

Heritage, Culture and Rights

Challenging Legal Discourses

Edited by
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Opening the Toolbox of International Human Rights Law in the Safeguarding of Cultural Heritage

FRANCESCO FRANCONI* AND LUCAS LIXINSKI**

I. Introduction

Cultural heritage and international cultural heritage law have been consistently used over time as mechanisms to build identities. Human rights law has become a cogent legal discourse to safeguard those identities. The example of the movement to promote the human rights of Indigenous peoples is particularly telling in this regard: since the 1970s, the international Indigenous movement has used culture as a key factor around which to rally support for the Indigenous cause, and as a catalyst through which to assert the human rights of Indigenous peoples.¹ A human right to heritage is however difficult to establish, and, even when proclaimed, is difficult to enforce.

One possible vehicle through which the two legal fields, cultural heritage and human rights, can be mutually reinforcing is the right to access and participation in decision-making on heritage matters. The notion of community participation in heritage governance stems largely from human rights principles. The idea of promoting community participation, even if difficult to enforce and implement, corresponds with the notion of a human rights approach to heritage management and governance.

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¹ For this discussion generally, see Karen Engle, *The Elusive Promise of Indigenous Development* (Durham NC, Duke University Press, 2010).

Despite this aim, heritage is often in opposition to narratives of progress in human rights discourses. The definition of heritage contained in the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (ICH Convention) states that ‘consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments’.² This provision was drafted in recognition of certain traditional cultural practices (female circumcision was the example discussed during the drafting) which might have a negative impact on the enjoyment of universally recognised human rights. This restriction of the definition of heritage as only that which is not in accordance with universal human rights standards represents a movement that places culture in an antagonistic position with respect to human rights, in that it showcases culture as potentially primitive and uncivilised, and thus needing erasure by the imperatives of modernity.

The relationship between culture and human rights has not been an easy one in the more than 50 years of international standard-setting and scholarship. In 1945, the Lemkin genocide convention project placed culture at the heart of the definition of genocide and recognised that the intentional destruction of a human beings based on their race and religion was inseparable from an attack on their collective identity and their specific culture.³ The 1948 Convention rejected the concept of cultural genocide and linked the *actus reus* of the crime to the physical destruction of ‘a national, ethnical, racial or religious group as such’.⁴ Similarly, the 1948 Universal Declaration of Human Rights consciously avoided recognising rights of culturally distinct groups and minorities as specific subjects of human rights, opting rather for an absolute, natural law conception of human rights that left little room for cultural relativism to play a role in the field. This approach was also reinforced by the fear that such recognition of specific cultural rights for groups would have destabilising effects on the internal structure of the

² Art 2.1. UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage, adopted by the General Conference of UNESCO at its 32nd session, Paris, 17 October 2003. For commentary, see generally Lucas Lixinski, *Intangible Cultural Heritage in International Law* (Oxford, Oxford University Press, 2013).

³ R Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation—Analysis of Government—Proposals for Redress* 2nd edn (first published 1944) (Clark, NJ, Lawbook Exchange, 2008); B Whitaker, ‘Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide’ 2 July 1985, UN Doc E/CN.4/Sub.2/1985/6; DD Anayiotos, ‘The Cultural Genocide Debate: Should the UN Genocide Convention include a Provision on Cultural Genocide, or Should the Phenomenon be Encompassed in a Separate International Treaty?’ (2009) 22(2) *New York International Law Review* 99–129; WA Schabas, *Genocide in International Law: The Crime of Crimes* 2nd edn (Cambridge, Cambridge University Press, 2009).

⁴ Art II, Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the UN General Assembly on 9 December 1948, and entered into force on 12 January 1951, 78 UNTS 277. This Art also includes in the definition of genocide acts that do not involve the physical destruction of the individual members of the group: namely the forcible transfer of children of the group to another group. This is as far as the Convention goes in acknowledging that acts not involving physical destruction, but only socio-cultural dismemberment of the group, may amount to genocide.

states, as seen in the experience of minorities' protection in the post-World War I period.⁵

From a more general point of view, the difficult relationship between culture and human rights can be explained by the fact that, since 1948, the human rights movement has been informed by an idea of human rights as rights pertaining to the individual, whereas culture by definition is a societal or collective phenomenon. Even if the International Covenants adopted in 1966 attempted to challenge this view, their provisions on collective rights were by and large seen as non-justiciable, thus in effect reinforcing the individual-centric nature of human rights law. Thinking of culture as a societal phenomenon implies the recognition of the collective interest of a human group in relation to the preservation of its way of life, including language, religious beliefs, artistic heritage and the education of children. This also explains the paucity of human rights provisions expressly devoted to the protection of culture in contemporary instruments on the protection of fundamental rights.⁶

In spite of this past resistance, today a different approach to culture is beginning to emerge in international law. The emergence of a global economy and the revolution in information and communication technology increased the opportunities for cultural interaction between nations and, at the same time, spurred an intense interest in local culture and traditions as an antidote to the alienating effects of globalisation. Preservation of the plurality and diversity of cultures is thus becoming a major concern for the international community, as is witnessed by the adoption of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.⁷ The universal support for the 1972 World Heritage Convention, which embodies the spirit of representativeness of the outstanding examples of the cultures of the world,⁸ is similarly evidence of the international concern for the identification and preservation of the diversity of the tangible expressions of the cultures of the world. Other important indicators of the growing role that culture plays in the present evolution of international law have been the intensification of interest in the protection of minorities—also with regard to the new phenomenon of minorities formed by immigrant populations—and the already mentioned movement on the rights of indigenous peoples. This latter movement led to the adoption of the 2007 UN Declaration of the Rights of

⁵ For a discussion, see Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects*. (Cambridge, Cambridge University Press, 2006).

⁶ See F Francioni and M Scheinin (eds), *Cultural Human Rights* (Leiden/Boston, Martinus Nijhoff Publishers, 2008) 2 ff.

⁷ UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted by the General Conference of UNESCO at its 33rd Session, Paris, 20 October 2005. Reprinted in *Standard Setting in UNESCO* vol II (Paris, UNESCO Publishing, 2007) 326 ff.

⁸ Convention concerning the Protection of the World Cultural and Natural Heritage, adopted by the General Conference of UNESCO at its 17th session, Paris, 16 November 1972. For a commentary, see F Francioni (ed), *The 1972 World Heritage Convention: a Commentary* (Oxford, Oxford University Press, 2008).

Indigenous Peoples, a declaration that is by and large inspired by the pre-eminent objective of safeguarding the specific way of life of indigenous peoples as cultural communities.⁹

If we take into account these developments, several normative perspectives can be explored on the relationship between culture and international law. The first concerns the way in which culture has contributed to the shaping of certain individual rights, such as the right to access and participate in a community's cultural life, the right to preserve one's cultural identity, as well as collective rights, in particular the rights of minorities and indigenous peoples. The second line of analysis relates to the human dimension of cultural heritage, a dimension that is the result of a dynamic evolution of the concept and scope of cultural heritage, from a material conception prevalent in the Western civilisation to the living culture and the 'intangible' cultural heritage, which includes social practices and traditions that are an integral part of the social fabric of any nation or group.¹⁰ The third perspective links to the tensions between heritage and human rights described above, and concerns the role of international human rights as a limit to the recognition and safeguarding of the culture and cultural heritage of a specific community. The fourth aspect of the interaction between culture and human rights stems from the emerging consensus that grave offences against the culture and cultural heritage of peoples, both in times of war and peace, must be criminalised and prosecuted under international law. And a fifth aspect of the relationship concerns the impact of culture on international trade and international investment law, which although important, largely falls outside the scope of this chapter.

Within these multiple perspectives, this chapter will focus on the ways in which international human rights law and international cultural heritage law can operate together in practice beyond a merely conceptual level. While the conceptual connections are important, they have been discussed elsewhere.¹¹ Instead, we focus on the mechanisms through which heritage law can be enforced using human rights tools, with reference to international decisions which address cultural heritage concerns.

This chapter is first and foremost a mapping exercise in an attempt to understand the multiple ways in which the fields of international heritage law and international human rights law relate from a practical standpoint. The chapter begins with an examination of the broad relationship between human rights and

⁹ United Nations Declaration on the Rights of Indigenous Peoples, GA Resolution A/res/61/295, 13 September 2007.

¹⁰ The human dimension, thus defined, can be more advantageous than a 'human rights dimension' as it does away with the biases of international human rights law and discourse, and instead shifts the focus back onto community aspirations, as opposed to individualism that permeates human rights law. We do admit, however, that there is a significant amount of borrowing from human rights law in shaping the human dimension.

¹¹ Including by us. See eg Francesco Francioni, 'Au-delà des traités: l'urgence d'un nouveau droit coutumier pour la protection du patrimoine culturel' (2007) 111 *Revue Générale de Droit International Publique* 19–42; and Lixinski, above n 2.

heritage, and ways in which the goals of both fields seem aligned. We then discuss the tensions existing between the goals of human rights and heritage protection which underscore the limits of both fields in relation to one other. After examining these tensions and convergences, we will highlight means through which the enforcement of heritage goals can be achieved through human rights mechanisms, and how heritage instrumentalises human rights law, at least to a certain extent. The next section explores the reverse possibility, or the way in which human rights can instrumentalise heritage and heritage goals as a tool for broader rights advocacy, a possibility that brims with potential, but is often overstated with disappointing results. Concluding remarks follow.

II. A Human Right to Heritage

The relationship between human rights and cultural heritage can be looked at from at least two principal disciplinary perspectives. From the perspective of heritage studies, the major component of existing literature connecting the two fields, human rights constitutes one discursive thread among others, as opposed to a set of legal tools or a body of law with prescriptive qualities. The argument in this disciplinary perspective is less normative and more descriptive of the way human rights ideas have permeated discourse around culture, as opposed to the way the law of human rights authorises or prohibits certain ways of thinking about heritage. One way of going about describing this relationship is to think of human rights as enabling the control of the past, and describing it generally in terms broader than human rights ‘law’.¹²

Similarly, much of the literature on the relationship between human rights and cultural heritage (disregarding the considerable focus on cultural diversity, or cultural rights)¹³ tends to focus on the contribution of scholars in the field of heritage studies, which address human rights more as a set of ideas and ways of framing cultural heritage issues than as being a body of law influencing another. While such an approach is valuable in asking broader questions about the role of human rights (law) in understanding and even challenging cultural heritage law and practices, this approach also tends to fall short of articulating solutions engaging human rights legal mechanisms in relation to cultural heritage law, and are thus less useful in navigating the challenges of relationships between two legal fields that are our present objective.

¹² Peter Stone, ‘Human Rights and Cultural Property Protection in Times of Conflict’ (2012) 18(3) *International Journal of Heritage Studies* 271–84, at 272.

¹³ Helaine Silverman and D Fairchild Ruggles (eds), *Cultural Heritage and Human Rights* (New York, Springer, 2007); and Michele Langfield, William Logan and Máiréad Nic Craith (eds), *Cultural Diversity, Heritage and Human Rights: Intersections in Theory and in Practice* (Abingdon, Routledge, 2010).

But there is an emerging body of literature in the legal field that connects heritage law and human rights law.¹⁴ Some of this body, nevertheless, is still fraught with problems of not clearly articulating connections between two legal fields in terms of techniques, but rather two sets of legal ideas as broader discourses about the way society is shaped by the law. There is less of a concern with the practice and adjudication of these concerns, and, while a focus on adjudication is by no means the only valid approach to international human rights or heritage law, there is certainly a gap in the literature. By not focusing on the techniques of the law and its process, an opportunity is missed to very tangibly affect the ways the relationships between heritage and rights are understood and enacted by legal practitioners.

Part of the reason why these relationships are so difficult to articulate may stem from the fact that human rights are not actually mentioned in most UNESCO instruments about cultural heritage, with the exception of the ICH Convention, noted above. The absence of reference to rights is perplexing given the connections between heritage and rights during the early development of human rights law in the post-WWII period, and the evolution of international criminal law. As Vrdoljak compellingly demonstrates, culture and cultural heritage were primary motivators behind early debates on the notion of genocide, during initial discussions and drafting of the 1948 Genocide Convention.¹⁵ And even the UNESCO Constitution clearly alludes to a mandate by the organisation that includes cooperation in the field of culture with a view to advancing human rights.¹⁶

The reasons why cultural heritage (and the notion of cultural genocide) was dropped from the Genocide Convention may explain why references to human rights were excluded from cultural heritage instruments under UNESCO for several decades. More specifically, the minority politics associated with heritage at the time (and to this day) were seen as too problematic to examine in detail within an unstable new international order,¹⁷ and the subsequent expertisation of UNESCO as a distinct agency throughout the Cold War period may have contributed to the idea of heritage as distinct from the politics of human rights. Instead, other political causes, such as decolonisation, made an appearance in heritage law-making at UNESCO, particularly with the 1970 Convention.¹⁸

¹⁴ See eg Silvia Borelli and Federico Lenzerini (eds), *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Leiden, Brill, 2012).

¹⁵ For a commentary, see Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge, Cambridge University Press, 2006).

¹⁶ UNESCO Constitution, Art 1(1): 'The purpose of the Organization is to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.'

¹⁷ *ibid.*

¹⁸ Convention on the Means of Preventing and Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property, Adopted by the UNESCO General Conference in Paris, 26 November 1970.

Recent efforts at integrating the two areas have focused largely on the idea of community participation in the management, conservation and safeguarding of heritage. A major obstacle to integration from an international legal standpoint is the notion that state sovereignty has been paramount in the field of heritage, whereas (contemporary) international human rights law is largely premised on the erosion or cession of sovereign attributes by states and the universality of human rights standards and principles.¹⁹ But the debates around the human dimension of international cultural heritage law seem to suggest a similar erosion is also possible in the realm of cultural heritage, precisely because of the influence of international human rights law and practice. This process of transformation began with a shift in the idea of ‘cultural heritage,’ from the material connotation of ‘cultural property’ and ‘cultural objects’ understood as tangible goods of artistic, historical and archaeological value to the ‘immaterial’ notion of heritage, coinciding with living tradition and customs of a cultural community.

The concept of ‘cultural property’ was inaugurated with the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict.²⁰ The definition covered only monuments and material objects, according to the prevailing Western tradition and understanding of art and culture. The scope of this notion was extended with the 1972 World Heritage Convention, which included natural heritage and a new notion of cultural heritage as a representation of the variety of significant and distinct cultural traditions of the world. In this sense, the 1972 Convention is an antecedent of the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The decisive step toward international recognition of the human dimension of cultural heritage was the launching by UNESCO of the Living Human Treasures and the Masterpieces of Oral and Intangible Heritage programmes, which finally led to the adoption of the ICH Convention in 2003. Although the ‘dematerialisation’ of cultural heritage and the widening of the scope of international protection to cover living culture and ‘intangible heritage’ has the potential for enhancing cultural human rights, it may also give rise to competing rights and discrepancies. For example, the safeguarding of intangible cultural heritage may run counter to the specific protection of intellectual property rights (IPRs), as recognised by Article 15(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This is acknowledged in the ICH Convention which contains a saving clause (Article 3b) on IPRs. Intangible cultural heritage may also entail the performance of potentially discriminatory practices, expressions of religious intolerance or forms of inhumane treatment of animals that run counter to the shared sense of human dignity or to basic consideration of humanity. The next section will explore some of these tensions in further detail.

¹⁹ Janet Blake, ‘Taking a Human Rights Approach to Cultural Heritage Protection’ (2011) 4(2) *Heritage & Society* 199–238, at 201.

²⁰ 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict, reprinted in *Standard Setting in UNESCO*, above n 7, 65 ff.

A series of rights protected in international human rights treaties can be applicable to cultural heritage if cultural heritage is understood as linked to the protection and promotion of cultural identity. Such rights include specific provisions on minority protection, freedom of religion, freedom of expression, freedom of assembly, the right to equality and non-discrimination, among others.²¹ This view, however, falls short of recognising cultural heritage as being a full member of the human rights legal framework, and instead instrumentalises cultural heritage and the legal regimes around it as a factual element (part of the ‘factual matrix’) of a human rights case. This strategy is understandable, as human rights bodies are constrained by their mandates to the application of the language of the treaties they are charged with; if those treaties do not mention a right to cultural heritage, the only way ideas around cultural heritage can make it into human rights cases is by being subordinated to different rights. Thus, cultural identity and heritage considerations are subordinated to, for instance, the right to property, based on the connection between indigenous cultural identity and land that has been at the centre of a number of cases of the Inter-American Court of Human Rights.

One attempt at the regional level aimed at changing this view of heritage as subordinated to pre-existing rights is the Council of Europe 2005 Faro Convention,²² which speaks explicitly of a human right to heritage. However, in the language of the instrument itself, such a right is not enforceable. A more explicit reference arises in the context of the ICESCR; General Comment No 21 of the United Nations Committee on Economic, Social and Cultural Rights speaks of the role of heritage in the right to participate in cultural life (Article 15(4) of the ICESCR).²³ In addition, the Committee found that states have an obligation: to respect and protect cultural heritage in peace time and in the context of war or natural disasters; to promote heritage through education and awareness-raising; and to fulfil heritage via programmes for the preservation and restoration of heritage.

A further mechanism for the implementation of cultural rights has been the adoption of the Optional Protocol to ICESCR in 2013,²⁴ which established a long overdue mechanism for the reception and resolution of individual complaints and enquiries into alleged violations of economic, social and cultural rights. It remains to be seen whether and how this new mechanism will enable the Committee to extend its review also to collective cultural rights. Given that groups and representative organisations have access to the complaint procedure under Article 1

²¹ For a fuller account including extensive case law, in the context of intangible cultural heritage, see Lixinski, above n 2.

²² Council of Europe Framework Convention on the Value of Cultural Heritage to Society, Adopted in Faro, 2005.

²³ International Covenant on Economic, Social and Cultural Rights, Adopted by the United Nations General Assembly in 1966.

²⁴ The Optional Protocol was adopted by the UN General assembly on 10 December 2008 and opened for signature on 24 September 2009. As of December 2016, the Protocol has 22 State Parties and has been signed but not ratified by an additional 26 States. It entered into force on 5 May 2013.

of the Optional Protocol, this mechanism may become an effective tool for the enforcement of collective cultural rights in situations where the state undertakes activities or implements policies that have adverse effects on the collective cultural rights of specific communities or groups within a territory. This may happen where the government acts in concert with foreign or domestic investors to initiate development projects in agriculture, mining, tourism or other economic development projects, that have the effect of displacing local communities with a significant cultural link to the land or of producing an irreversible adverse impact on their socio-cultural structure and way of life. In this new role, the Committee can draw on past experience, such as the examination of state universal periodic reports²⁵ with regard to protection of cultural rights, and contribute to the development and elaboration of General Comments. The Committee has produced a much more significant impact at the normative level through the elaboration of General Comments. In the field of cultural rights three General Comments are especially relevant: General Comment 21 on the rights of everyone to take part in cultural life (Article 15, paragraph 1a ICESCR); General Comment 17 on the right of everyone to benefit from the protection of moral and material interests resulting from literary and scientific production (Article 15 paragraph 1c ICESCR); and General Comment 13 on the right to education under Article 13 and on the specific obligations to ensure education as an indispensable tool to participate in a free society, to abstain from any form of discrimination and to avoid interference with the liberty of parents or legal guardians in choosing the type of schooling and education for their children.

Many of these Comments return to the notion of community participation in cultural heritage management, protection and safeguarding. This approach, reflected at both the UNESCO level and in regional contexts (particularly at the Council of Europe),²⁶ is useful not only in dealing with cultural heritage; natural heritage sites also benefit from community participation in management.²⁷ This is also the case with respect to managing and restoring cultural heritage in (quasi-perennial) conflict zones such as Palestine,²⁸ and in areas like Timbuktu, which

²⁵ The 'soft implementation' by the monitoring system through periodic reports has not been up to the original expectation of developing a holistic perspective on state compliance with the rights enshrined in the UN Covenant. This is due to the disappointing record of tardiness and incomplete submission of state reports.

²⁶ Werner Krauss, 'European Landscapes: Heritage, Participation and Local Communities' in Brian Graham and Peter Howard (eds), *The Ashgate Research Companion to Heritage and Identity* (Farnham, Ashgate, 2008) 42–438.

²⁷ For a view from officers at the International Union for Conservation of Nature, the NGO who is in charge of advising the World Heritage Committee on natural heritage and has long pioneered community participation in the World Heritage system, see generally Gonzalo Oviedo and Tatjana Puschkarsky, 'World Heritage and Rights-based Approaches to Nature Conservation' (2012) 18(3) *International Journal of Heritage Studies* 285–96.

²⁸ Eman Assi, 'World Heritage Sites, Human Rights and Cultural Heritage in Palestine' (2012) 18(3) *International Journal of Heritage Studies* 316–23.

have been in and out of conflicts in recent times.²⁹ Community participation allows for more local ownership of heritage, ensuring its preservation by the local community, and even the flourishing of other forms of (intangible) heritage around specific sites.³⁰ Even if the notion of community participation has been criticised by many in the field of heritage studies for working as an ideal behind which communities themselves might not congregate, and for essentialising the notion of ‘community’,³¹ it is still regarded by much of the incipient literature on human rights and heritage as the best bridge between the two fields.

But a direct connection between heritage and human rights in the realm of community participation also makes problematic assumptions about the ways in which heritage obligations are met. The most common mechanism for heritage protection at the international level is that of listing, the most famous of those being the World Heritage List which contains over 1000 properties listed in over 150 countries around the globe. Many of the tensions raised in this respect reinforce ideas of cultural heritage as not mutually supportive with human rights, which are explored in the following section.

III. Heritage in Tension with Rights

The listing of heritage, which is the most utilised mechanism in terms of international protection, is not necessarily conducive to the adoption of a human rights approach to heritage as listing is largely dependent on state sovereignty and excludes communities from the international selection and management of their heritage. The Rice Terraces of the Philippines (Cordillera), for instance, were added to the World Heritage List in 1995 as a cultural landscape. The community living in the area were not consulted during the inscription process and are consequently moving to where they are allowed to develop their land in the way they deem fit, as opposed to manicuring a landscape for tourist consumption.³² This is a paradox since the finding of the ‘outstanding universal value’ of the landscape, which justified its inscription in the UNESCO World Heritage List, was as a consequence of the ingenious work of the local population and their interaction with the environment in order to provide for their basic economic and social needs.

Heritage listing can bring additional problems. The added pressure to a site from tourists and perceived tourist expectations is another example of how heritage

²⁹ For a view prior to the latest outbreak of conflict in Mali, see Ali Ould Sidi, ‘Maintaining Timbuktu’s Unique Tangible and Intangible Heritage’ (2012) 18(3) *International Journal of Heritage Studies* 324–31.

³⁰ *ibid.*

³¹ See for instance Emma Waterton and Laurajane Smith, ‘The Recognition and Misrecognition of Community Heritage’ (2010) 16(1–2) *International Journal of Heritage Studies* 4–15.

³² Blake, above n 19 at 226.

protection can come into conflict with the human rights of local inhabitants of an inscribed area. In Angkor Wat (Cambodia), for instance, the listing of the temple complex has caused tensions with the rights of local inhabitants to live in the area and redistribute land title according to local laws and usages.³³ Also, urban planning policies related to the protection of heritage areas can have an adverse impact on the right to housing of communities.³⁴ More broadly, the protection of heritage can have significant effects on the realisation of the right to development when development is seen as requiring the destruction of old structures and their replacement with newer ones, either as a monument to modernity or to accommodate growing populations.

But perhaps the most problematic aspect of heritage listing as the primary means of (international) heritage protection that creates tension with human rights values and standards is the gap that exists between what is promised to communities when their heritage area is being 'prepared' for inscription on a UNESCO list, and what they receive in actuality. For instance, heritage listing can foreground one specific aspect of a site's history and in the process erase other histories to which communities might feel a greater connection, or impair the right of local inhabitants of a heritage site to privacy and to live their everyday lives without being surrounded by tourists who seek an 'authentic' insight into the place and its people.³⁵ In addition, the process of inscription may require local skills in the management of a heritage area that are not present among the local population, such as specific crafts and architectural conservation techniques which are expected by the expert body, but foreign to the area of the heritage site.³⁶ Or it can impair the right of local inhabitants of a heritage site to privacy and to live their everyday lives without being surrounded by tourists and their quest for 'authentic' experiences.³⁷

Another particularly troubling example of the gap between the promise of heritage listing and community aspirations is the inscription of the Uluru-Kata Tjuta Park in Australia onto the World Heritage List. The area was originally listed only as a natural site, disregarding the history of centuries of aboriginal use of the site; subsequently, the inscription was amended to include the cultural aspects of the site, but communities are still largely disenfranchised from the use of the site, as exemplified by their inability to totally ban tourists from climbing the Uluru.³⁸

³³ See the chapter by Josephine Gillespie in this volume.

³⁴ Graeme Bristol, 'Rendered Invisible: Urban Planning, Cultural Heritage and Human Rights' in Langfield, Logan and Nic Craith, above n 13, 117–34.

³⁵ Katarzyna Zalasinska and Katarzyna Piotrowska, 'Kalwaria Zebrzydowska Cultural Landscape' (2012) 18(3) *International Journal of Heritage Studies* 307–15.

³⁶ Bente Mathisen, 'East Africa World Heritage Network and Stakeholder Priorities' (2012) 18(3) *International Journal of Heritage Studies* 332–38.

³⁷ Zalasinska and Piotrowska, above n 35, 307–15.

³⁸ Jillian Walliss, 'The Right to Land Versus the Right to Landscape: Lessons from Uluru-Kata Tjuta National Park, Australia' in Shelley Egoz, Jala Mkhzoumi and Gloria Pungetti (eds), *The Right to Landscape: Contesting Landscape and Human Rights* (Farnham, Ashgate, 2011) 153–64; and Jukka Jokilehto, 'Human Rights and Cultural Heritage. Observations on the Recognition of Human Rights in the International Doctrine' (2012) 18(3) *International Journal of Heritage Studies* 226–30.

Tensions between heritage and human rights in the listing process can also exist when the heritage itself is seen as potentially conflicting with human rights. The 'human rights exception' in Article 2(1) of the ICH Convention speaks to this issue and has been analysed in more detail elsewhere.³⁹ One example is that of the Catalan tradition of building human towers, a Spanish manifestation of heritage that stirred considerable debate when first proposed for inclusion on the Representative List of the Intangible Cultural Heritage of Humanity given its potential for violating human rights of children, who could fall and injure themselves.⁴⁰ This particular tension tends to reignite the old debates between universalism and cultural relativism in international human rights law, using cultural heritage processes as a proxy. Because cultural heritage is in some ways more institutionalised than 'cultural practices' (as in the case of listed heritage), it seems to fuel jaded debates on universalism and relativism which we suggest are counterproductive as they tend to undermine the contribution of cultural heritage to community cohesion which underlined the birth of notions of rights.

The dual implementation of culture, and cultural heritage more specifically, and international human rights can trigger two distinct types of conflicts, namely: a) the tension between the *collective right* of the group as a cultural community to maintain its distinct customs and practices and the *individual rights* of members of the group to personal freedom and self-determination; b) the incompatibility of the cultural traditions of a community with standards of international law.

The first conflict has arisen in a number of cases brought before international human rights courts and monitoring bodies. *Lovelace v Canada* involved the claim of a Canadian woman who had left her native tribe to marry outside the indigenous community. When she later divorced her non-native husband, she sought permission to return and buy a home in her native land. She was refused access to programmes permitting the purchase of a house on the alleged ground that under the customary rules of the tribe, she had lost her Native Indian status after marriage. Deference of Canadian law to the law of the indigenous peoples foreclosed the possibility of enforcing the claimant's right to have access to a home in Canadian courts. Although the UN Human Rights Committee decided the case in favour of the personal right of the applicant, the decision was not made on the basis of an assumed prevalence of the individual right over the collective right of the community to maintain its cultural traditions. Rather, the Committee⁴¹ found that Canada had failed to ensure the observance of the principle of non-discrimination on the basis of gender given that the refusal of the right to return applied only to women who had left the tribe and not to male members. Another manifestation

³⁹ Lixinski, above n 2. See also Federico Lenzerini, *The Culturalization of Human Rights Law* (Oxford, Oxford University Press, 2014).

⁴⁰ UNESCO Intangible Cultural Heritage, Human towers, at www.unesco.org/culture/ich/index.php?RL=00364.

⁴¹ Human Rights Committee, Communication No 24/1977, *Sandra Lovelace v Canada*, UN Doc CCPR/C/13/D/24/1977, 30 July 1981.

of this type of conflict concerns property rights and the community's interest in preserving certain forms of cultural heritage. A state may enact laws and regulations for the protection of a cultural landscape and then see such regulations challenged in court on the basis of the individual right to property and to the peaceful enjoyment of his/her possessions, as provided under Article 1, Protocol 1 to the European Convention on Human Rights. Emblematic of this situation is the case *Fondi Sud v Italy* in which Italy was required by the European Court of Human Rights to pay substantial reparation (49 million euros) for the economic damage suffered by the applicants as a consequence of the confiscation of real estate and demolition of buildings which had resulted in the disfiguring of the landscape of a tract of the coastline in the southern region of Apulia. The development and the construction of the building was found to be in breach of national law on heritage and landscape and condemned in a series of national judgments. But since the development and building had been originally permitted by local authorities, the Strasbourg Court held that the confiscation and demolition amounted to an ex post facto application of criminal sanctions (Article 7) and to violation of property rights (Article 1, Protocol 1).⁴² Conversely, cultural human rights may be claimed by individuals to challenge public regulations on land management and landscape conservation. In *Chapman v United Kingdom*, the Roma applicants were claiming the right as a minority to live in a trailer in defiance of United Kingdom regulation on land use and landscape protection. The cultural claim failed because of the overriding importance of the public interest in land management in an environmentally sensitive area⁴³ and because of the absence of a specific cultural provision on minority rights in the European Convention system. The applicants had based their case on the alleged violation of Articles 8 (private and family life) and 14 (non-discrimination) of the Convention.⁴⁴

The second type of conflict concerning the incompatibility of the relevant manifestation of heritage and internationally recognised human rights may arise with regard to material expressions of art and heritage which symbolise ideas and beliefs which are offensive to human dignity. This is the case with monuments celebrating racism or memorialising slavery or periods of history marked by gross violations of human rights. This becomes a sensitive problem when such monuments are located in a public place or in a politically significant space such as a government building or historical site. In this case the preservation of the cultural

⁴² *Fondi Sud v Italy*, Judgment of 10 May 2012, App No 75909/01.

⁴³ *Chapman v United Kingdom*, Judgment of 18 January 2001, App no 27238/95.

⁴⁴ It is to be noted, however, that the Court recognised a possible future consensus amongst the Member States of the Council of Europe regarding the special needs of minorities and an obligation to protect their security, identity and lifestyle. As a matter of fact a general consensus in this direction had been expressed within the Council of Europe at the time of the adoption of the Framework Convention for the Protection of National Minorities of 1 February 1995, which provides that state parties submit a report to the Council of Europe containing 'full information on the legislative and other measures taken to give effect to the principles set out in this framework Convention' (Art 25).

property may yield to the political-cultural aim of removing the memory of a discredited past.⁴⁵

But the most frequent clash between culture and human rights is likely to occur in the area of intangible cultural rights, where cultural traditions may involve gender segregation and discrimination, as well as practices entailing the violation of physical integrity, self-mutilation, female genital cutting and other forms of physical violence. This potential clash, as highlighted above, is acknowledged in the text of the ICH Convention. Similar provisions can be found in the 2005 Convention on Cultural Diversity (Articles 2(1) and 5(1)), and in Article 46(2) of the 2007 UN Declaration on the Rights of Indigenous Peoples. However, these provisions provide only a partial solution to the problem. First, the exclusion of cultural practices that are incompatible with human rights only operates within the limited scope of the relevant convention and for the purpose of its operation. This means that with regard to the ICH Convention, the human rights test may only serve the purpose of barring the inscription of a particular cultural heritage in the Representative List of the Intangible Cultural Heritage of Humanity pursuant to Article 16. The 2005 Convention on Cultural Diversity does not contemplate a similar list but provides for a fund and a committee which may evaluate the compatibility of a given cultural expression with human rights. The above treaty provisions only apply prospectively once the treaties have entered into force, and may not affect problematic cultural practices that may have already received some form of international recognition.⁴⁶

Despite the many possible tensions between heritage and rights, the positive potential of a constructive relationship between the two fields remains promising. One area is the way in which human rights enables the enforcement of international cultural heritage law, either through traditional human rights mechanisms or in international criminal law. Another potential area for interaction entails thinking about the connections between heritage and human rights beyond the rights of individual humans and embracing group or collective rights. Some of these possibilities are the object of the next two sections.

IV. Human Rights as Instrumental to the Enforcement of Heritage Law

One of the means through which heritage law can be enforced is in international criminal law, an area akin to international human rights law. This aspect of the

⁴⁵ See the illuminating analysis of S Levinson, *Written in Stone: Public Monuments in Changing Societies* (Durham NC, Duke University Press, 1998) and, by the same author, 'Political Change and the Creative Destruction of Public Space' in Francioni and Scheinin, above n 6, 341 ff.

⁴⁶ This is the case with items included in the UNESCO programme of Masterpieces of Oral and Intangible Heritage, which was not subject to the human rights test.

intersection between culture and human rights is a relative latecomer to the development of international law. Regrettably, international law scholarship has long neglected the connection between the protection of cultural heritage and egregious violations of human rights. It took the descent into sheer barbarity of the Yugoslav war of the 1990s and the subsequent infamous destruction of the ancient art and heritage by the ruling Taliban in Afghanistan—later replicated in Mali and Syria and Iraq—to direct scholars and public opinion to the link between attacks on culture and violations of human rights. Much of the cultural destruction of monuments, religious buildings, libraries and historical sites in these wars was not the collateral effect of the conduct of hostilities, but the result of deliberate targeting of cultural objects with the purpose of ‘cleansing’ the attacked territory, not only of any human presence, but also of the symbols and cultural traces of the enemy’s life and presence in the territory. For example, on 9 November 1993, Croatian artillery bombed and destroyed the ancient Mostar bridge, not for alleged military necessity, but because the bridge symbolised the peaceful coexistence and the material and cultural connection of the Muslim and Christian communities on the two sides of the river. For the same reason, Serbs destroyed mosques in Bosnia and Muslims destroyed Orthodox churches and monasteries in Kosovo. When, in March 2001, the Taliban finally carried out its threats to destroy the great Buddhas of Bamiyan, the world reacted with incredulity and indignation. Yet, the experience of the Yugoslav wars had provided ample evidence that attacks on culture and cultural heritage had become a systematic method of conducting war by other ‘means’ and to extend the brutality of ethnic cleansing to cultural persecution and cultural extinction.

Over the past two decades, the link between attacks on culture and grave violations of human rights has emerged at the level of international law and has assumed precise legal connotations in the form of international crimes.⁴⁷ This is reflected in the criminalisation of offences against cultural heritage in the Statute of the International Criminal Tribunal of Former Yugoslavia (ICTY), Article 3(d), and in the Statute of the International Criminal Court, Article 8. The 1999 Second Protocol to the 1954 Hague Convention has introduced a detailed regime of individual criminal responsibility for attacks against cultural property in times of conflict, both international and non-international (Articles 15 to 20), which goes beyond the general provisions of the 1954 Hague Convention and the 1907 Hague Convention IV. In 2003 the UNESCO General Conference adopted by unanimous vote the Declaration Concerning the Intentional Destruction of Cultural Heritage, which restates the principle of state responsibility and individual criminal liability for deliberate acts of destruction of cultural heritage of great importance

⁴⁷ For a review of the role of courts in the development of this area of the law, see F Lenzerini, ‘The Role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage’ in F Francioni and J Gordley (eds), *Enforcing International Cultural Heritage Law* (Oxford, Oxford University Press, 2013) 40 ff.

for humanity.⁴⁸ More importantly, a chain of case law has developed in the judicial practice of international criminal tribunals which has articulated and clarified the different aspects of the legal connection between wilful destruction of cultural heritage and breaches of human rights. First, this practice has clarified and expanded the concept and scope of cultural property relevant to the commission of a war crime.⁴⁹ Second, it has established that intentional destruction of cultural property is an independent count of criminal liability under the law of armed conflict, and that, when the destruction is carried out with a discriminatory intent, it amounts to a crime against humanity, ie the crime of persecution.⁵⁰ Third, in cases of attacks on cultural property recognised as being of exceptional importance and registered as such in the inventory of competent international organisations, the attacks involve the breach of an *erga omnes* obligation and entail aggravated responsibility.⁵¹ Finally, the ICTY has held that the deliberate and systematic destruction of cultural heritage of a particular ethnic group may constitute evidence of the ‘specific intent’ (*mens rea*) required for the commission of the crime of genocide.⁵²

On the enforcement of cultural rights specifically, there are broadly four categories of means and methods of cultural rights implementation. The first is that of ‘direct’ means of enforcement through the specific machinery provided by relevant international human rights instruments and institutions that include cultural rights in their scope of application and competence. The second category is that of ‘indirect’ means of implementation, which includes the human rights courts and bodies that, in the absence of specific provisions on the protection of cultural rights, have adopted an evolutive interpretation of other human rights provision in order to extend a certain level of protection to collective cultural rights. The third category is the so-called ‘enforcement by other means’, that is, the protection of certain cultural rights and cultural values by enforcement mechanisms and procedures established in areas of international law other than human rights. This category includes foreign investment arbitration and the dispute resolution mechanisms under World Trade Organization (WTO) law. Finally, the fourth category includes mechanisms that permit the systemic integration of cultural rights in other areas of international law, such as cultural heritage and environmental law. The first two categories belong more properly in our present analysis.

With respect to the first category of direct enforcement, the possibilities of enforcement using the ICESCR Optional Protocol mechanism have been alluded to above. In addition, the UN Human Rights Council is an important vehicle to

⁴⁸ Arts VI and VII of the Declaration, adopted on 17 October 2003. Text in *Standard Setting in UNESCO*, above n 7, 729 ff.

⁴⁹ See *Prosecutor v Blaskic*, Case IT-95-14-T, Trial Chamber, Judgment 3 March 2000; *Kordic v Cerkez*, Case IT-95-14/2 T, Trial Chamber, Judgment of 26 February 2001.

⁵⁰ *Kordic v Cerkez*, *ibid.*

⁵¹ *Prosecutor v Strugar*, Case IT-01.42-T, Trial Chamber II, Judgment of 31 January 2005.

⁵² *Prosecutor v Krstic*, Case IT-98-33-T. Judgment of the Trial Chamber, 2 August 2001, affirmed by the Appellate Chamber 19 April 2004.

foster the implementation of cultural rights. By Resolution 10/23 of March 2009, the Council established a special procedure for an independent expert in the field of cultural rights for a period of three years. The mandate of the independent expert was extended for an additional period of three years in 2012 and assumed the status of Special Rapporteur. The mandate of the Special Rapporteur includes the identification of best practices in the promotion and protection of cultural rights at a national and international level; the gathering of information about alleged violations of cultural rights received from persons or organisations; cooperation with states and international organisations, especially UNESCO. The main focus of the work by the first Special Rapporteur, Farida Shaheed (2009–2015),⁵³ was on three critical areas: access to culture and cultural heritage and right to benefit from scientific progress; the right to artistic freedom; the role of memory and education in the rebuilding of cultural heritage and cultural exchange in war-torn societies. At the regional level, methods of direct implementation of collective cultural rights are rare because of the absence of specific substantive cultural rights provisions in the applicable human rights instruments, notably the European Convention on Human Rights and the American Convention. An exception, however, can be found in the African Charter of Human and Peoples' Rights (Banjul Charter): Article 17, paragraphs 2 and 3 have been interpreted by the African Commission in such way as to recognise the obligation of State Parties to protect and promote cultural diversity and enact positive measures to safeguard traditional values and identity of social groups different from the dominant majority. In the case of the *Endorois*,⁵⁴ an excellent illustration of this type of enforcement of collective cultural rights, the Commission found Kenya in breach of the Banjul Charter for the forcible displacement of a pastoral community from their ancestral land, depriving them of their cultural and religious practices and their means of subsistence and development. With regard specifically to Article 17 of the African Charter, the Commission stated:

By forcing the community to live in semi-arid land without access to medicinal salt licks and other vital resources for the health of their livestock, the Respondent State have created a major threat to the Endorois pastoral way of life. It is of the view that the very essence of the Endorois' right to culture has been denied, rendering the right, to all intents and purposes, illusory. Accordingly, the Respondent State is found to have violated Article 17 (2) and (3) of the Charter.⁵⁵

Regarding the second category of indirect enforcement, the case law of human rights courts, especially the European Court and the Inter-American Court, has interpreted the applicable norms on the protection of specific *individual* rights in such a way as to give indirect recognition to collective cultural rights. The

⁵³ Karima Bennoune was appointed Special Rapporteur in September 2015.

⁵⁴ African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya*, ruling 276/2003, 25 November 2009.

⁵⁵ *ibid.*, para 251.

ground-breaking decision by the Inter-American Court in *Mayagma (Sumo) Awas Tingni Community v Nicaragua* applied Article 21 on the right to property in an evolutive manner, inclusive of a collective ownership of the Awas Tingni people to their land.⁵⁶ *Saramaka People v Suriname* found that the concession by the respondent government of logging rights to Chinese investors amounted to an infringement of the collective rights of the Saramaka people to the peaceful enjoyment of their ancestral land and specifically to their communal property over the forest (Article 21).⁵⁷ It also found that their rights to be recognised as a juridical entity (Article 3) and to judicial protection (Article 25) had been breached. The Court noted that:

[T]he members of the Saramaka people make up a tribal community ... not indigenous to the region, but that share similar characteristics with indigenous peoples ... whose social, cultural and economic characteristics are different from other sections of the national community, particularly because of their special relationship with their ancestral territories, and because they regulate themselves, at least partially, by their own norms, customs, and/or traditions.⁵⁸

This jurisprudential orientation of the Inter-American Court has found confirmation in other cases involving collective cultural rights of indigenous peoples and local traditional communities, among them, *Moiwana Community v Suriname*⁵⁹ and *Pueblo Indígena Kichwa de Sarayaku v Ecuador*.⁶⁰

In the case law of the European Court of Human Rights, the collective dimension of cultural considerations has played a double role: on the one hand as a positive argument in order to strengthen the implementation of specific rights recognised in the the European Convention and additional protocols; on the other hand, as a limit to the enforcement of individual rights.

In *Muñoz v Spain*,⁶¹ a judgment concerning Article 14 and the principle of non-discrimination in the treatment of Roma marriages in Spain, which dealt specifically with the equal recognition of such traditional marriages, the Strasbourg Court held that ‘the force of *the collective belief of a community* that is well defined cannot be ignored’.⁶² A factor in this decision was that the Roma community was found to be well established and deeply rooted in Spanish society. Similarly, the European Court found in *Cha’are Shalom v France* that Article 9 on freedom of thought and religion can be interpreted to recognise access to consumption of meat produced from animals slaughtered according to religious

⁵⁶ Inter-American Court, Judgment of 31 August 2001, Series C No 79.

⁵⁷ Inter-American Court of Human Rights, Judgment of 28 November 2007, Series C No 172.

⁵⁸ *ibid.*, paras 79 and 84.

⁵⁹ Inter-American Court of Human Rights, Judgment of 15 June 2005, Series C No 124.

⁶⁰ Inter-American Court of Human Rights, Judgment of 27 June 2012, Series C No 245.

⁶¹ ECtHR, *Case Of Muñoz Díaz v Spain* App no 49151/07, Judgment of 8 December 2009. For analysis of this case, see the chapter on minority marriages in E Brems (ed), *Diversity in European Human Rights* (Cambridge, Cambridge University Press, 2012) 401–25.

⁶² *ibid.*, para 59.

prescriptions in derogation to generally applicable sanitary and ethical norms on animal welfare.⁶³ The same Article 9 has been applied in *Ahmet Arslan v Turkey* to support the claim to exercise free choice regarding vestiment in a public space.⁶⁴ These decisions are important because they represent a strong judicial response to an increasing cultural intolerance emerging in Europe and to what amounts to attacks on Jewish, Muslim and other minorities' cultural and religious traditions, which ultimately have the effect of making cultural communities feel like strangers in Europe.⁶⁵

Article 11 of the European Convention on Human Rights has been used as an indirect tool to enforce the collective cultural rights of a minority group through the individual right of freedom of association. In *Macedonian Association v Greece* the European Court of Human Rights unanimously held in July 1998 that the refusal by Greek courts to register a Macedonian cultural association was an interference with the applicants' exercise of their right to freedom of association. The Court stated unequivocally that 'the right to form an association is an inherent part' of the right to freedom of association and that the right of citizens to form a legal entity 'to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which the right would be deprived of any meaning.'⁶⁶

The right to education and linguistic rights go to the core of collective cultural rights since they condition the existence and survival of a cultural group beyond the biological life of its members. In the European system of human rights enforcement, Article 2 of Protocol 1 of the European Convention has been used to promote and protect individual as well as collective rights of the community. In *Cyprus v Turkey* the Strasbourg court found Turkey in breach of Article 2, Protocol 1, for its denial of education in Greek language to Greek Cypriots living in the area of Northern Cyprus under Turkish occupation.⁶⁷ However, this is a special case and the decision has arguably been influenced by the special status of Northern Cyprus as an occupied territory. As a general rule, the European Court has not recognised the cultural claim to education in a particular language as a human right under the European system.

The right to property, as protected under Article 1 of Protocol 1 additional to the European Convention, has been interpreted by the European Court to carefully balance the economic interest of the individual owner of cultural property, both movable and immovable, and the collective interest of the state to regulate

⁶³ ECtHR, *Case of Cha'Are Shalom ve Tsedek v France* App no 27417/95, judgment of 27 June 2000.

⁶⁴ *Ahmet Arslan and others v Turkey*, App no 41135/98, Judgment of 23 February 2012.

⁶⁵ It is worth noting that a conservative party such as the French Front National of Marine Le Pen, triumphant in the last European elections of May 2014, has called for the banning of the Hijab and the Kippah in public places, without calling for the banning of similar vestiment specific to other religions. See O Roy, 'The Closing of the Right's Mind' *International New York Times* 5 June 2014, 6.

⁶⁶ ECtHR, *Sidiropoulos & Others v Greece* Application 57/1997/841/1047, Judgment July 1998,

⁶⁷ *Cyprus v Turkey* App no 25781/94, Judgment of 10 May 2001.

the status and use of such cultural property in the interest of the public good. Sometimes the balance has tilted in favour of the former, as in the Grand Chamber judgment in *Beyeler v Italy* where the Court rejected Italy's claim that its law on the protection of national cultural heritage foreclosed the sale of a work of art by the applicant and permitted the acquisition of such work by the state at a price much lower than the fair market value.⁶⁸ Other cases place more emphasis on the protection of cultural heritage as a collective right and 'legitimate aim' of the State Parties,⁶⁹ and that the cultural value of historic buildings must be taken into account in determining the amount of compensation due to the owner in the case of expropriation for reasons of public utility.⁷⁰

In the field of collective cultural values, a prominent role is played by memory and history as unifying elements for the construction of a shared identity. In this respect, the provisions of Article 10 (freedom of expression) and Article 17 (the abuse of rights) of the European Convention on Human Rights have provided an indirect tool for the enforcement of collective cultural values and the right to truth. In *Dinç v Turkey*,⁷¹ the respondent was found to be in violation of Article 10 for having prosecuted and sentenced a journalist whose only crime had been that of expressing his views on the Turkish-Armenian conflict and the alleged genocide in the early part of the twentieth Century. Dinç was later killed by fanatic Turkish nationalists. In *Garaudi v France* the European Court applied the provision of Article 17 on the abuse of rights in order to declare inadmissible a complaint by a French writer whose systematic denial of the Holocaust was found to be motivated not by truth-seeking, but for the specific intent of defamation of Holocaust survivors.⁷² Article 10, in conjunction with Article 6 on the right to a fair hearing, has also been used to support the right of access to historical documents as a necessary tool for the fulfilment of the collective right to truth. In *Kenedi v Hungary* the European Court found Hungary in breach of both these provisions for its protracted denial (over a period of more than 10 years) of a request to access official documents made by a historian who was writing a book about the role of the Hungarian state secret services in the 1960s.⁷³ Hungary had persisted in its refusal to permit access to the documents in spite of a court order granting the applicant an unconditional right to know; hence, the concomitant finding of a violation of Article 6.

These two broad categories of enforcement make human rights law perhaps most effectively a tool box for the pursuance of cultural heritage-related goals. But there are several shortcomings associated with these possibilities. First, if one understands cultural rights, rights related to heritage, as primarily collective, international human rights adjudication has thus far largely failed to recognise

⁶⁸ *Case of Beyeler v Italy*, App no 33202/96, Judgment (Grand Chamber) 5 January 2000.

⁶⁹ *Debelianovi v Bulgaria*, App no 61951/00, Judgment 27 November 2008.

⁷⁰ *Kozagioglu v Turkey*, App no 2334/03, Judgment 19 February 2009.

⁷¹ *Dinç v Turkey*, App no 19654/92, Judgment 3 July 2001.

⁷² *Garaudi v France*, App no 65831/01, Judgment 24 June 2003.

⁷³ *Kenedi v Hungary*, App no 31475/05, Judgment 26 May 2009.

the possibility of the adjudication of collective rights. The same can be said with respect to tensions about *actio popularis* in international law, and the enforceability of *erga omnes* obligations.⁷⁴

Further, moving away from the collective issues and asserting a right to heritage on an individual basis, past experience in human rights adjudication still seems to portray cultural identity interests in a manner that is deferential to states. A form of the proportionality test is still applied by human rights (quasi-)adjudicatory regimes, but its deference to subsidiarity is larger than in other areas of human rights law, leading to the impression of a standard that equates to the form of ‘heritage minus’.

But the adjudication of violations of individual cultural identity is by no means the only way in which heritage law and human rights law can come together in practice. In the domain of community participation, rights of access and participation can be very useful, and human rights standards can be used to adjudicate and enforce this type of participation.⁷⁵

However, one needs to be reminded that rights of access in particular should not be treated as paramount, and the rights of others can easily come into play. This tension is particularly important in places like Bahrain where, for example, understandings of the right of access to heritage have privileged locals over the tourist gaze.⁷⁶ The idea of heritage being the domain of locals seems to be reconcilable with ideas of privacy in international human rights law, but stands in tension with the universalist aspirations of international heritage law, to the extent it creates an exception to the provisions of a treaty that aspires to create a universal language and set of aspirations for the management of cultural heritage worldwide.

And, finally, despite the potential use of human rights law as a valuable tool in collaboration with cultural heritage law, there are also unintended consequences and risks that may emerge from this partnership. In addition to the co-option risk of subordinating cultural heritage goals to human rights aspirations, one must also consider the extent to which a human rights approach to heritage has the potential to neglect the economics of heritage, and exclude other means for the enforcement of cultural heritage law which can be more effective, such as criminal enforcement in the field of traffic of cultural objects. Further, thinking of cultural heritage law in human rights law terms can also ‘over-promise’ in terms of the potential of both fields to promote and liberate identity, in a way that can generate frustration about what either field can offer. The following section explores some of the possibilities of using cultural heritage law as an instrument of human rights goals.

⁷⁴ Amy Strecker, ‘The “Right to Landscape” in International Law’ in Egoz, Mkhzoumi and Pungetti, above n 38, 57–68.

⁷⁵ Stener Ekern, William Logan, Birgitte Sauge and Amund Sinding-Larsen, ‘Human Rights and World Heritage: Preserving our Common Dignity through Rights-based Approaches to Site Management’ (2012) 18(3) *International Journal of Heritage Studies* 213–25.

⁷⁶ Gareth Doherty, ‘Bahrain’s Polyvocality and Landscape as a Medium’ in Egoz, Mkhzoumi and Pungetti, above n 38, 185–96.

V. Heritage as Instrumental to Rights Advocacy

Part of the reason why cultural heritage (law) can be seen as instrumental to human rights advocacy is the connection between cultural heritage and minority protection, which, as suggested above, is one of the reasons why the connection between rights and heritage has gone unacknowledged in the majority of heritage instruments under UNESCO. This connection has assumed greater importance as diasporic communities multiply around the world and the politics of multiculturalism becomes part of the legal vernacular.⁷⁷ Cultural heritage thus can play a particular role in advancing a certain version of the right to self-determination as a collective right.

Much of this notion also has to do with ideas espoused in particular by Logan, of human rights as a tool to politicise heritage. In this account, the field of human rights (law) is instrumentalised by the field of heritage (law), and not the other way around. Even though in Logan's conception human rights are not defined in narrow legalistic terms, he does speak of human rights as a language of power, which includes the law.⁷⁸

One consequence of this approach is the notion that heritage be interpreted in a way that most promotes human rights. Interpretation can be seen as being an 'accurate' and 'objective' documentation of heritage, as an expression of collective identity or as the promotion of cultural diversity. The latter seems to be the focus of recent UNESCO efforts in the field of heritage, but it has been suggested that the integration of these approaches will be more successful in aligning human rights and heritage.⁷⁹

Of course, any idea of promoting rights through heritage calls into question what rights are being protected to begin with. Cultural heritage, as an evolution of the idea of 'cultural property', seems to still depend largely on ownership for its legal operation. But the promotion of the right to property through heritage law would seem to run counter to the idea of heritage as a broader interest.⁸⁰

Rather, what seems to be at stake in connecting heritage and rights advocacy is the idea of instrumentalising heritage for the promotion of notions of justice and

⁷⁷ On the connection among human rights, multiculturalism and heritage in the context of diasporic communities, see Clara Arokiasamy, 'Embedding Shared Heritage: the Cultural Heritage Rights of London's African and Asian Diaspora Communities' (2012) 18(3) *International Journal of Heritage Studies* 339–45.

⁷⁸ William Logan, 'Cultural Diversity, Cultural Heritage and Human Rights: Towards Heritage Management as Human Rights-based Cultural Practice' (2012) 18(3) *International Journal of Heritage Studies* 231–44.

⁷⁹ Neil A Silberman, 'Heritage Interpretation and Human Rights: Documenting Diversity, Expressing Identity, or Establishing Universal Principles?' (2012) 18(3) *International Journal of Heritage Studies* 245–56.

⁸⁰ Kenneth R Olwig, 'The Right Rights to the Right Landscape?' in Egoz, Mkhzoumi and Pungetti, above n 38, 39–50.

human wellbeing, however defined.⁸¹ In fact, heritage can play an important role precisely in defining what justice and wellbeing stand for, but only to the extent heritage is taken not as an end in itself, but as part of a larger context of interests, needs and aspirations.

One example is when heritage serves as a means to emancipate colonial histories and identities. In a way, heritage can be used to memorialise and replay colonialism, and the current conservation paradigm at the international level (criticised for promoting western—and particularly European—understandings of heritage and its worth) seems to benefit from heritage processes.⁸² But heritage processes can also allow for that same colonial heritage to be reclaimed and re-signified by the local (post-colonial) population;⁸³ additionally, heritage can even be used as a means to foster movements to break away from colonial powers.

A similar effect can be observed in the context of indigenous rights, at least to the extent that indigenous rights are also seen as a ‘post-colonial trope’.⁸⁴ But here, as with other contested possibilities of advocacy, the ultimate control by the state over the process of defining and authorising heritage⁸⁵ is obscured by the promises of heritage and recognition.⁸⁶ The largely unacknowledged ultimate control of the state over defining heritage can have the effect of allowing states to use heritage to promote the oppression and de-politicisation of minority groups which can challenge state unity.⁸⁷

VI. Concluding Remarks

The potential relationship between human rights law and heritage law is often obscured by a focus on attempting to understand how human rights and heritage relate to each other as broader sets of ideas and practices, disconnected from the legal field. While there is some liberating appeal in not necessarily focusing on the narrow legality of these bodies of law and the institutions around them, the legal

⁸¹ Shelley Egoz, Jala Makhzoumi and Gloria Pungetti, ‘The Right to Landscape: An Introduction’ in Egoz, Mkhzoumi and Pungetti, above n 38, 1–20.

⁸² Mathisen, above n 36.

⁸³ Gareth Doherty, ‘Bahrain’s Polyvocality and Landscape as a Medium’ in Egoz, Mkhzoumi and Pungetti, above n 38, 185–96.

⁸⁴ Gro B Ween, ‘World Heritage and Indigenous Rights: Norwegian Examples’ (2012) 18(3) *International Journal of Heritage Studies* 257–70.

⁸⁵ Laurajane Smith, *Uses of Heritage* (London, Routledge, 2006).

⁸⁶ Elizabeth Povinelli, *The Cunning of Recognition* (Durham NC, Duke University Press, 2002); and Engle, above n 1.

⁸⁷ Amund Sinding-Larsen, ‘Lhasa Community, World Heritage and Human Rights’ (2012) 18(3) *International Journal of Heritage Studies* 297–306; and Janette Philp, ‘The Political Appropriation of Burma’s Cultural Heritage and its Implications for Human Rights’ in Langfield, Logan and Nic Craith, above n 13, 83–100.

dimension is nevertheless important, at least to the extent that law is a language of power which can help pursue common strategic objectives of human rights and heritage respect and protection.

But the existing legal tools need further refinement if they are to fully work in this realm, by for instance enhancing the way proportionality is applied in international human rights law to give more credence to the views of communities, instead of states themselves (even if this tool would challenge the subsidiarity of international human rights law). Similarly, rights such as equality and non-discrimination, freedom of belief and freedom of expression can be used more effectively, alongside procedural rights such as fair trial and the right to participation in public affairs. It may even be that the latter category of procedural rights holds more potential in this area, as its structural impacts are more apparent, and can help shift the paradigm away from individualism and towards more community-based forms of heritage management. Finally, perhaps a greater focus on the law around these relationships will allow for the strengthening and actualisation of the promise of the human dimension of heritage, one that brings to life community aspirations. We hope this chapter contributes to that debate.