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Karolina Sikora*

karolina.sikora@ulapland.fi
orcid.org/0000-0002-0665-9469
Arctic Centre, University of Lapland
Pohjoisranta 4, 96100 Rovaniemi, Finland

The Right to Cultural Heritage in International Law, with Special Reference to Indigenous Peoples' Rights

Abstract: In recent years, the social dimension of cultural heritage has gained significance in international law. A better understanding of the human rights dimensions of cultural heritage has resulted in substantial recognition of the right to heritage; a right that has not been explicitly regulated in international law. This article aims to analyse the path that cultural heritage law has taken to adopt a human rights law dimension. It also discusses the construction of the right to heritage and maps the connections and disconnections between and within cultural heritage law and international human rights law frameworks. The article uses the example of Indigenous peoples as a referent, due to the special bond that many may have to cultural values which play a significant role in the formation of Indigenous identity. In this context, I argue for a human rights approach to cultural heritage, which offers not only participation but also the co-creation of heritage together with local and Indigenous communities.

* **Karolina Sikora** is a researcher at the Northern Institute for Environmental and Minority Law at the Arctic Center of the University of Lapland, Finland. She holds a master's degree in law from the University of Wrocław. In her research, she is examining the right to the cultural heritage of the ethnic minorities in the Russian North.

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Introduction

Until the Second World War, interest in cultures and the meanings of contemporary practices were referred to as a matter of “anthropological observation rather than a subject of legal protection”.¹ In the second half of the 20th century, however, some of the cultural values became recognized as cultural heritage, having outstanding value for the whole of humankind. The tasks of recognizing and protecting cultural heritage have been mainly entrusted to UNESCO, a special agency of the United Nations (UN) that aims to promote cooperation in the educational, scientific, and cultural fields.² Despite this, the preservation and safeguarding mechanisms created after the Second World War placed cultural heritage in the category of a constituent element of the cultural past.³ Therefore, for decades cultural heritage has not been considered as falling within human rights law. This perspective on heritage began to change when the work on the Convention for the Safeguarding of the Intangible Cultural Heritage (“the ICH Convention”) started.⁴ The direction in which cultural heritage law has evolved since then led to adoption of the perspective that heritage as a cultural process is an indispensable component of people’s individual and collective identity and thus empowers formerly marginalized groups and communities. Consequently, human rights mechanisms have declared the right to heritage as a human right. However, this has not yet been explicitly regulated in international law⁵ due to the different approaches taken by the two main legal frameworks related to heritage: human rights law on one hand and international heritage law on the other. In examining the fundamental change in heritage discourse, I argue in this paper for the human rights law approach to cultural heritage, as it shifts more agency on Indigenous peoples and local communities to identify and select relevant cultural pieces. In this regard, the article focuses on two issues, which together present a narrow perspective of the broad topic. However, due to the complexity of different aspects of the matter, this article

¹ E. Polymenopoulou, *Indigenous Cultural Heritage and Artistic Expressions: “Localizing” Intellectual Property Rights and UNESCO Claims*, “Canadian Journal of Human Rights” 2017, Vol. 6, p. 99.

² Constitution of the United Nations Educational, Scientific and Cultural Organization, 16 November 1945, 4 UNTS 275 (“UNESCO Constitution”).

³ T. Kono (ed.), *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21st Century*, Martinus Nijhoff Publishers, Leiden 2010.

⁴ 17 October 2003, 2368 UNTS 3.

⁵ Human Rights Council, *Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed*, 21 March 2011, UN Doc. A/HRC/17/38.

does not comprehensively discuss all of them. As the starting point of the article, I conceptualize cultural heritage and discuss the development of the notion. In this context I refer specifically to Indigenous peoples' perspectives on heritage and present the influence of Indigenous ontologies on heritage theory. Then I analyse the development and construction of the human right to cultural heritage within the international law framework.

Cultural Heritage and Its Recognition under International Law

Given that the humanities apply various concepts of culture across multiple scientific disciplines, the different concepts are contested inside diverse fields.⁶ Nonetheless culture is largely understood as the sum of the spiritual and material outputs of a society.⁷ Some of the remarkable, but also mundane, cultural elements may get a chance to be recognized as cultural heritage, which is already a more specific term than culture, especially from a legal point of view.⁸ Primarily, cultural heritage has been defined as the legacy of tangible and intangible, pieces that were inherited from the past and are considered to be worth protecting and passing on to the next generations.⁹ Inheritance, in this case, allows politicians and researchers to decide which pieces of culture are worthy of being safeguarded, and which are unworthy of such safeguarding for either humanitarian or moral reasons.¹⁰ Consequently, settling an issue involves a complex process of selecting and producing heritage, which includes the identification, documentation, protection, and transmission of cultural elements.¹¹

The development of the concept of cultural heritage in international law

The protection of cultural heritage at the international level started with a discourse on the loss of cultural memory in connection with the colonial era¹² and continued with a discussion concerning the outcomes of the massive destruction

⁶ D. Denby, *Herder: Culture, Anthropology and the Enlightenment*, "History of the Human Sciences" 2005, Vol. 18(1), pp. 55-76.

⁷ R. Rosaldo, *Ideology, Place, and People without Culture*, "Cultural Anthropology" 1988, Vol. 3(1), pp. 77-87.

⁸ N. Adell et al. (eds.), *Between Imagined Communities of Practice: Participation, Territory and the Making of Heritage*, Göttingen University Press, Göttingen 2015.

⁹ K. Konsa, *Heritage as a Socio-Cultural Construct: Problems of Definition*, "Baltic Journal of Art History" 2013, Vol. 6, pp. 125-151.

¹⁰ R. Harrison, *Excavating Second Life: Cyber-Archaeologies, Heritage and Virtual Communities*, "Journal of Material Culture" 2009, Vol. 14(1), pp. 75-106; L.V. Protz, P.J. O'Keefe, "Cultural Heritage" or "Cultural Property"?, "International Journal of Cultural Property" 1992, Vol. 1(2), pp. 307-320.

¹¹ C. Geering, *Protecting the Heritage of Humanity in the Cold War: UNESCO, the Soviet Union and Sites of Universal Value, 1945-1970s*, "International Journal of Heritage Studies" 2020, Vol. 26(12), pp. 1132-1147.

¹² G. Steinmetz, *The Uncontrollable Afterlives of Ethnography: Lessons from "Salvage Colonialism" in the German Overseas Empire*, "Ethnography" 2004, Vol. 5(3), pp. 251-288.

of historical monuments in the major wars of the 19th and 20th centuries; in particular the latter.¹³ It is unquestionable that UNESCO was initially designated the task of creating a legal framework to prevent the destruction of cultural heritage during times of armed conflict, which materialized with the 1954 Hague Convention.¹⁴ This UN agency was subsequently responsible for establishing international protection mechanisms to recognize and preserve cultural pieces of unique significance from physical loss.¹⁵ In 1972, the Convention for the Protection of the World Cultural and Natural Heritage (“the WH Convention”, or WHC)¹⁶ established a framework to prevent the destruction and disappearance of items of cultural and natural heritage. The scope of the Convention covers monuments, sites, objects, and artefacts, thus considering heritage as only physical pieces. This standpoint has been justified for two reasons. Firstly, it was tangible heritage that had been primarily destroyed or illegally traded during wartime.¹⁷ Secondly, for many scientific disciplines the materiality of physical objects guarantees a basis for reliable evidence.¹⁸ However, only those cultural elements which are considered to be of “outstanding value” for the whole of humankind will be granted recognition under the WHC. The concept of universal values worth protecting has been dominant across all fields of international law and has also established a system for international cooperation in the cultural heritage field.¹⁹ Despite the former appreciation for the concept of universality, current scholarship has largely criticized it as tending to homogenize cultural elements. Moreover, the current literature attacks the notion that some sites and monuments are more valuable than others due to their “universal” significance. This has given rise to tension between “universal heritage” and “heritage of local and/or Indigenous significance”, the latter of which can be challenged by grass-roots initiatives, leading to conflicts between local communities and officials.²⁰

Since the 1970s, heritage theory has been gradually and incrementally influenced by Indigenous peoples’ ontologies and the then-emerging Indigenous

¹³ T. Kono, op. cit.

¹⁴ Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240; see J. Blake, *International Cultural Heritage Law*, Oxford University Press, Oxford 2015, p. 4.

¹⁵ C. Geering, op. cit.

¹⁶ 16 November 1972, 1037 UNTS 151.

¹⁷ W. von Truetzschler, *The Evolution of “Cultural Heritage” in International Law*, in: *15th ICOMOS General Assembly and International Symposium: “Monuments and Sites in Their Setting – Conserving Cultural Heritage in Changing Townscapes and Landscapes”, 17-21 October 2005, Xi’an, China*, <http://openarchive.icomos.org/id/eprint/303/1/1-33.pdf> [accessed: 26.10.2021].

¹⁸ J. Blake, *International Cultural Heritage Law*.

¹⁹ Ibidem.

²⁰ P. Taruvinga, W. Ndoro, *The Vandalism of the Domboshava Rock Painting Site, Zimbabwe: Some Reflections on Approaches to Heritage Management*, “Conservation and Management of Archaeological Sites” 2003, Vol. 6(1), pp. 3-10.

peoples' rights movement.²¹ Consequently, heritage started to be perceived as an uninterrupted process that undergoes constant (re)creation each time it is enjoyed.²² This acknowledgement implied that "the history of art and architecture, archaeology, anthropology, and ethnology no longer concentrate on single monuments in isolation but rather on considering cultural groupings that were complex and multidimensional".²³ At this point, a fundamental shift has arisen in how States perceive cultural heritage,²⁴ and an intangible heritage that was not fully recognized by previous legislation has come into being, the growing importance of which found expression in the adoption of the 2003 ICH Convention. This Convention defines intangible heritage as "practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage".²⁵ This can be exemplified as "oral traditions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and the universe or the knowledge and skills to produce traditional crafts".²⁶

Therefore, in contrast to material heritage, the significance of intangible aspects has been built up around the symbolic meaning of objects and practices and has been rather tied up with their relevance for local communities.²⁷ This implies that heritage is situated within a particular social and historical context and has meaning only in that particular background.²⁸ This development has been especially relevant for ethnic minorities and Indigenous communities, as it has helped them to prevent significant parts of their cultural elements from exclusion – parts that are often intangible and valuable for a narrow group of people.²⁹ Furthermore, the ICH Convention establishes heritage as belonging to specific communities regardless of their belonging to a particular State and its territory, which means that cul-

²¹ F. Francioni, L. Lixinski, *Opening the Toolbox of International Human Rights Law in the Safeguarding of Cultural Heritage*, in: A. Durbach, L. Lixinski (eds.), *Heritage, Culture and Rights: Challenging Legal Discourses*, Hart Publishing, Oxford 2017.

²² L. Smith, *Uses of Heritage*, Routledge, London 2006.

²³ World Heritage Committee, *Expert Meeting on the "Global Strategy" and Thematic Studies for a Representative World Heritage List*, 13 October 1994, UN Doc. WHC-94/CONF.003/INF.6, p. 3.

²⁴ W.S. Logan, *Closing Pandora's Box: Human Rights Conundrums in Cultural Heritage Protection*, in: H. Silverman, D.F. Ruggles (eds.), *Cultural Heritage and Human Rights*, Springer, New York 2007, pp. 33-52.

²⁵ ICH Convention, Art. 2.

²⁶ UNESCO, *What Is Intangible Cultural Heritage?*, <https://ich.unesco.org/en/what-is-intangible-heritage-00003> [accessed: 20.03.2020].

²⁷ J. Blake, *International Cultural Heritage Law*.

²⁸ L. Smith, op. cit.

²⁹ R. Kurin, *Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A Critical Appraisal*, "Museum International" 2004, Vol. 56, pp. 66-77.

tural, religious, and linguistic communities are not defined by territorial borders.³⁰ As a result, the two UNESCO Conventions from 1972 and 2003 have created separate systems for the protection and promotion of tangible (the 1972 Convention) and intangible (the 2003 Convention) heritage. These documents manifest various uncertainties which were present at the times of their drafting, and therefore reflect various approaches. The 1972 WH Convention regulates the protection of the common heritage of mankind worthy of international protection, whereas the 2003 ICH Convention counterbalances the power of globalization and addresses the growing desire to recognize and protect local forms of heritage, which are deemed to be no less relevant than the universal ones (i.e. the 'common heritage of mankind').

The Indigenous perspective on cultural heritage discourse

Indigenous peoples, like any other group, are certainly not internally or externally homogeneous. However, in order to offer recognition and protection of their rights under the international law framework, there was a need to create a legal category of Indigenous peoples.³¹ Therefore, certain commonalities that Indigenous peoples may share worldwide had to be gathered together and systematized in order to establish protection of the rights of a particular group. The same applies to the preservation mechanisms for Indigenous peoples' cultural heritage and other relevant cultural pieces. While international law provides valuable tools to safeguard Indigenous heritage, they are, however, often insufficient. The prevailing international cultural heritage law discourse strives to set heritage within universal, clear, and cognitive structures. Such structures provide a common approach to the conservation of heritage in a uniform manner, and thus focus predominantly on the tangible aspects thereof, substantially narrowing the understanding of heritage.³² Nowadays, the classical institutional framework under the WH Convention has been widely criticized as a tool that reinforces the authorized character of heritage.³³ Even though the redefined approach under the 2003 Convention pays greater attention to the Indigenous perspective of heritage, it is still a demanding task to provide effective legal protection for Indigenous cultural heritage. Several reasons have been put forward for this. Above all, the dualistic

³⁰ M. Cornu, R. Smeets, *Art. 12: Inventories*, in: J. Blake, L. Lixinski (eds.), *The 2003 UNESCO Intangible Heritage Convention: A Commentary*, Oxford University Press, Oxford 2020.

³¹ J. Anaya, *Indigenous Peoples in International Law*, Oxford University Press, Oxford 1996.

³² C. Bortolotto, *UNESCO and Heritage Self-Determination: Negotiating Meaning in the Intergovernmental Committee for the Safeguarding of the ICH*, in: N. Adell et al. (eds.), *Between Imagined Communities of Practice: Participation, Territory and the Making of Heritage*, Göttingen University Press, Göttingen 2015.

³³ L. Smith, *op. cit.*; E. Waterton, L. Smith, *There Is No Such Thing as Heritage*, in: L. Smith (ed.), *Taking Archaeology Out of Heritage*, Cambridge Scholars Publishing, Newcastle-upon-Tyne 2009, pp. 10-27.

view of cultural heritage, as developed in heritage law and theory, may not necessarily reflect the views of certain groups who understand heritage in a holistic manner.³⁴ This means there exists a lack of differentiation between the material and intangible aspects of heritage, as tangible heritage often encompasses the symbolic meaning of objects as well. What's more, certain aspects of Indigenous heritage might also be co-produced together with non-humans forces.³⁵ This is because the extensive relationships, sometimes described as kinships, with entire ecosystems do not allow us to detach culture from nature.³⁶ In consequence, Indigenous ontologies may confront anthropocentrism vis-à-vis their approach to humans as superior to nature.³⁷ Finally, heritage understood as a process can no longer be placed within a framework of a linear concept of time, but has to instead be perceived as a self-repeating cycle.³⁸ The consequences of insufficiently addressing the cultural values of Indigenous peoples in the legal framework reflect people's habitual existence. For certain Indigenous communities, the positive aspect of heritage implies the recognition and protection of many daily (and ancient) activities, particularly in connection to the land. The land rights ensure, most importantly, biological survival and the means of subsistence, and also foster well-being and health.³⁹ At the same time, on the emotional level heritage perceived as a form of non-renewable resource for producing and promoting local identities may be vulnerable to over-exploitation.⁴⁰ As previous cases have shown, shaping a strong cultural identity requires resistance to the forms of discrimination and prejudices that Indigenous peoples often experience.⁴¹ Therefore, recognition of the constant creation of heritage allows Indigenous communities to sustain their cultural continuity, which determines the survival of Indigenous communities as distinct peoples and thus affects their status in international law.

³⁴ F. Lenzerini, *Reparations for Wrongs against Indigenous Peoples Cultural Heritage*, in: A. Xanthaki et al. (eds.), *Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges*, Brill, Leiden 2017.

³⁵ R. Harrison, D. Rose, *Intangible Heritage*, in: T. Benton (ed.), *Understanding Heritage and Memory*, Manchester University Press, Manchester 2010; P.K. Virtanen, *Ancestors' Times and Protection of Amazonian Indigenous Biocultural Heritage*, "AlterNative: An International Journal of Indigenous Peoples" 2019, Vol. 15(4), pp. 330-339.

³⁶ R. Harrison, *Beyond "Natural" and "Cultural" Heritage: Toward an Ontological Politics of Heritage in the Age of Anthropocene*, "Heritage & Society" 2015, Vol. 8(1), pp. 24-42.

³⁷ R. Harrison, D. Rose, op. cit.

³⁸ P.K. Virtanen, op. cit.

³⁹ D. Short, C. Lennox (eds.), *Handbook of Indigenous Peoples' Rights*, Routledge, London 2018.

⁴⁰ L. Meskell, *The Intersections of Identity and Politics in Archaeology*, "Annual Review of Anthropology" 2002, Vol. 31(1), pp. 279-301.

⁴¹ A. Xanthaki et al. (eds.), *Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges*, Brill, Leiden 2017; D. Khanolainen, Y. Nesterova, E. Semenova, *Indigenous Education in Russia: Opportunities for Healing and Revival of the Mari and Karelian Indigenous Groups?*, "Compare", 20 October 2020, doi: 10.1080/03057925.2020.1834350.

Cultural Heritage and Human Rights

There are two ways to approach the intersections of cultural heritage and human rights law. The majority of the existing literature takes the perspective of cultural heritage studies, treating human rights more like an admirable idea than an actual legal tool to shape heritage law and practices. While such a position is valuable for a wider understanding of how heritage contributes to human diversity and how it constructs societies, this approach downplays the role of human rights mechanisms in shifting the power dynamics in heritage politics. On the other hand, while looking from the human rights law standpoint the discrepancies between human rights and heritage are already visible at the semantical level. Human rights language has been excluded from most cultural heritage law documents, except for the ICH Convention.⁴² Even though the 1945 UNESCO Constitution had a primary goal of creating universal respect for justice, the rule of law, human rights, and fundamental freedoms,⁴³ that tone has disappeared over the years due to the fear of potential conflicts between culture and human rights. Considering that culture may not necessarily reflect only the enlightened and refined legacy of humanity, this doubt reinforces the debate over cultural relativism and its place within the human rights system. Specifically, insofar as concerns intangible aspects, heritage may play the role of a double-edged sword, as certain cultural practices may infringe upon universally-recognized human rights principles, like non-discrimination, equality, or physical integrity. Therefore, only those cultural practices compatible with existing human rights instruments can be protected and promoted at the international level.⁴⁴ However, this clause functions only within the scope of the ICH Convention. Thus, the limitation included there will apply only in the case of a nomination for inscription on the Representative List of the Intangible Cultural Heritage of Humanity, and will not have retroactive power. This means that ambiguous practices, which to some extent might have found recognition under the previous UNESCO Programme of Masterpieces of Oral and Intangible Heritage, are not covered by the limitation clause.⁴⁵ Additionally, the Universal Declaration of Human Rights⁴⁶ purposefully focuses on universal, individual rights and does not introduce the rights of cultural minorities, limiting the role that cultural relativism might play in human rights law.⁴⁷ Understanding culture as societal and always interpersonal – based

⁴² A.F. Vrdoljak, *Human Rights and Cultural Heritage in International Law*, in: A.F. Vrdoljak, F. Lanzerini (eds.), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature*, Hart Publishing, Oxford 2014.

⁴³ UNESCO Constitution, Art. 1.

⁴⁴ ICH Convention, Art. 2(1).

⁴⁵ F. Francioni, L. Lixinski, *op. cit.*

⁴⁶ 10 December 1948, 217 A (III).

⁴⁷ P. Jones, *Human Rights, Group Rights, and Peoples' Rights*, "Human Rights Quarterly" 1999, Vol. 21(1), pp. 80-107.

on the social practice of differentiation – usually involves groups of people but also takes place at the individual level. Consequently, culture requires the recognition of collective rights, which do not refer to any specific group but rather to all communities that share common cultural values. Although the 1966 International Covenant on Civil and Political Rights (ICCPR)⁴⁸ has tried to challenge the individualism of human rights, its Article 27 protects cultural rights exercised jointly in communities with others, which despite their quasi-collective form remain of an individual nature.⁴⁹ Still, the Human Rights Committee has underlined that Article 27, while protecting individual rights, depends on sustaining the culture of a particular group as a collective.⁵⁰ Thus, the rights aim at safeguarding the identities of minority groups and “enriching the fabric of society as a whole”.⁵¹ Currently, legal scholarship tends to interpret Article 27 ICCPR as having both individual and collective dimensions. This position is based on the argument that all cultural rights are two-dimensional, regardless of how the norms are constructed.⁵² Because the collective dimension is not clearly incorporated into the definition of cultural rights, whether their content derives from separate norms or from the results of their interpretation is open to question.⁵³ Despite the challenges in enforcing collective rights within existing international human rights legal structures, there is an increasing tendency in both the scholarly literature⁵⁴ and jurisprudence⁵⁵ to inevitably recognize some form of group rights in order to protect culture and cultural heritage. This development has been connected with the increasing awareness of the need to ensure the rights of minorities, as well as ethnic and Indigenous groups; an awareness which eventually led to the adoption of the Indigenous and Tribal Peoples Convention (“the ITP Convention”)⁵⁶ in 1989, and later the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)⁵⁷ in 2007. The ITP Convention proclaims a number of rights that Indigenous and tribal peoples enjoy collectively. These are primarily rights to lands and resources that Indigenous peoples occupy or otherwise use. The Convention also acknowledges the collective aspects of exercising customs, traditions, and

⁴⁸ 16 December 1966, 999 UNTS 171.

⁴⁹ M. Jovanović, *Cultural Rights as Collective Rights*, in: A. Jakubowski (ed.), *Cultural Rights as Collective Rights: An International Law Perspective*, Brill, Leiden 2016, pp. 13-35.

⁵⁰ Human Rights Committee, *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994, UN Doc. CCPR/C/21/Rev.1/Add.5.

⁵¹ *Ibidem*, para. 9.

⁵² M. Jovanović, *op. cit.*

⁵³ *Ibidem*.

⁵⁴ K. Hausler, *Collective Cultural Rights in the Inter-American Human Rights System*, in: A. Jakubowski (ed.), *Cultural Rights as Collective Rights: An International Law Perspective*, Brill, Leiden 2016; M. Jovanović, *op. cit.*

⁵⁵ Inter-American Court of Human Rights, *Lhaka Honhat Association (Our Land) v. Argentina*, Judgment of 6 February 2020.

⁵⁶ International Labour Organization, *Indigenous and Tribal Peoples Convention*, 27 June 1989, C169.

⁵⁷ 2 October 2007, UN Doc. A/RES/61/295.

using Indigenous languages.⁵⁸ In addition, UNDRIP sets out collective rights which range from “the right to self-determination and lands, territories and resources, to the recognition of treaties and the right not to be subjected to forced assimilation, destruction of culture, genocide or any other act of violence, to rights affirming Indigenous spirituality, culture, education and social welfare”.⁵⁹ Thus UNDRIP has propagated a distinct category of rights, based on (incomplete) decolonization and self-determination – namely, Indigenous rights. These specify pre-existing laws as being applicable to Indigenous peoples but also contribute to developing new (collective) approaches to human rights.⁶⁰ In this way UNDRIP expresses the ambition of both States and Indigenous peoples to enhance standards for the protection of Indigenous rights as human rights.⁶¹ Even though the Declaration as a whole cannot be seen as an assertion of customary law(s), it still has far-reaching legal implications in international law. Some provisions included in UNDRIP correlate with existing rules of customary international law, binding upon all States; like for instance the right to internal self-determination or the right to self-government.⁶² Nevertheless, as Karen Engle has noted, UNDRIP is an intricate regulation, since on one hand by addressing the right to self-determination and the collectivity of rights it “challenges the liberal human rights paradigm”, while on the other hand UNDRIP consolidates human rights as a category and restrains an escalation of external self-determination biases.⁶³

Towards the human rights approach to heritage

The development of the concept of cultural heritage from tangible to including living heritage, as well as the growing importance of collective and minority rights, has gradually introduced the human rights dimensions of cultural heritage more explicitly.⁶⁴ However, international cultural heritage law and human rights law his-

⁵⁸ K. Hausler, op. cit.

⁵⁹ K. Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, “European Journal of International Law” 2011, Vol. 22(1), p. 48.

⁶⁰ R.C. Fan, *Evolution of Indigenous Peoples’ Rights and Indigenous Knowledge Debate*, in: D. Short, C. Lennox (eds.), *Handbook of Indigenous Peoples’ Rights*, Routledge, London 2018; D.S. Dorough, *The Significance of the Declaration on the Rights of Indigenous Peoples and Its Future Implementation*, in: C. Charters, R. Stavenhagen (eds.), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, IWGIA, Copenhagen 2009.

⁶¹ International Law Association, *Resolution No. 5/2012: Rights of Indigenous Peoples*, 2012.

⁶² Ibidem; S. Barnabas, *The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law*, “International Human Rights Law Review” 2017, Vol. 6(2), p. 242.

⁶³ K. Engle, op. cit., p. 142.

⁶⁴ J. Blake, *Taking a Human Rights Approach to Cultural Heritage Protection*, “Heritage & Society” 2011, Vol. 4(2), pp. 199-238; W. Logan, *Cultural Diversity, Cultural Heritage and Human Rights: Towards Heritage Management as Human Rights-Based Cultural Practice*, “International Journal of Heritage Studies” 2012, Vol. 18(3),

torically developed as two separate branches of international law. The main path towards integrating these two fields has become the right to access and participate in cultural heritage, which is seen as part of the right to heritage itself. The right to cultural heritage was clearly referred to in the Faro Convention (2005), which treats it as a platform combining the two frameworks.⁶⁵ Even though the Faro Convention endorses not only collective rights but also collective obligations with respect to cultural heritage, due to the lack of monitoring mechanisms the Convention does not create enforceable rights.⁶⁶ In 2011, the need to further recognize the right to cultural heritage was stressed in the Human Rights Council report by Farida Shaheed, which however is not legally binding.⁶⁷ Thus, the only way to address the right has been through subordinating it to already existing rights.⁶⁸ Therefore, the right to cultural heritage has been conceptualized as a set of rights that covers two different categories. The first relates to the identification, interpretation, and development of cultural heritage, and respective policies; namely what has been included in the cultural heritage law system. The second involves follow-up activities associated with “knowing, understanding, entering, visiting, making use of, maintaining, exchanging and developing cultural heritage, as well as [with] benefiting from the cultural heritage and creations of others”⁶⁹. These elements construct an area of ‘rights to culture’, as developed under the human rights law framework. Therefore, the right to heritage refers neither to the recognition and protection of cultural heritage in a strictly technical way nor to the right to culture alone.

Heritage-making process

The first set of rights to heritage relates to the heritage-making process, which is firmly regulated within international cultural heritage law. While the definition of cultural heritage is nebulous, it nonetheless contains very clear instructions on how heritage comes into being. There have been two views on heritage production. The first invokes the “naturalized reality” of heritage, thus perceiving it as something that already exists and needs only to be discovered.⁷⁰ The current list-

pp. 231-244; R. Matthews et al., *Heritage and Cultural Healing: Iraq in a Post-Daesh Era*, “International Journal of Heritage Studies” 2020, Vol. 26(2), pp. 120-141.

⁶⁵ Council of Europe Framework Convention on the Value of Cultural Heritage for Society, 27 October 2005, CETS 199, paras. 1, 5, 12.

⁶⁶ Ibidem, paras. 4a, 6c; O. Vicha, *The Concept of the Right to Cultural Heritage within the Faro Convention*, “International and Comparative Law Review” 2014, Vol. 14(2), pp. 25-40.

⁶⁷ Human Rights Council, *Report of the Independent Expert...*

⁶⁸ F. Francioni, L. Lixinski, op. cit.

⁶⁹ Human Rights Council, *Report of the Independent Expert...*, para. 58.

⁷⁰ J. Davallon, *The Game of Heritagisation*, in: X. Roigé, J. Frigolé (eds.), *Constructing Cultural and Natural Heritage: Parks, Museums and Rural Heritage*, Documenta Universitaria, Girona 2010.

ing system favours this perception of heritage since it facilitates the recognition of the particular examples of heritage without a need to thoroughly define them. Therefore this approach lacks a creative component and tends to freeze heritage in time. The academic scholarship has gradually moved away from this concept, but the practice of governmental bodies and international organizations keeps it alive.⁷¹ The second approach treats heritage protection as a practice of labelling culturally-specific values, which appear as highly processed products of complex administrative machinery.⁷² Even though this concept includes elements of heritage plasticity, it falls short of fulfilling the expectations of cultural bearers, since what is promised to them in the preliminary stages of heritage-making often differs from what they actually receive.⁷³ Nevertheless, this second approach currently prevails, since heritage-making is a highly formalized process. UNESCO regulations leave the competence to decide on the identification, protection, and transmission of heritage to the State's disposal.⁷⁴ States carry out their duties with the help of appointed agencies and experts, as well as with the knowledge and practice in particular fields, such as archaeology, anthropology, heritage studies, and history.⁷⁵ Thus States and experts can both be found to be at fault for the actual lack of participation of other actors. At the same time, UNESCO's presence at the bottom level, the local one, is very limited.⁷⁶ Its bureaucracy does not enable it to be familiar with all the internal conflicts within a State preceding the official nomination of cultural pieces, but it does see a coherent and final proposal.⁷⁷ Since international heritage law regulates the duties of States as pertaining to the protection of heritage and does not specify any rights of individuals and communities to participate in heritage, the present decision-making structure reinforces state-driven narratives and the construction of authorized heritage.⁷⁸ Consequently, the expertization of the heritage law framework has greatly contributed to the idea of heritage as being distinct from human rights policies. In practice, this means that a State is obliged

⁷¹ C. del Mármol, M. Morell, J. Chalcraft, *Introduction: Of Seduction and Disenchantment: An Approach to the Heritage Process*, in: C. del Mármol, M. Morell, J. Chalcraft (eds.), *The Making of Heritage: Seduction and Disenchantment*, Routledge, New York 2014.

⁷² R. Bendix, A. Eggert, A. Peselmann (eds.), *Heritage Regimes and the State*, Universitätsverlag Göttingen, Göttingen 2012.

⁷³ F. Francioni, L. Lixinski, op. cit.

⁷⁴ W. Logan, *Cultural Diversity...*

⁷⁵ W. Nodoro, *Heritage Laws: Whose Heritage Are We Protecting?*, "South African Archaeological Bulletin" 2015, Vol. 70(202), pp. 135-137; L. Smith, op. cit.

⁷⁶ M. Askew, *The Magic List of Global Status: UNESCO, World Heritage and the Agendas of States*, in: S. Labadi, C. Long (eds.), *Heritage and Globalisation*, Routledge, London 2010.

⁷⁷ M. Herzfeld, *A Place in History: Social and Monumental Time in a Cretan Town*, Princeton University Press, Princeton, NJ 1991.

⁷⁸ A.F. Vrdoljak, op. cit.; C. Bortolotto, op. cit.

to protect heritage, but is not bound to acknowledge and safeguard the link between community and heritage, which detaches it from its source.⁷⁹ The breakthrough to this approach was expected to come together with the ICH Convention's recognition of non-state actors, comprising communities, groups, and individuals in the process of safeguarding intangible heritage. Even though the States remain the contracting parties to the ICH Convention, the substantive addressees are the cultural communities and other groups whose cultural traditions are the real object of safeguarding under international law.⁸⁰ Therefore, the Operational Directives to the ICH Convention require the mandatory consent of the communities concerned for the inscription of elements of intangible heritage on the lists established by the Convention.⁸¹ Since the ICH Convention leaves it up to States to decide what is regarded as a community, all of the key arrangements are foremost in the hands of national elites, which enables them to keep control over minority groups and local communities. Therefore, the addressed framework implements a scheme in which power is at the centre, and decisions reach the periphery from the top.

Participation in decision-making as a human right

Human rights are a powerful tool in the contextualization of cultural rights, yet they appear to be poorly implemented by heritage professionals, largely due to the heavily bureaucratic governmental framework for heritage protection.⁸² Thus, implementation of the human rights approach to heritage can mainly be achieved at a local level, where human rights mechanisms can help to shift more agency to local communities to manage their heritage matters. In this context, the human rights dimension of cultural heritage touches upon *who* decides on *what* has been protected, *why*, and for *whom*; namely referring to the idea of participation in decision-making, which stems largely from the domain of human rights. Typically, participation is associated with an assumption that everyone who is affected by a given social structure or institution needs to be regarded as a subject in relation to it, which has been conceptualized as the "all affected" principle.⁸³ Referring to the values of transparency and social inclusion, the principle states that everyone

⁷⁹ A. Xanthaki, *International Instruments on Cultural Heritage: Tales of Fragmentation*, in: A. Xanthaki et al. (eds.), *Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges*, Brill, Leiden 2017, pp. 1-19.

⁸⁰ R.J. Hales et al., *Indigenous Free Prior Informed Consent: A Case for Self Determination in World Heritage Nomination Processes*, "International Journal of Heritage Studies" 2013, Vol. 19(3), pp. 270-287; L. Lixinski, *Heritage Listing as Self-Determination*, in: A. Durbach, L. Lixinski (eds.), *Heritage, Culture and Rights: Challenging Legal Discourses*, Hart Publishing, Oxford 2017.

⁸¹ UNESCO, *Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage*, 2020, paras. 16, 17.

⁸² J. Blake, op. cit.; R. Matthews et al., op. cit.

⁸³ S. Näsström, *The Challenge of the All-Affected Principle*, "Political Studies" 2011, Vol. 59(1), pp. 116-134.

who may be or is influenced by a decision needs to have a right to participate in its making, leading to a satisfactory outcome for everyone.⁸⁴

Initially, the Universal Declaration of Human Rights codified the human rights law principles, including the right to participate in the cultural life of the community (Article 27); Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁸⁵ constitutes the formal expression of this principle as a binding obligation of human rights law. This norm is no longer understood as simply pertaining to participation in cultural activities, but also as covering participation in the decision-making processes related to the creation and implementation of cultural policies.⁸⁶

Participation in the co-creation of Indigenous heritage under the WH Convention

The participatory approach to recognizing and protecting cultural heritage has its roots in the WH Convention and has been further developed by those States in which heritage law and policies have been influenced by Indigenous peoples' voices.⁸⁷ The established postulate *de lege ferenda* has been to challenge existing regulations to ensure that communities are involved in international heritage processes and to diversify and broaden the composition of decision-makers. With reference to Indigenous peoples' rights, instruments created for the recognition of their specific position have a much wider scope than general human rights tools. To introduce the wider participation of different actors in decision making, there is a need to specify the character of the participation, i.e. whether it is consultation, consent, observation, or other activities. The ITP Convention, for instance, ensures that Indigenous communities shall participate in decision-making in addition to being consulted concerning all decisions that may affect them before such decisions have been made.⁸⁸ On the other hand UNDRIP, in Article 18, stipulates that Indigenous peoples have the right to participate in decision-making in matters which would affect their rights. Moreover, Indigenous peoples have the right to maintain their distinct political, legal, economic, social and cultural institutions, as well as the right to participate fully in the political, economic, social, and cultural life of the State (Article 5). Participation can be exercised through representatives chosen by Indig-

⁸⁴ International Law Association, *Interim Report. Participation in Cultural Heritage Governance at the Global Level*, 2020.

⁸⁵ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

⁸⁶ Committee on Economic, Social and Cultural Rights, *General Comment No. 21: Right of Everyone to Take Part in Cultural Life (Art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, UN Doc. E/C.12/GC/21.

⁸⁷ S. Labadi, *UNESCO, Cultural Heritage, and Outstanding Universal Value: Value-Based Analyses of the World Heritage and Intangible Cultural Heritage Conventions*, Rowman & Littlefield, Lanham, MD 2013.

⁸⁸ ITP Convention, Art. 6.

enous peoples in accordance with their own procedures. For Indigenous peoples, full participation means a shift from the status of 'stakeholders' to 'right holders', granting them the status of *equal partners*.⁸⁹ In order to enforce the human rights law approach to the cultural heritage of Indigenous peoples, heritage law needs to be understood in the light of UNDRIP.⁹⁰ In particular, to achieve bottom-up participation from Indigenous and local people there is a need to fully implement their free, prior, and informed consent (FPIC) in all decisions affecting their community. Nevertheless, FPIC has not been explicitly included as a State's obligation in UNESCO's Operational Guidelines for the Implementation of the World Heritage Convention.⁹¹ Instead, the nomination procedure indicates *partnership* in the selection, management, and monitoring of World Heritage. Among other things, the Operational Guidelines indicate those local communities which shall take part in the processes through consultation periods, public hearings, and inquiries.⁹² Furthermore, the genuine implementation of FPIC ought to be understood as the *consent* of Indigenous peoples, and not just their mere *consultation*, not to mention *observation*. Nonetheless, the UNESCO regimes are still limited largely to consultative procedures, with little impact on the actual decision-making. Therefore, endorsing FPIC at the domestic level seems more feasible. From the States' point of view, this must be supported by relevant strategies, something that has not been fully achieved in most of the States, mainly due to the lack of international supervision concerning how FPIC is implemented.⁹³ The other possible reason is a misleading interpretation of FPIC as the right to a unilateral veto, which is incorrect in the view of the terminology used in UNDRIP. Article 19 indicates that "states shall consult and cooperate in good faith with the Indigenous peoples [...] in order to obtain their free, prior and informed consent". Therefore, the right of Indigenous peoples is not based on a right to consent, but on the right to be consulted in order to achieve consent.⁹⁴ FPIC should not be seen as a veto power, but as a means to involve Indigenous peoples in decision-making processes to prevent state domination therein.⁹⁵

⁸⁹ J. Dahl, *The Indigenous Space and Marginalized Peoples in the United Nations*, Palgrave Macmillan, New York 2012.

⁹⁰ A. Xanthaki, *op. cit.*

⁹¹ UNESCO, *The Operational Guidelines for the Implementation of the World Heritage Convention*, 2019, paras. 64, 123.

⁹² *Ibidem*, paras. 39, 40.

⁹³ S. Disko, *World Heritage Sites in Indigenous Peoples' Territories: Ways of Ensuring Respect for Indigenous Cultures, Values and Human Rights*, in: D. Offenhäuser, W. Zimmerli, M.-T. Albert (eds.), *World Heritage and Cultural Diversity*, German Commission for UNESCO, Bonn 2010; International Law Association, *Interim Report...*

⁹⁴ D. Cambou, *The Legal Significance of the Right of Indigenous Peoples to Self-determination and Its Implications for the Sami People*, PhD dissertation, Vrije Universiteit Brussel, 2016.

⁹⁵ J. Rombouts, *Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent*, Wolf Legal Publishers, Oisterwijk 2014.

However, this interpretation does not prevent the UNDRIP from being used to advocate for States to obtain the consent of Indigenous peoples in certain situations in which the decision might substantially affect the interests of Indigenous peoples. In such a case it is not only the duty of the State to consult Indigenous peoples, but also to obtain their consent.⁹⁶

Participation in the co-creation of Indigenous heritage under the ICH Convention

Contrary to the WH Convention, the nomination procedure for intangible cultural heritage attempts to put the *participation of communities, groups, and relevant non-governmental organizations* at its core. The 2003 Convention refers to participation rights in two instances, i.e. both in the identification and subsequent safeguarding of intangible cultural heritage. More precisely, Article 11(b) states that “each State Party shall identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups, and relevant non-governmental organizations”. Additionally, Article 15 provides that each State Party shall endeavour to ensure the widest possible participation of the communities, groups, and, where appropriate, individuals that create, maintain, and transmit heritage, and to actively involve them in its management. Even though the Convention does not offer any concrete details for such participation, and the wording used in the documents indicates a rather soft recognition of the participation rights, the Operational Directives confirm the obligatory nature of the consent of local communities for the inscription of intangible heritage on lists.⁹⁷ Consequently, the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage advocates for the creation of functional and supplementary collaboration between the so-called ‘cultural bearers’ and centres of expertise or research institutes.⁹⁸ Nevertheless, the requirement for a participatory approach to international nominations, even though it has been consolidated in the recent practice of the ICH Convention organs, remains highly dependent on States’ involvement with communities at the local level. What Chiara Bortolotto underlines is the “relationships between ‘heritage experts’ and ‘heritage bearers’, which remains a grey zone in the implementation of the Convention”.⁹⁹ In the first place, there is a risk that collaboration will *de facto* mean the further expertization of the heritage law framework, without contributing to the wider changes. Secondly, in the desired model of partnership, the role of a researcher should focus on aiding communities in the

⁹⁶ Human Rights Council, *Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making*, 17 August 2011, UN Doc. A/HRC/18/42.

⁹⁷ C. Bortolotto, *op. cit.*; UNESCO, *Operational Directives...*, paras. 16, 17.

⁹⁸ UNESCO, *Operational Directives...*

⁹⁹ C. Bortolotto, *op. cit.*, p. 258.

nomination and safeguarding process, rather than making unilateral decisions. Partnerships ought to be based on equal standing, rather than downgrading the position of a local stakeholder to being an “informant” to the expert.¹⁰⁰ It is also crucial to consider, and if necessary make peace between, the multiple voices within a specific community. Differing opinions need to be heard with regard to gender balance, age, or sexual orientation, based on the non-discrimination principle. Considering the heterogeneity of “the” community, one needs to give more weight to the position of actual creators and practitioners than communities’ representatives and leaders, with their often contested legitimacy.¹⁰¹

Indeed, the drafters of the ICH Convention wished to underline the importance of the self-identification of heritage bearers with their own heritage. Even in the definition of intangible heritage, the Convention indicates that communities are responsible for identifying the cultural elements that they themselves refer to as heritage (Article 2.1). This form of self-determination on heritage matters supports the community’s agency over the heritage by triggering internal processes that stem from the ethnocultural differences and cultural liberalism. Thus, if we consider Lucas Lixinski’s¹⁰² observation that “recognition of a community’s heritage could also lead to the community’s international recognition”, cultural heritage listings may play a significant role in recognizing not only communities’ cultural, but also their political self-determination. At the same time, despite the promises of participation in governance, it would be impractical (and sometimes inadvisable) to suggest that communities should replace the State entirely in the governance of cultural heritage and other resources.

States are still the ones who, under international law, are subjects of law and thus have related duties and responsibilities. As a result, the current approach to heritage supported by governments and experts is intended to keep the international *status quo*, and thus reinforce state dominance in the field.

Right to Culture

The second category of right(s) to heritage encompasses shadowing activities developed within the right to culture. As a universal human right, the right to culture includes, among others, the right to access, participate, and enjoy the outcomes of the cultural activities of a society, regardless of whether or not they are recognized as heritage. In this regard, the Universal Declaration of Human Rights establishes, in its Article 27, that everyone has the right to freely participate in the cultural life of the community, to enjoy the arts, and to share in scientific advancements and

¹⁰⁰ International Law Association, *Interim Report...*

¹⁰¹ R. Brubaker, *Ethnicity without Groups*, “European Journal of Sociology / Archives Européennes de Sociologie / Europäisches Archiv für Soziologie” 2002, Vol. 43(2), pp. 163-189.

¹⁰² L. Lixinski, *op. cit.*

their benefits. The Human Rights Council has further developed this norm, highlighting that the enjoyment of cultural rights fosters an understanding of other cultures, mutual respect, and tolerance between peoples and nations worldwide, and thus contributes to maintaining stable, friendly relations.¹⁰³

Respect for cultural rights and awareness of the value of cultural heritage is essential for development, peace, building social cohesion, and the promotion of mutual respect, tolerance, and understanding between individuals and groups, in all their diversity. Thus, Article 27 ICCPR, relating to minorities, stipulates that persons belonging to minorities shall not be denied the right to enjoy their own culture, to profess and practice their own religion, or to use their own language. With regard to this norm, the Human Rights Committee specifies that the construction of the Article places negative obligations on State Parties, which are bound to abstain from denying the enjoyment of the listed rights.¹⁰⁴ Hence the norm recognizes, through a negative obligation, minority rights *per se* as a positive measure.¹⁰⁵ Although the article pertains to minorities, as a result of the practice of the Human Rights Committee it applies to Indigenous peoples as well, making the scope of the provision as extensive as possible.¹⁰⁶

At the universal level, Article 15 ICESCR recognizes the right of everyone to take part in cultural life, to enjoy the benefits of scientific progress and its applications, and to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which they are the author. In this regard, participation in and access to the cultural life of a community has become a relevant indicator of assessing social and economic development. Therefore, Article 15 ICESCR has been further concretized in the General Comments by the Committee on Economic, Social and Cultural Rights, producing a much more significant impact at the normative level than the Covenant itself.

General Comment No. 13 refers to the right to education as a fundamental tool to consciously participate in society. In this document, the Committee has developed the so-called 4-A scheme, which constitutes a set of basic principles relating to the right to education. These standards cover availability, accessibility, acceptability, and adaptability.¹⁰⁷ Accessibility has, among others, been further developed with respect to culture and pertains to four aspects: economic access; physical

¹⁰³ Human Rights Council, *Resolution 34/2: Promotion of the Enjoyment of the Cultural Rights of Everyone and Respect for Cultural Diversity*, 6 April 2017, UN Doc. A/HRC/RES/34/2.

¹⁰⁴ Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13.

¹⁰⁵ K. Hossain, D. Cambou (eds.), *Society, Environment and Human Security in the Arctic Barents Region*, Routledge, London 2018.

¹⁰⁶ K. Göcke, *The Case of Ángela Poma Poma v. Peru before the Human Rights Committee*, "Max Planck Yearbook of United Nations Law Online" 2010, Vol. 14(1), pp. 337-370.

¹⁰⁷ Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The Right to Education (Art. 13)*, 8 December 1999, UN Doc. E/C.12/1999/10, para. 6.

access; access to information concerning culture; and access to the decision-making processes in all related matters.¹⁰⁸ Broadly understood, General Comment No. 21 concretizes the notion that access to culture is an inherent part of participation in cultural life itself.¹⁰⁹ Specifically, its goal is to enable the wider public to more actively participate in cultural activities. In this respect, the most elementary obligation of States is to eliminate any barriers or obstacles that restrain access to one's culture or other cultures.¹¹⁰ More concretely, State Parties to ICESCR are bound to ensure access to museums, libraries, cinemas, theatres and to cultural activities, services, and events in order to enable those individuals and communities to realize their rights without discrimination on grounds of financial position or any other status or barrier.¹¹¹ Special emphasis has been placed on children, including children from poorer families and migrant or refugee children, as well as elderly people and people with disabilities, identified as groups more vulnerable to exclusion in terms of access to culture.¹¹² With respect to Indigenous peoples, there is a need to create favourable conditions for them to preserve, develop, express, and disseminate their identity, history, culture, language, traditions, and customs.¹¹³ However, even though the right to culture is extensive, it is not unlimited. The boundaries are determined by the scope of other human rights which cannot be infringed under international law. Thus, where there are conflicts of rights, some individual human rights take precedence over others, and individual rights may trump collective rights. In both of these cases, cultural rights would tend to lose out more often.

Conclusions

Applying human rights standards to cultural heritage, and in particular, to the participation of communities in its co-creation, reveals the existing blind spots of the legal system and thus the tensions between the States and communities concerned. Cultural heritage treaties set out the framework of obligations and principles within which executive tools are developed and implemented to enable participation in the heritage-making process at all stages of its creation. However, there remains a lack of clarity concerning who should and can decide about the heritage and thus shape its meaning for and within its bearers. Although there is international law dealing with cultural heritage (and related policy-making), it re-

¹⁰⁸ Human Rights Committee, *CCPR General Comment No. 23...*

¹⁰⁹ Committee on Economic, Social and Cultural Rights, *General Comment No. 21...*, paras. 3, 6, 15.

¹¹⁰ P.J. O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Institute of Art and Law, Bulth Wells 2014.

¹¹¹ Committee on Economic, Social and Cultural Rights, *General Comment No. 21...*, para. 54(d).

¹¹² Committee on Economic, Social and Cultural Rights, *Guidelines on Treaty-Specific Documents to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, 24 March 2009, UN Doc. E/C.12/2008/2, paras. 65, 67(c).

¹¹³ *Ibidem*.

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mains generally within the domain of a State's internal affairs, and decision-making is a matter for internal politics to decide and for internal societal dialogue. The role of human rights in this picture is thus to encourage and facilitate that dialogue and to empower individual members of ethnic communities to challenge state-level decisions which are harmful to them and their heritage. Nevertheless, despite the rhetoric of liberation, we can witness rather an escalation of ethnic and community conflicts than advocacy for cultural diversity and hybridity. Recognition of the fact that heritage, especially Indigenous heritage, is not one-dimensional and cannot be separated from people's lives would ensure the better implementation of laws and better protection of the people concerned. For this reason the human rights approach to heritage could create an appropriate framework for challenging States' dominance in the field. If we acknowledge that heritage is embedded and embodied in people, protecting humans becomes about protecting heritage, and vice versa. This is the clear linkage between cultural heritage and human rights.

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