in 2005, stress that indigenous peoples' cultural heritage must not be exploited without their free, prior and informed consent.<sup>134</sup> This emphasis is reflected in recent UN and UNESCO instruments providing for some measure of participation by indigenous peoples in state decision-making which impacts upon their cultural heritage.<sup>135</sup>

Whilst the 1970 UNESCO Convention does not explicitly make reference to the right to self-determination in its preamble it does recall the provisions of the Declaration of the Principles of International Cultural Cooperation which, as noted above, refers to the right of each state to develop its own culture.<sup>136</sup> Also, UNESCO as an agency of the United Nations and pursuant to its own constitution, and all UN member states are required to adhere to the UN Charter which articulates the principle of self-determination.

### 3.2.3 The Right to Participate in Cultural Life

The overlap between human rights and protection of cultural heritage (including illicit traffic of cultural objects) is necessarily most overt in respect of those human rights specifically related to culture, namely, the right to participate in cultural life, and the so-called minority protection provision.<sup>137</sup> Several specialist cultural heritage instruments make reference to the right to participate in cultural life.<sup>138</sup> The *travaux préparatoires* of the 1970 UNESCO Convention had defined its purpose as controlling the illicit transfer of the cultural heritage of 'peoples'. The preamble of the

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<sup>132</sup> UN doc. E/CN.4/1996/84, para. 51.

<sup>133</sup> Protection of the heritage of indigenous people, Final Report of the Special Rapporteur, Erica-Irene Daes, UN doc. E/CN.4/Sub.2/1995/26, Annex.

<sup>134</sup> Review of the draft principles and guidelines on the heritage of indigenous peoples, prepared by Yozo Yokota and the Saami Council, UN doc. E/CN.4/Sub.2/AC.4/2004/5, para. 19.

<sup>135</sup> Including Article 8(j), Convention on Biological Diversity, 5 May 1992, in force 29 December 1993, 1760 UNTS 79; and Article 11(b), ICH Convention.

<sup>136</sup> 1970 UNESCO Convention, Preamble, para. 1.

<sup>137</sup> Article 27 ICCPR.

<sup>138</sup> See UCH Convention, Preamble, paras 3, 4 and 5 and Article 7(2); Cultural Diversity Declaration, Article 5; ICH Convention, Preamble, para. 2; and Cultural Diversity Convention, Preamble, para. 21.

preliminary draft cited Article 27 UDHR, adding: ‘which means that it is incumbent upon States to protect the cultural property existing within their territory against the dangers from the illicit export and transfer of such property.’<sup>139</sup> The United States rejected this interpretation of Article 27 and successfully negotiated its deletion from the final text.<sup>140</sup> However, the preamble does provide: ‘that the interchange of cultural property among nations for scientific, cultural and educational purposes [...] enriches the cultural life of all peoples[...].’<sup>141</sup> This right has been defined as participation in the cultural life not only of the state, that is, the national culture, but also the culture and heritage of the community to which an individual may belong.

The right to participate in cultural life was incorporated into Article 27 UDHR and subsequently rearticulated in Article 15 ICESCR.<sup>142</sup> While the UDHR is a non-binding declaration, this human right’s subsequent inclusion in the ICESCR renders it legally binding on states parties. It has been reiterated in numerous other human rights instruments.<sup>143</sup> The African Charter includes the right to participate in cultural life,<sup>144</sup> and Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights enunciate the right.<sup>145</sup> However, the ECHR does not provide for the right to cultural life specifically.

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<sup>139</sup> UNESCO Doc.SHC/MD/3, paras 9 and 10.

<sup>140</sup> UNESCO Doc.SHC/MD/5, Annex 1, 22. The Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property, adopted by the General Conference 19 November 1964 in Records of the General Conference Thirteenth Session, Resolutions, p. 158, is likewise silent in respect of human rights.

<sup>141</sup> 1970 UNESCO Convention, Preamble, para. 2.

<sup>142</sup> The ‘interdependence’ of the right to participate in cultural life with other human rights including the right to education (Articles 13 and 14 ICESR), right to self-determination (Art. 1) and right to adequate standard of living (Art. 11) acknowledged by the CESCR: General Comment No. 21(2009), para. 2.

<sup>143</sup> Convention on the Elimination of All Forms of Racial Discrimination (CERD) (21 December 1965, GA Res. 2106 (XX), Annex, p. 20), 660 UNTS 195, Article 5(e)(vi); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (18 December 1979, GA Res. 34/180), 1249 UNTS 13, Article 13(c); Convention on the Rights of the Child (CRC) (20 November 1989, GA Res. 44/25, UN doc. A/44/49 (1989)), Article 31(2); International Covenant on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, in force 1 September 2003, GA Res. 45/158, annex, 45, UN doc. A/45/49 (1990), Article 43(1)(g); Convention on the Rights of Persons with Disabilities, 13 December 2006, UN doc. A/61/611 (2006), Article 30(1); ICCPR, Articles 17, 18, 19, 21, 22 and 27; UN Minorities Declaration, Article 2.1; UNDRIP, Articles 5, 8, 10-13; ILO No. 169, Articles 2, 5, 7, 8, and 13-15; Declaration on the Right to Development, GA Res 41/128, 4 December 1986, Article 1.

<sup>144</sup> Article 17(2), African Charter.

<sup>145</sup> Article 14(1)(a), Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 17 November 1988, in force 16 November 1999, OAS T.S. No. 69, 28 ILM 156 (1989).

During the drafting of the ICESCR, UNESCO presented a preliminary draft Article 15 which referred primarily the preservation and development of tangible cultural heritage – ‘the inheritance of books, publications, works of art and other monuments and objects of historic, scientific and cultural interest.’<sup>146</sup> However, it also required states parties to ‘encourage[e] the free cultural development of racial and linguistic minorities.’<sup>147</sup> The *travaux* highlight that the drafters were preoccupied with the participation and enjoyment by the wider population of culture manifestations confined ordinarily to a small elite, with most delegations during the negotiations favouring an emphasis on the ‘national’ community. Culture was defined narrowly as ‘high’ culture including museums, libraries and theatres.<sup>148</sup> UNESCO’s preparatory documents for Article 15 ICESCR embraced ‘folk arts, folklore and popular traditions [...]’.<sup>149</sup> This definition was revived in the UNESCO Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It, which provides that: ‘The concept of culture has been broadened to include all forms of creativity and expression of groups or individuals, both in their ways of life and in their artistic activities.’<sup>150</sup> More recently, the Committee on Economic, Social and Cultural Rights in its General Comment No. 21(2009) has also endorsed a broader understanding of culture that includes its individual and collective dimension and accepts that it ‘reflects [...] the community’s way of life and thought.’<sup>151</sup>

As noted above, the 1970 UNESCO Convention in its preamble links the right to participation in cultural life with international cultural exchange.<sup>152</sup> In 1976, the UNESCO General Conference adopted the Recommendation on Participation by the People at Large in Cultural Life and their Contribution *and* Recommendation concerning the International Exchange of Cultural Property. The opening recital of the Recommendation concerning International Exchange notes that it is ‘still largely dependent on the activities of self-seeking parties and so tends to lead to speculation which causes the price of such property to rise, making it inaccessible to poorer countries and institutions while at the same time encouraging the spread of illicit trading [...]’. It added that legal,

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<sup>146</sup> UN doc. E/CN.4/541, 2.

<sup>147</sup> Ibid.

<sup>148</sup> See Y.M. Donders, *Towards a Right to Cultural Identity?* (Intersentia/Hart 2002), 139.

<sup>149</sup> UNESCO doc. CUA/42, 9-10.

<sup>150</sup> Adopted on 26 November 1976 by the General Conference of UNESCO, 19<sup>th</sup> session, Nairobi.

<sup>151</sup> General Discussion on the Right to Take Part in Cultural Life as recognised in Article 15 of the International Covenant on Economic, Social and Cultural Rights, UN doc. E/1993/22, Chapter VII, (‘General Discussion’), paras 204, 209, 210 and 213. See R. O’Keefe, ‘The “Right to Take Part in Cultural Life” under Article 15 of the ICESCR’, ICLQ, vol. 47 (1998), p. 904 at, 905.

<sup>152</sup> See Article 4(d) 1970 UNESCO Convention; UNIDROIT Convention, Preamble, para. 6.

scientific and technical regulations designed to curb illicit trafficking is ‘a powerful means of promoting mutual understanding and appreciation among nations.’<sup>153</sup> This cautionary note was reaffirmed in the subsequent UNESCO Recommendation on the Protection of Movable Cultural Property, which noted that: ‘[T]he growing desire of the public to know and appreciate the wealth of the cultural heritage, of whatever origin, has nevertheless led to an increase in all the dangers to which cultural property is exposed [...] in some countries, of clandestine excavations, thefts, illicit traffic and acts of vandalism[...].’<sup>154</sup> It then calls on states to ‘intensify and give general effect to such measures for the prevention and management of risks as will ensure the effective protection of movable cultural property’ including those contained in the 1970 UNESCO Convention, the 1954 Hague Convention and World Heritage Convention.<sup>155</sup>

Developments in recent years have gradually recalibrated the interpretation of this right in line with UNESCO’s original interpretation. In its General Comment No. 21, the CESCR has observed that the right is to be enjoyed by persons ‘(a) as an individual, (b) in association with others, or (c) within a community or group, as such.’<sup>156</sup> Accessing cultural heritage relates not only to individuals being able to access movable heritage located in museums, archaeological sites and so forth but also the ability of non-dominant groups to access their own cultural heritage. Article 4(f) of the 1976 UNESCO Recommendation requires UNESCO Member states to:

[...] guarantee the recognition of the equality of cultures, including the cultures of national minorities and of foreign minorities if they exist, as forming part of the common heritage of all mankind, and ensure that they are promoted at all levels without discrimination; ensure that national minorities and foreign minorities have full opportunities for gaining access, to and participating in the cultural life of the countries in which they find themselves in order to enrich it with their specific contributions, while safeguarding their right to preserve their cultural identity.

Similarly, the CESCR has observed that Article 15(1)(a) ICESCR encompasses the right of ‘minorities and persons belonging to minorities [...] to conserve, promote and develop their own

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<sup>153</sup> Preamble, paras 2, 3 and 4, Recommendation for the International Exchange of Cultural Property, adopted by the General Conference 26 November 1976, *Records of the General Conference Nineteenth Session*, vol. I: Resolutions, Annex I, p. 17.

<sup>154</sup> Preamble, paras 1 and 3, Recommendation for the Protection of Movable Cultural Property, adopted by the General Conference 28 November 1978, *Records of the General Conference Twentieth Session*, vol. I: Resolutions, Annex I, p. 11.

<sup>155</sup> Preamble, paras 7 and 8, 1978 UNESCO Recommendation.

<sup>156</sup> General Comment No. 21(2009) para. 9.

culture.’<sup>157</sup> Adding that it places an obligation on States parties ‘to recognize, respect and protection minority cultures as an essential component of the identity of the States themselves.’<sup>158</sup> In respect of indigenous peoples’ enjoyment of this right, the Committee has stated that they have a right ‘to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage [...]’.<sup>159</sup>

This element has been reaffirmed with the state reporting requirements demanded by the Committee including positive measures to protect and promote cultural diversity and create ‘favourable conditions’ for minorities and indigenous peoples to preserve and develop their cultures.<sup>160</sup> Also, the International Court of Justice, CESCR, and Human Rights Council have interpreted the application of the ICESCR generally (including the right to participate in cultural life) to extend to ‘both territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction.’<sup>161</sup> This position accords with Article 12 of the 1970 UNESCO Convention.

The CESCR has confirmed that Article 15 ICESCR requires positive ‘action’ and encompasses obligations to respect, protect and fulfil.<sup>162</sup> In its General Comment No. 21, the Committee notes that the specific obligation to respect includes the ‘right of all peoples to have access to, and to participate in, varied information exchanges, and to have access to cultural goods and services, understood as vectors of identity, values and meaning.’<sup>163</sup> But it also requires states to ‘respect free access by minorities to their own culture, heritage and other forms of expression [...]’.<sup>164</sup> It also notes that the right entails specific obligations to respect and to protect ‘cultural heritage in all its forms, in times of war and peace, and natural disasters’. It states:

Cultural heritage must be preserved, developed, enriched and transmitted to future generations as a record of human experience and aspirations, in order to encourage creativity in all

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<sup>157</sup> Ibid., para. 32.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid., para. 36.

<sup>160</sup> Guidelines on Treaty-Specific Documents to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, 13 January 2009, UN doc. E/C.12/2008/2 at 14, paras 68 and 71(c).

<sup>161</sup> *Legal Consequences of the Construction of the Wall, Advisory Opinion*, (Note 8 above) at p. 180; UN doc. E/C.12/1/Add.90; and HRC Res. 6/19, 28 September 2007, Religious and cultural rights in the Occupied Palestinian Territory, including East Jerusalem, UN doc. A/HRC/RES/6/19.

<sup>162</sup> General Comment No. 21, paras 6 and 48.

<sup>163</sup> Ibid., para. 49(b).

<sup>164</sup> Ibid., para. 49(d).



its diversity and to inspire a genuine dialogue between cultures. Such obligations include the care, preservation and restoration of historical sites, monuments, works of art and literary works, among others.<sup>165</sup>

The CESCR observed that the obligation to respect and protect fundamental freedoms, cultural heritage and diversity is ‘interconnected’ and requires states to take measures to prevent third party interference with such rights.<sup>166</sup> This obligation to respect and protect is further elaborated in respect of the cultural heritage of the ‘most disadvantaged and marginalized individuals and groups’ when framing policies with ‘attention [...] paid to the adverse consequences of globalization, undue privatization of goods and services, and deregulation on the right to participate in cultural life.’<sup>167</sup> This has been interpreted by the Committee to include protection of movable cultural heritage from theft and deliberate destruction through illicit traffic.<sup>168</sup> The General Comment adds that state parties should be cognisant that cultural goods have: ‘[E]conomic and cultural dimensions, conveying identity, values and meanings. They must not be treated solely as having solely a commercial value.’<sup>169</sup>

States parties’ obligation to fulfil includes the passage of appropriate laws; establishment of effective mechanism for individuals and groups to participate in decision-making, access to justice and appropriate remedies if it is violated; and programs for the preservation and restoration of cultural heritage.<sup>170</sup> The Committee found that Article 15 ICESCR carries core obligations including permitting and encouraging persons belonging to minority, indigenous or other communities to participate in the ‘design and implementation of laws and policies’ that impact upon them and states parties ‘should obtain their free and informed consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.’<sup>171</sup> This reinforces the provisions of UNDRIP, described above; and Article 2(3) UN Minorities

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<sup>165</sup> Ibid., para. 50(a).

<sup>166</sup> Ibid., para. 50.

<sup>167</sup> Ibid., para. 50(c).

<sup>168</sup> See UN docs .E/1991/23, para. 79; UN doc. E/1992/23, paras 310, 312; UN doc. E/1993/22, para. 186; and UN doc. E/1995/22, para. 136.

<sup>169</sup> General Comment No. 21, para. 43, citing the Cultural Diversity Convention, Preamble, para. 18 and Article 18, Cultural Diversity Declaration.

<sup>170</sup> Ibid., para. 54.

<sup>171</sup> Ibid., para. 55(d).

Declaration. Both instruments provide that its provisions cannot be construed as contrary to the UN Charter including sovereign equality, territorial integrity and political independence of states.<sup>172</sup>

### 3.2.4 Minority rights

The extension of the interpretation of the right to participate in cultural life explicitly to minorities and indigenous peoples has led to an overlap with the dedicated minority protection provision contained in the ICCPR. Article 27 is the first provision for the protection of minorities of universal application.<sup>173</sup> The UN Minorities Declaration, adopted by the General Assembly in 2002, in its preamble states that it is inspired rather than based on Article 27 ICCPR, and therefore not restricted by this provision.<sup>174</sup> Article 2 draws upon rights articulated in Article 27 ICCPR (restated as a positive right) and Article 15 ICESCR.

The inclusion of the minority protection within the international human rights framework reinforced the assumption that the right holder is an individual and not a group.<sup>175</sup> During the drafting and negotiations of the covenant, the UN Sub-Commission on the Prevention of Discrimination and Protection of Furthermore, the complaint mechanism contained in the Optional Protocol to the Covenant provides standing to States or individuals but not to ‘communities’.<sup>176</sup> The concession to the collective aspect of minority rights came with the words ‘in community with other members of their group’. The Human Rights Committee has affirmed that the right of enjoyment of culture, practice of religion, or use of language can only be realised meaningfully when exercised ‘in a community’.<sup>177</sup> General Comment No. 23 states that Article 27 protects ‘individual rights’ but that the obligations owed by states are collective in nature.<sup>178</sup>

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<sup>172</sup> UNDRIP, Preamble, para. 17 and Article 46; UN Minorities Declaration, Article 8(4).

<sup>173</sup> GA Res. 2200A(XXI), 16 December 1966, in force 23 March 1976. The ECHR, American Declaration, American Convention, and African Charter do not specifically contain a minority protection provision. However, the tribunal and commissions overseeing the implementation of these treaties have interpreted existing provisions broadly to encompass obligations to protect the cultural heritage of minorities and indigenous peoples.

<sup>174</sup> Preamble, para. 4, UN Minorities Declaration.

<sup>175</sup> See UN doc. E/CN.4/Sub.2/384/Add.2, paras 125; and General Comment No. 23, UN doc. HRI/GEN/1/Rev.1, 38, para. 1.

<sup>176</sup> Optional Protocol to the International Covenant on Civil and Political Rights, GA Res. 2200A(XXI), 16 December 1966, in force 23 March 1976.

<sup>177</sup> See *Kitok v. Sweden* (Comm. No. 197/1985), UN doc. A/43/40, p. 221 (1988); *Lubicon Lake Band (Bernard Ominayak) v. Canada* (Comm. No. 167/1984), UN doc. A/45/40, Pt.2, 1 (1990); and *Länsman v. Finland* (Comm. No. 511/1922), UN doc. CCPR/52/D/511/1992, and Comm. No. 671/1995, UN doc. CCPR/C/58/D/671/1995.

<sup>178</sup> General Comment No. 23, para. 6.2.

The right contained in Article 27 is negatively articulated, with the addition of the words ‘shall not be denied the right’.<sup>179</sup> However, UN Special Rapporteur Francesco Capotorti rejected this narrow reading of this obligation. He argued that beyond the application of the principle of non-discrimination, this protection even if it was contained in the ICCPR resembles the ‘economic and social’ rights that require a state to act proactively on behalf of the right-holders.<sup>180</sup> Likewise, General Comment No. 23 endorses that Article 27 imposes positive obligations on states parties.<sup>181</sup> Pursuant to Article 4(2) UN Minorities Declaration, the relevant state must create favourable conditions to enable members of a minority to ‘express their characteristics’ and ‘develop their culture’ where they do not violate national or international law. Article 5(1) provides that national policies and programmes must be planned and executed with ‘due regard for the legitimate interests’ of minorities, and ‘due regard’ is defined by the Commentary as ‘be[ing] given reasonable weight compared with other legitimate interests that the Government has to take into consideration.’<sup>182</sup>

While indigenous peoples have persistently rejected being designated as minorities, relevant provisions contained in UNDRIP reflect the structure of Article 27 ICCPR, but are tailored to indigenous peoples’ specific concerns. These provisions confer positive and collective rights. Article 12 covers the right of indigenous peoples to ‘maintain, protection and develop the past, present and future manifestations of their cultures’ including ‘archaeological and historical sites, artefacts [...]’. It obligates states to implement effective mechanisms of redress for cultural objects removed without ‘free, prior and informed consent’ and in violation of customary law. Article 13 concerns the right of indigenous peoples to profess and practice their religion, including ‘the right to use and control of their ceremonial objects; and the right to repatriation of their human remains’. It requires states to institute mechanisms in conjunction with indigenous peoples to facilitate access and repatriation.

In her 1993 Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples, Erica-Irene Daes observed indigenous communities have had to contend with ‘the systematic “mining” of archaeological sites for marketable antiquities’ and ‘continuing efforts by

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<sup>179</sup> UN doc. E/447, para. 55; UN doc. E/CN.4/Sub.2/351, 13-14; UN doc. E/CN.4/Sub.2/SR.647, 158; and UN doc. E/CN.4/Sub.2/384/Add.2, paras 130 ff.

<sup>180</sup> UN doc. E/CN.4/Sub.2/384/Add.2, paras 130-36, 160-61; and UN doc. E/CN.4/Sub.2/384/Add.5, paras 24-30. See General Comment No. 23, paras 6.1 and 6.2.

<sup>181</sup> *Ibid.*, paras 6.1, 6.2 and 9.

<sup>182</sup> Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, 4 April 2005, UN doc. E/CN.4/Sub.2/AC.5/2005/2, 17.

tourists, art dealers and scholars to purchase culturally-important objects which are still in use'.<sup>183</sup> She noted that some states had enacted laws to address this issue 'but they had not always been effective.'<sup>184</sup> While the 2005 draft Guidelines reinforced the 'intrinsic value' of indigenous peoples' cultural heritage, it also recognised that indigenous peoples and individuals enjoyed the right to property.<sup>185</sup> The 1993 draft Guidelines had provided that states in conjunction with relevant international organisations should assist indigenous communities in the recovery of their movable cultural heritage (and ancestral remains).<sup>186</sup>

#### 4. Conclusion

The cross-fertilisation between human rights and cultural heritage law in the field of movable heritage has enabled a refinement of the rights held and obligations owed in a manner which has moved the protection of movable heritage beyond the purely statist typology and resultant legal debate, which long dominated the control of the illicit trade in cultural objects.<sup>187</sup> Human rights law reinforces that states alone are not the only right-holders in respect of movable heritage. Whilst indicating the potential multiplicity of right-holders, the interconnectedness of human rights, and complexity of oft-competing claims, it points the way to how they may co-exist and be resolved. The right of an individual to property is circumscribed by the interests of the broader society including the communal right to cultural property of certain groups. The right to self-determination used initially by newly independent states to garner international cooperation to control the trade in cultural objects has been reaffirmed as a right held by 'peoples' within and across states. It is 'peoples' who have a right to determine whether and how their movable heritage is transferred. Whilst export controls instituted by states may be an important mode of realising the right to participate in cultural life of the national community by its citizens, this right also requires states to ensure that individuals are able to participate in the cultural life of the communities to which they belong. The broadening of this right has been augmented by the resuscitation of minority protections

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<sup>183</sup> UN doc. E/CN.4/Sub.2/1993/28, para. 49.

<sup>184</sup> *Ibid.*

<sup>185</sup> UN doc. E/CN.4/Sub.2/AC.4/2006/5, pp. 4 and 5.

<sup>186</sup> UN doc. E/CN.4/Sub.2/1995/26, Annex.

<sup>187</sup> See Merryman, 'Two Ways of Thinking About Cultural Property', (1986) 80 AJIL 831. Merryman made concessions in his later writings in respect of cultural objects of importance to indigenous and tribal communities. Cf. Francioni, 'From Cultural Property to Cultural Heritage: the Dynamic Evolution of a Concept and Scope', in A. Yusuf (ed.), *L'action normative de l'UNESCO*, vol. 1 (2007), pp. 230-249; and Prott and O'Keefe, "'Cultural Heritage" or "Cultural Property"?' IJCP, vol. 1 (1992), p. 311.

beyond non-discrimination into a positive obligation on states to ensure the protection and promotion of the identity of certain groups. The ongoing elaboration of these human rights has increasingly led to the refinement of the obligations of states (and non-state actors) concerning movable heritage.

This cross-fertilisation has the potential to impact upon the access to justice of right-holders and the effectiveness of legal protection for cultural objects. There has been pointed criticism of the lack of enforceability of recent cultural heritage conventions and the detrimental flow-on effect for long-established instruments.<sup>188</sup> As noted above, it is these same conventions which have most explicitly emphasised the importance of cultural heritage for the promotion of human rights. Although they shall not cure the wider concerns of the defects of language and accountability frameworks of these treaties, international and human rights instruments and their respective enforcement structures can provide access to justice for some right-holders when obligations are breached in respect of movable heritage. The requirement for national reporting of the transposition and implementation of obligations by UN, UNESCO and treaty-based bodies, complaint mechanisms before UN, UNESCO and treaty-based bodies, and regional human rights courts and commissions, and prosecutions before national and international courts necessarily provide scope for the further evolution of jurisprudence relating to obligations for the protection of cultural objects, resolution of competing claims, and sanctions and remedies for breaches.<sup>189</sup>

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<sup>188</sup> Prot, *supra* note 105.

<sup>189</sup> A.F. Vrdoljak, 'Access to Justice for Minority Groups', in F. Francioni, M. Gestri, N. Ronzitti, T. Scovazzi (a cura di), *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione Europea*, (Milano: Giuffrè, 2008), pp. 115-148. For review of role of UNESCO Commission on Conventions and Recommendations' Procedure 104 complaints mechanism for monitoring of human rights violations within UNESCO's competences, see UNESCO Doc.184EX/19.