THE IMPACT OF UNIFORM LAWS ON THE PROTECTION OF CULTURAL HERITAGE AND THE PRESERVATION OF CULTURAL HERITAGE IN THE 21ST CENTURY

Toshiyuki KONO and Stefan WRBKA

INTRODUCTION /PROLOGUE

Cultural heritage has come to be viewed as a shared common interest of humanity, to be kept safe and protected under the auspices of international law. From the early interest of the international community in protecting cultural properties and masterpieces during periods of armed conflict, this interest has expanded and evolved to include the properties and tangible materials of peoples during peaceful times as well as the very people who embody, create and recreate these cultures – the living, breathing heritage, culminating in the latest point of interest of international cultural heritage protection and preservation: intangible cultural heritage.

Safeguarding efforts have also extended to cultural heritage underwater and the campaign against the illicit trade of cultural objects. Moreover, other cultural values have come into play. These include the protection of natural heritage, closely linked to environmental issues, or the respect for human dignity and the human rights of individuals and communities, particularly those of indigenous peoples and minority groups.

In general, the development of approaches to safeguarding cultural heritage at the international level has been quite slow and fragmented. Initially, there seemed to be little awareness about the safeguarding of cultural heritage. More recently, however, one can see that – though still fragmented – the trend in global thinking is moving towards a more comprehensive regime of cultural heritage protection and preservation, expressed through the various conventions established at the international level and grounded on the principles of cultural internationalism while reaffirming cultural nationalism.

Cultural property internationalism is a rather new phenomenon whereby everyone has an interest in the preservation and enjoyment of cultural property wherever it is situated and from whatever cultural or geographic

source it derives.[1] Cultural property is viewed as the 'collective cultural heritage of all people.'[2] Thus, the international community considers the privileges of the common global interest and the right to intervene and ensure its protection as paramount over the rights of any particular nation. This view is, however, tempered by cultural nationalism, which is the view that 'cultural property is a part of the cultural heritage of the nation in which it is found or the nation which contains the cultural descendants of its creator.'[3] The principle of state sovereignty underlies this perspective. A state has the jurisdiction and the right to exercise control over matters within its territorial boundaries. This position is generally taken by source nations. Thus, the various international and supranational laws will continue to be influenced by domestic legislation and vice versa, and any level of uniformity of such national laws will shape the future international norms on cultural heritage protection and preservation in the 21st century. Combining both international and national cultural heritage protection into one study also means taking into account both movements, the concept of cultural property internationalism as well as the concept of cultural nationalism, as both interact with each other and cannot be regarded as totally separate concepts.

The idea of writing this report was born on the occasion of the 1st Intermediate Congress of the International Academy of Comparative Law in Mexico concerning 'The Impact of Uniform Law on National Law. Limits and Possibilities', which took place in November of 2008.[4] Zweigert and Kötz define the term unification of law – deriving from the latin terms unus ('one') and facere ('to make') –, the fundamentals of uniform law deriving from the latin terms unus and forma ('form') –, as 'a discipline of legal policy which aims at settling or removing differences of national legislation through a consensus in international legal principles within the limits of desirability and possibility.'[5] They go on to define the international procedure used for the unification of national laws as 'being of the kind that an Einheitsgesetz (loi uniforme, uniform law) will be drafted by experts in

[1] J.H. Merryman, 'Cultural Property Internationalism', 12 *International Journal of Cultural Property* (2005) p. 11 at p. 11.

[2] J. Warring, 'Underground Debates: The Fundamental Differences of Opinion That Thwart UNESCO's Progress in Fighting the Illicit Trade in Cultural Property', 19 *Emory International Law Review* (2005) p. 227 at p. 247.

[3] Warring, loc. cit. n. 2, at p. 247.

[4] Information about this congress can be found online at http://www.iuscomparatum.org/offres/gestion/menu_141_perso_ 141_1837/mexico-congress-2008.html (last visited on December 31, 2008).

[5] K. Zweigert and H. Kötz, *Einführung in die Rechtsvergleichung* [Introduction to Comparative Law], 3rd edn. (Tübingen, J.C.B. Mohr 1996) at p. 23.

the field of comparative law and put into a collective treaty which mandates its states parties to implement and transform this uniform law into national law (note: as long as the international tool is not self-executing[6]).'[7] Fox expressively refers to the work of the international community defining the term unification of laws as 'efforts by a number of international organizations to make the municipal laws of the countries of a region or the entire world as uniform as possible, thus, eliminating conflicts of laws problems'[8], while Black's Law Dictionary defines the term (note: United States) uniform law as a '… law proposed as legislation for all the states to adopt exactly as written, the purpose being to promote greater consistency among the states.'[9]

It should be noted that the concept of international and national cultural heritage protection and preservation is a very broad concept touching issues related to public law as well as private law, both on an international level as well as on a national level. Thus within the scope of this report, the term uniform law shall be understood in a broader and less strict meaning, leading to a kind of soft uniform law. In particular obligations arising from international public law tools cannot unify national laws completely. They can however express the concerns of the international community and provide a model which national legislation should follow. Hence, international cultural protection law cannot be regarded as being a typical exponent of uniform law, rather it is a genuine form of international uniform law.

This report consists of two main parts: the first part will deal with seven major international conventions related to the issue of protection and preservation of cultural heritage[10]. It will provide the reader with a

[6] For the question of self-execution see *infra* I.5.3.

[7] Zweigert and Kötz, op. cit. n. 5, at p. 23.

[8] J.R. Fox, *Dictionary of International and Comparative Law*, 2nd edn. (Dobbs Ferry/New York, Oceana Publications Inc. 1997) at p. 325.

[9] B.A. Garner et al., eds., *Black's Law Dictionary*, 7th edn. (St. Paul/Minnesota, West Group 1999) at p. 1531).

[10] See *infra* I.2.: 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict;

infra I.3.: 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property;

infra .I.4.: 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage;

infra I.5.: 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects;

infra I.6.: 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage;

infra I.7.: 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage;

infra I.8.; 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

comprehensive, up-to-date outline of the most important instruments, illustrating the drafting processes and ideas behind the conventions and summarizing the core regulations important both at the international level and also at the national level in terms of the implementation process. Thus, it will be a good addition to the framework of recently published specific literature on single areas[11].

The second part of this report will be an analysis of 16 national legal frameworks in relation to cultural heritage, evaluating – among other things – national concepts in this field, specific national regimes and the impact of the discussed international tools on national laws. It will also point out convergences and divergences in the implementation process among the following countries: Canada, Croatia, the Czech Republic, Denmark, France, Germany, Italy, Japan, Mexico, the Netherlands, New Zealand, Spain, Switzerland, Taiwan, Tunisia and the United States.

The 16 contributing countries reflect various, sometimes opposing national approaches. With the exception of Taiwan, which is not recognized as a politically independent country by UNESCO and UNIDROIT and thus is not a state party to any of the conventions outlined in Part I of this report, all contributing countries are involved in the international cultural safeguarding process, with their national legislation influenced by and influencing the international framework. Some countries have been influenced more, others less. The contributing countries represent a balanced mixture of older and newer national cultural heritage legislation. Some are quite active at the international level while others are passive. They also represent various geographical, historic and cultural differences as well as differing overall national concepts and perceptions of cultural heritage protection and the balancing of state and private interests and questions related to indigenous group and community rights.

The realization of this report would not have been possible without the help of a network of people: We would like to thank Steven van Uytsel, Marose Pereira, Margaret Uy and Paulius Jurčys for their research support in drafting this report, Ruben Pauwels, Oliver Galindo, Sean Michael McGinty,

I should refer to J. Nafziger and T. Scovazzi, eds., *The Cultural Heritage of Mankind* (Hague Academy of International Law, 2008) (Leiden/Boston, Martinus Nijhoff 2008) as the most recent and comprehensive work, which covers these international instruments, relevant soft-laws and related issues.

[11] F. Francioni and F. Lenzerini, eds., *The 1972 World Heritage Convention – A Commentary* (Oxford, Oxford University Press 2008); J. Blake, *Commentary on the 2003 UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage* (Leiscester, Institute of Art and Law 2006); S. Dromgoole, ed., *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001* 2nd edn. (Leiden, Martinus Nijhoff Publishers 2006).

Brian Luke Goh and Concetta Frano Grimm for their language assistance, and Robert K. Paterson, Igor Gliha, Tatjana Josipović, Pavel Šturma, Ditlev Tamm, Anne Østrup, Marie Cornu, Kurt Siehr, Federico Lenzerini, Yoshiaki Ishida, Hideto Takagi, Jorge Sánchez Cordero, Ernesto Becerril, Katja Lubina, Paul Myburgh, Sofia de Salas, Eva Maria Belser, Eva Rüegg, Eva Molinari, Ming-Yan Shieh, Chung-Hsi Lee, Monia Ben Jémia, and James A.R. Nafziger for their commitment and invaluable contributions to this general report. We also would like to thank the International Academy of Comparative Law for supporting the idea behind this report. We hope that this report will support the understanding of international and national legal tools in the field of the protection and preservation of cultural heritage and foster its development for the sake of future generations and cultural enjoyment.

Let us now take you on a journey through the history and development of national and international frameworks of cultural heritage protection and preservation law and their future.

Fukuoka, Japan, January 2009 Toshiyuki Kono,

Stefan Wrbka

Note: As far as possible, national and international developments in the field of cultural heritage protection and preservation up and until December 31, 2008 have been taken into account and were incorporated in this report. Page references to the national reports are references to the unpublished versions of the national reports as of December 31, 2008.

INTERNATIONAL LEGAL FRAMEWORK

1. CULTURAL HERITAGE PROTECTION: A STORY OF SEVERAL BEGINNINGS – OR: THE PRE-UNESCO PERIOD

From the early ages of Roman conquest, victors would take for themselves the treasures and cultural works of conquered peoples as trophies to be displayed during triumphant homecoming parades and presented to the public at the Roman Forum, 'the world's first great outdoor museum.'[12]

[12] Merryman 2005, loc. cit. n. 1, at p. 13.

These grandiose ornaments affirmed the glory of Roman military power. The tradition was continued throughout the medieval period, during the time of the Crusades and the Italian Renaissance.[13] Cicero first wrote that 'it is not contrary to nature to despoil him whom it is honourable to kill.'[14] It was therefore 'not strange that the law of nations has permitted the destruction and plunder of the property of enemies.'[15] Grotius accepted this principle, but argued for moderation, proposing that 'sacred or artistic works should not be destroyed where there is no military advantage in doing so,'[16] and that 'destruction that neither weakens the enemy nor helps the destroyer is immoderate and disproportionate.'[17]

True cultural property internationalism was first argued two centuries later by Vattel, who sought for the protection of cultural property in the interests of mankind and human society, and broadened the basis for protection to include 'works of remarkable beauty.'[18]

Eventually, more concrete rules were developed to prevent the destruction and plunder of cultural property during war. In 1863 Francis Lieber proposed the Instructions for the Government of Armies of the United States in the Field (hereafter the 'Lieber Code')[19], the first attempt at a comprehensive body of rules governing the conduct of belligerents in enemy territory.[20] In particular Articles 34-36 of the Lieber Code aim at the protection of cultural property, including property belonging to 'churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education or foundations for the promotion of knowledge,'[21] as well as 'classical works of art, libraries, scientific collections or precious instruments.'[22] Under the regime of the Lieber Code, properties might only have been seized or removed by conquering nations if the properties could be removed without damage, with a reservation that

[13] Merryman 2005, loc. cit. n. 1, at p. 14.
[14] H. Grotius, *The Law of War and Peace* (Indianapolis, Bobbs-Merrill 1925) at p. 658.
[15] Grotius, op. cit. n. 14, at p. 658.
[16] Merryman 2005, loc. cit. n. 1, at p. 14.
[17] Merryman 2005, loc. cit. n. 1, at p. 14.
[18] Merryman 2005, loc. cit. n. 1, at p. 14 referring to E. de Vattel, *The Law of Nations – Book III: War* at Paragraph 168 – see E. de Vattel, *The Law of Nations or the Principles of Natural Law*, translated by Ch.G. Fenwick (New York, Oceana Publications Inc. 1964) at p. 293 et seq.
[19] The text of the Lieber Code can be found in L. Friedman, *The Law of War – A Documentary History Volume I* (New York, Random House 1972) at p. 158 et seq. or online at http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument (last visited on December 31, 2008).
[20] J.H. Merryman, 'Two Ways of Thinking About Cultural Property in the event of Armed Conflict', 80 *American Journal of International Law* (1986) p. 831 at p. 834.
[21] Article 34 Lieber Code.
[22] Article 35 Lieber Code.

final determination of ownership was to be made by the peace treaty at the end of hostilities.[23]

Inspired by the idea of the Lieber Code, Russia called for an international meeting of 15 states in Brussels in 1874 to discuss the possibility of regulating the laws, rights and duties of war. Article 8 of the drafted Declaration of Brussels Concerning the Laws and Customs of War (hereafter the 'Declaration of Brussels')[24] directed that 'property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences even when state property, shall be treated as private property' and that 'all seizure or destruction of, or willful damage to, institutions of this character, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities,' while its Article 13 (g) stipulated an exemption from liability by saying that 'any destruction or seizure of the enemy's property that is not imperatively demanded by the necessity of war' is forbidden. The declaration of Brussels was, however, never adopted due to the objection of Great Britain.[25] Six years later in 1880, the said provisions of the Declaration of Brussels were unfrozen by the Institute of International Law and incorporated in its Laws of War on Land (hereafter the 'Oxford Manual'), 'rendering a service to military men themselves.'[26]

In 1899, aiming at 'the revision of the Declaration Concerning the Laws and Customs of War elaborated in 1874 by the Conference of Brussels, which [had] remained unratified'[27], the First Hague Peace Conference adopted the 'first formal international treaty providing some protection for cultural property'[28]: the 1899 Convention With Respect to the Laws and Customs of War on Land (hereafter the '1899 Hague II Convention') and its annex Regulations Concerning the Laws and Customs of War on Land (hereafter the '1899 Hague II Regulations').[29] Article 27 of the 1899 Hague II Regulations called for the taking of 'all necessary steps … to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals, and

[23] Article 36 Lieber Code.

[24] The text of the Declaration of Brussels can be found in Friedman, op. cit. n. 21, at p. 194 et seq.

[25] Merryman 1986, loc. cit. n. 20, at p. 834.

[26] Preface (5) Oxford Manual.

[27] W.I. Hull, *The Two Hague Conferences and their Contributions to International Law* (New York, Kraus Reprint 1970) at p. 213.

[28] K. Chamberlain, *War and Cultural Heritage* (Leicester, Institute of Art and Law 2004) at p. 9.

[29] For the text of the 1899 Hague II Convention and the 1899 Hague II Regulations see e.g. Carnegie Endowment for International Law, J.B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press 1915) p. 100 et seq. or online at http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument; last visited on December 31, 2008).

places where the sick and wounded are collected, provided they are not used at the same time for military purposes' in times 'of sieges and belligerents'. Culturally related property was to be treated as private property[30]. They were required to be respected and not subject to confiscation,[31] destruction, or intentional damage[32]. Occupying armies were allowed to take possession of state owned movable property only if it was used for military purposes.[33] As to immovable properties such as 'public buildings, real properties, forests, and agricultural works,' the occupying state was regarded as 'an administrator and usufructuary.'[34] For cases not covered by the Hague II Regulations, the principles of international law based on the 'usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience' applied.[35]

Less than a decade later, at the initiatives of the Inter-Parliamentary Union (IPU)[36] and – after the end of the Russo-Japanese War – Russia, Theodore Roosevelt convoked the Second Hague Peace Conference in 1907.[37] Two conventions adopted at that conference had impacts on the treatment of property, including cultural property in wartime, with the purpose of trying to 'complete and explain in certain particulars the work of the First [Hague] Peace Conference.'[38] These were the 1907 Convention Respecting the Laws and Customs of War on Land (hereafter the '1907 Hague IV Convention') supplemented by its annex Regulations Concerning the Laws and Customs of War on Land (hereafter the '1907 Hague IV Regulations') and the 1907 Convention Concerning Bombardment by Naval Forces in Time of War (hereafter the '1907 Hague IX Convention').

[30] Article 56 1899 Hague II Regulations considers 'the properties of the communes, those of religious, charitable, and educational institutions, as well as those of arts and science, even when owned by the State, as private property.'

[31] Article 46 1899 Hague II Regulations.

[32] Article 56 1899 Hague II Regulations.

[33] Article 53 1899 Hague II Regulations.

[34] Article 55 1899 Hague II Regulations.

[35] Preamble (9) 1899 Hague II Convention.

[36] Established in 1889 with its current headquarters in Geneva, IPU as an 'organization of Parliaments of sovereign States' focuses at (1) fostering 'contacts, coordination and the exchange of experience among Parliaments and parliamentarians of all countries;' (2) considering 'questions of international interest' and expressing 'its views on such issues with the aim of bringing about action by Parliaments and their members;' (3) contributing 'to the defence and promotion of human rights, which are universal in scope and respect for which is an essential factor of parliamentary democracy and development' and (4) contributing to better knowledge of the working of representative institutions and to the strengthening and development of their means of action' and by doing this 'works in close cooperation' with the United Nations. (Article 1 Statutes of the Inter-Parliamentary Union; the text is available online at http://www.ipu.org/strct-e/statutes-new.htm#1; last visited on December 31, 2008).

[37] Hull, op. cit. n. 27, p. 4 et seq.

[38] Preamble (4) 1907 Hague II Convention.

The 1907 Hague IV Convention and the 1907 Hague IV Regulations were built on the framework of the 1899 Hague II Convention and the accompanying 1899 Hague II Regulations. This is reflected by the fact that many provisions were copied into the 1907 instruments, some of them in a slightly amended form.[39] As far as the before-mentioned Article 27 of the 1899 Hague II Convention in relation to sieges and belligerents is concerned, R. O'Keefe states that its 'only innovation was the inclusion of 'historic monuments' among several types of property to be spared', clearly defining them as objects to be respected.[40] Another innovation worth mentioning is the introduction of the obligation of 'belligerent parties' to pay compensation if violating the provisions of the 1907 Hague IV Regulation, making those parties liable 'for all acts committed by persons forming part of its armed forces.'[41]

While the 1907 Hague IV Convention focused on land-based warfare, the 1907 Hague IX Convention dealt with its counterpart on the sea. With regard also to culturally related buildings its Article 5 stated that 'all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected' provided that they were not used for 'military purposes'. Like the protective regime under Article 27 of the 1907 Hague IV Convention and 1899 Hague II Convention respectively, protective obligations have no absolute character and are limited by the vague and undefined exemption of military necessity.[42]

An important step was taken in 1935, when the United States and 20 Latin American countries signed the Treaty on the Protection of Artistic and

[39] Among others, the following important provisions were basically preserved: (a) Article 23 on the prohibition of the destruction or seizure of the enemy's property; (b) Article 25 on the prohibition of attacks or bombardments of undefended towns, villages, dwellings or buildings; (c) Article 27 on sparing non-military buildings devoted to religion, art, science, and charity during sieges and bombardments; (d) Articles 28 and 47 on the prohibition of pillage; (e) Article 46 on respecting private properties and exempting them from confiscation; (f) Article 53 on the possession by the occupying army of all movable properties for military purposes; (g) Article 55 on the role and duties of the occupying State as an administrator and usufructuary of the public buildings, real properties, forests, and agricultural works of the occupied State located within the occupied territory; and (h) Article 56 on the treatment of the properties of the municipalities, religious, charitable, and educational institutions, as well as those of arts and science, even when owned by the State, as private property; for details about the core framework of the 1907 Hague IV Convention see e.g. Hull, op. cit. n. 27, p. 213 et seq. or R. O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge, Cambridge University Press 2006) p. 22 et seq.

[40] R. O'Keefe, op. cit. n. 39, at p. 27.

[41] Article 3 1907 Hague IV Convention.

[42] For a discussion of this term see e.g. R. O'Keefe, op. cit. n. 39, at p. 23.

Scientific Institutions and Historic Monuments, commonly referred to as the Roerich Pact[43]. The main purpose of the Roerich Pact was the respecting of 'treasures of culture' in peacetime as well as in wartime.[44] Under its regime 'historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents.'[45] The focus was primarily on immovable objects, whereas movable property was only protected insofar as it was located in a protected building.[46]

The Geneva Conventions of 1949, especially the Forth Geneva Convention of 1949, the Convention (IV) relative to the Protection of Civilian Persons in Time of War (hereinafter, GCIV), should also be mentioned as another important piece of the puzzle paving the way for the first UNESCO convention aimed at the protection of cultural heritage. More than eight decades after the creation of the first Geneva Convention under the auspices of the International Committee of the Red Cross in 1863 and affected by the cruelties of World War II, representatives of approximately 70 national governments met at a diplomatic conference in Geneva to set a new standard for international humanitarian law concerns. On August 12, 1949, after more than three months of intense discussion, the diplomatic conference adopted four new Geneva conventions, based on a revision of the existing Geneva law, a draft dated 1934 – the Tokyo Draft – and the Hague Conventions of 1907.

[43] The text of the Roerich Pact is available online at http://www.icrc.org/ihl.nsf/FULL/325?OpenDocument (last visited on December 31, 2008). The former Soviet Union signed the Roerich Pact in 1954, making it the only non American party.

[44] Preamble of the Roerich Pact.

[45] Article 1 Roerich Pact.

[46] Merryman 1986, loc. cit. n. 20, at p. 835. The Roerich Pact also asked for identifying protected properties by the *Banner of Peace* bearing the Pax Cultura emblem. It was widely superseded by the distinctive marking as defined by the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict and is currently only relevant for States Parties which are bound by the Washington Treaty of 1935 but not by the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, applying (as of December 31, 2008) to the United States and Chile.

With the exception of common[47] Article 3, which applies to non-international conflicts and which can be found in all four Geneva Conventions, the Geneva Conventions apply to conflicts with international characteristics. An important new feature of the 1949 Geneva Conventions is linked to the protection of civilians. Unlike the older Geneva Conventions the Geneva Conventions of 1949 expand their scope of application to comprise not only combatants but also the protection of civilians.

In addition to the added regulations on the protection of civilians, the inclusion of property into the scope of application has to be accentuated. While major parts of the Geneva Conventions of 1949 were basically revised texts of the already existing Geneva law, the GCIV was a new instrument within the Geneva legal framework and partly linked to the Hague Convention IV respecting the Laws and Customs of War on Land of 1907. The GCIV, which entered into force in 1950 and which has been ratified by nearly 200 States Parties so far[48], is targeted at the protection of civilians, defined by Article 4 GCIV as persons 'who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.'[49] The GCIV does however also include property in various forms in its protective regime. For example, Article 33 GCIV forbids '[r]eprisals against protected persons and their property'. Article 53 GCIV goes a step further and says that '[a]ny destruction by the Occupying Power of real or personal property belonging individually or collectively to private

[47] E.g. Article 3 GCIV: 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples'; The wording of Article 3 of the other three Geneva Conventions is exactly the same with the exception that Article 3 of the Second Geneva Convention adds the term *shipwrecked* to the term *wounded and sick.*

[48] See http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P (last visited on December 31, 2008).

[49] The term *civilians* should not be mixed with the personal scope of application of the Third Geneva Convention of 1949 (hereafter, GCIII), prisoners of war. For a detailed definition of the term *prisoners of war* see Article 4 GCIII.

persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations'. Property related provisions can be found throughout this convention and the protected pillar 'property' is also included in Article 146 GCIV on penal sanctions and Article 147 GCIV on 'grave breaches' of the convention mandating States Parties to enact suitable legislation to support the protective regime of the GCIV on a local basis. Undoubtedly, the idea of protecting people and property in general from the threats of armed conflicts was given fresh impetus - and the time seemed ripe for a further instrument - a more detailed yet narrower regime of protection, the protection of cultural property.[50]

Although GCIV itself does little, Protocol 1[51] which it adopted in 1977 strengthened the protective regime applicable to cultural heritage. Article 53 of the Protocol prohibits "to commit any acts of hostility directed against historic monuments, works of art or places of worships which constitute the cultural or spiritual heritage of peoples", the use of such objects for military effort, and direct reprisals against such objects. According to Article 85, paragraph 4 (d) and paragraph 5, to destroy "the clearly-recognized historic monuments, works of art or places of worship" constitutes a "grave breach" and shall be regarded as war crimes.

CONVENTION FOR RHE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT (1954)[52]

2.1. The 1954 Convention: Facing the Threats of Armed Conflicts

2.1.1. Background of the 1954 Convention: Wartime Destruction

In the wake of the massive destruction of cultural heritage during the Second World War, it became obvious that there was a need to specially focus on protecting cultural heritage in wartime. It was also clear that the best way to

[50] See e.g. UNESCO Doc. CLT/CIH/MCO/2008/PI/69/REV: UNESCO, *Protect Cultural Property in the Event of Armed Conflict* (Paris, UNESCO Publishing 2005) 14 et seq. (available online at http://unesdoc.unesco.org/images/0013/001386/138645e.pdf, last visited on December 31, 2008).

[51] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted in 1977, entered into force in 1979) (the text is available at: http://www.unhchr.ch/html/menu3/b/93.htm, last visited on December 31, 2008).

[52] If used without any determination, the term *convention* refers to the *Convention for the Protection of Cultural Property in the Event of Armed Conflict* in this chapter.

accomplish that goal was the introduction of an international legal instrument, as previous attempts[53] did not show the positive effects hoped for. Three years after its establishment, UNESCO – based on its constitutional presetting of 'assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions'[54] – initiated comprehensive studies related to wartime protection of cultural objects[55]. Based on intensive discussions and taking into account various draft proposals and comments by the UNESCO Secretariat, the International Council of Museums (ICOM)[56], UNESCO's Member States and experts groups, UNESCO convened an intergovernmental conference in 1954 in order to transpose the deliberative results into a legally binding international framework.[57]

On May 14, 1954 the final draft of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereafter the '1954 Convention')[58], the first global treaty solely focusing on the protection of cultural heritage in the event of armed conflict[59], and the Regulations for the Execution of the Convention (hereafter the 'Hague Regulations') as an 'integral part'[60] of it were adopted.

2.1.2. Scope of Application of the 1954 Convention and the Term Cultural Property

The main purposes of the 1954 Convention were the safeguarding and respect for both movable and immovable tangible cultural property during armed conflicts[61], attempting 'to strike a balance between humanitarian and

[53] *Supra* I.1. Also Hélène Tigroudja, 'Les règles du droit international général applicable à la protection du partimoine culturel en temps de conflict armé', in Nafziger and Scovazzi, op. cit. n. 10, pp. 771-816.

[54] Article I (2) (c) UNESCO Constitution.

[55] UNESCO Resolution 6.42. (text available online at http://unesdoc.unesco.org/images/0011/001145/114593e.pdf; last visited on December 31, 2008).

[56] Established in 1946 as an international non-governmental organization and consultative body of UNESCO with the headquarters in Paris, the International Council of Museums (ICOM) focuses on 'the conservation, continuation and communication to society of the world's natural and cultural heritage, present and future, tangible and intangible' (Article 2 (1) ICOM Statute; available online at http://icom.museum/statutes.html; last visited on December 31, 2008).

[57] For details on the drafting process see e.g. Chamberlain, op. cit. n. 28, p. 22 et seq.

[58] A full text version is available online at http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited on December 31, 2008).

[59] Merryman 1986, loc. cit. n. 20, at p. 836.

[60] Article 20 1954 Convention.

[61] See Articles 2 and 3 1954 Convention.

military requirements'[62]. As R. O'Keefe points out that balance was also a 'perennial one between maximizing participation in the convention and maximizing the protection it afforded,'[63] meaning that the drafters of the 1954 Convention had to provide a basis acceptable to as large a number of states as possible, making it impossible to lace together a comprehensive and tight legal instrument for the protection of cultural property. For the sake of attracting as many states as possible concessions had to made, weakening the positive impact of the convention and – as will be shown below – this has led to heavy criticism among scholars and the international community[64]. Still, it should be noted that the 1954 Convention and its two supplementary protocols[65] are the most comprehensive and 'most important legal instruments for the protection of cultural property in time of armed conflicts' and should be respected for having increased the 'awareness of the significance of cultural property and developing the concept of common cultural property.'[66]

For a proper understanding of the legal framework of the 1954 Convention two fundamental terms have to be defined: the terms cultural property and armed conflict.

With regard to the latter, the 1954 Convention states that its regulations are basically applicable 'in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one or more of them.'[67] The term armed conflict has been described as '[a]ny difference arising between two [or more] States and leading to the intervention of members of the armed forces.'[68] Another useful definition of the term armed conflict was made in 1995 by the International Criminal Tribunal for the former Yugoslavia (hereafter the 'ICTY')[69]. Basically it stated that 'an armed

[62] Chamberlain, op. cit. n. 28, at p. 23.

[63] R. O'Keefe, op. cit. n. 39, at p.93.

[64] *Infra* I.2.3.

[65] *Infra* I.2.2. for the First Protocol and *infra* I.2.3. for the Second Protocol.

[66] S. Eagen, 'Preserving Cultural Property: Our Public Duty: A Look at How and Why We Must Create International Laws that Support International Action', 13 *Pace International Law Review* (2001) p. 407 at p. 426. Also Maurice K. Kamga, 'La convention pour la protection des biens culturels en cas de conflit arme de 1954 et ses deux protocoles de 1954 et de 1999', in Nafziger and Scovazzi, op. cit. n. 10, pp. 817-849.

[67] Article 18 (1) 1954 Convention.

[68] R. O'Keefe, op. cit. n. 39, at p. 96 citing J. Pictet, ed., *Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Commentary* (Geneva, ICRC Publishing 1958) at p. 20.

[69] The International Criminal Tribunal for the Former Yugoslavia (ICTY) is a body of the United Nations (UN) established to prosecute serious crimes committed during the wars in ex-Yugoslavia and to try their alleged perpetrators. It is organized as an ad-hoc court and located in The Hague. For details refer

conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.'[70] Such status continues 'from the initiation of armed conflict and extends beyond the cessation of hostilities until a general conclusion of peace is reached,' when it is international, or, should the armed conflict be non-international, until 'a peaceful settlement is achieved.'[71]

Thus, the concept of armed conflicts under the regime of the 1954 Convention refers to a wider spectrum than just legal states of war. R. O'Keefe states that 'the machinery of control established by the [1954] Convention is applicable as much to belligerent occupation as they are to active hostilities,'[72] while Chamberlain explains that the 1954 Convention also applies to other forms of armed disputes such as to 'acts of self-defence, peacekeeping operations under the authority of the United Nations, or undeclared hostilities.'[73]

Article 18 (2) of the 1954 Convention clarifies that the Convention is also applicable 'to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.' R. O'Keefe states that the undefined term occupation 'relies … on the accepted customary definition reflected in Article 42 of the Hague Rules [note: 1899 Hague II Convention and 1907 Hague IV Convention respectively], which states that the territory is considered occupied "when it is actually placed under the authority of the hostile army" and that the occupation "extends only to the territory where such authority is established and can be exercised"'.[74]

With regard to the application in relation to non-signatory states Article 18 (3) of the 1954 Convention stipulates that the Convention should also be applicable if the non-signatory state declares 'that it accepts the provisions

to ICTY Statute available online at http://www.icls.de/dokumente/icty_statut.pdf (last visited on December 31, 2008).

[70] *The Prosecutor* v. *Dusko Tadic* (Decision on the Defence Motion for Interlocutory Appeal Jurisdiction), No. IT-94-1-AR72, Paragraph 70 (ICTY 1995), available online at http://www.un.org/icty/tadic/appeal/decision-e/51002.htm (last visited on December 31, 2008), cited by H. Abtahi, 'The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia', 14 *Harvard Human Rights Journal* (2001) p.1 at p. 3.

[71] Abtahi, loc. cit. n. 70, at p. 3.

[72] R. O'Keefe, op. cit. n. 39, at p. 97.

[73] Chamberlain, op. cit. n. 28, at p. 66. As for non-traditional types of armed conflicts, see Rosario Domínguez-Matés, 'The international protection of cultural heritage during non-traditional armed conflicts, including acts of terrorism', in Nafziger and Scovazzi, op. cit. n. 10, pp. 851-882.

[74] R. O'Keefe, op. cit. n. 39, at p. 97.

thereof and so long as it applies them,' a provision which was of practical importance for example in relation to the (Federal Republic of) Germany before its ratification of the 1954 Convention.[75]

The 1954 Convention also sets the frame for a minimum standard of application in the case of mere internal conflicts in a State Party's territory, as its Article 19 prescribes the application of at 'a minimum, the provisions of the present Convention which relate to respect for cultural property.'

The outstanding element found in and introduced by the 1954 Convention for the first time is the 'realization by the High Contracting Parties that cultural property is of the utmost importance to mankind and needs to be given the ultimate in protection measures.'[76] Another step forward is the fact that the 1954 Convention tries to protect cultural property regardless of its origin, ownership or the territory it is situated in.[77] The basic idea behind that principle is the conviction that every kind of damage to cultural property constitutes harm to the cultural heritage of human mankind, as every nation contributes to the world's culture, thus creating the need to protect the cultural heritage of all peoples by means of an international mechanism[78]. That leads Merryman to the conclusion that the 1954 Convention is 'a piece of international legislation that exemplifies an influential way of thinking about cultural property,'[79] calling this concept a piece of 'cultural internationalism.'[80]

When drafting the 1954 Convention it was believed that previous international agreements touching on the issue of cultural property included 'over-ambitious definitions, which, by aiming too high, risked getting to little.'[81] What was reached in the end was a single definition of the property falling within the scope of application of the 1954 Convention, giving it 'a

[75] See R. O'Keefe, op. cit. n. 39, at p. 97 n. 21.

[76] S.A. Williams, *The International and National Protection of Movable Cultural Property* (New York, Oceana Publications Inc. 1978) at p. 41.

[77] B. Thorn, *Internationaler Kulturgüterschutz nach der UNIDROIT-Konvention* [International Protection of Cultural Property after the UNIDROIT Convention] (Berlin, De Gruyter Rechtswissenschaften Verlags-GmbH 2005) at p. 35.

[78] Thorn, op. cit. n. 77, at. p. 35; *Thorn* also expresses that the convention has one of its origins in the idea put forward by *Quatremere de Quincy* who declared the national cultural property as common heritage of mankind and every state as being an escrow holder in relation to the cultural heritage in its territory – see Thorn, op. cit. n. 77, at p. 36.

[79] Merryman 1986, loc. cit. n. 20, at p. 842.

[80] Merryman 1986, loc. cit. n. 20, at p. 842.

[81] R. O'Keefe, op. cit. n. 39, at p. 101 citing 7 C/PRG/7, Annex I, p. 7.

specific legal definition.'[82] The respective term cultural property is defined in Article 1 of the 1954 Convention as follows:

movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic interest; works of art, manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centres containing monuments.'

R. O'Keefe notes that 'the [note: exemplary] definition is strictly for the purposes of the 1954 Convention [note: and its two protocols[83]]. It is not cross-referable to the definitions found in subsequent UNESCO instruments.'[84]

As the definition shows, cultural property under the regime of the 1954 Convention can take the form of both movable as well as immovable tangible property. What makes the respective property a cultural property in terms of the 1954 Convention is the fact that it has to be 'of great importance to the cultural heritage of every people'. The phrase 'of every people' is basically understood as leaving the discretion in determining whether or not a property is of great importance to the respective State Party in whose territory the property is found.[85] It is also argued that this discretionary power has to be reflected in an active approach taken by the State Party in whose territory the property is located. The State Party should either notify other States Parties of its identification of a piece of property as cultural property prior to an armed conflict [note: as an expression of an 'appropriate

[82] R. O'Keefe, op. cit. n. 39, at p. 101.
[83] *Infra* I.2.2. and I.2.3.
[84] R. O'Keefe, op. cit. n. 39, at p. 102.
[85] Chamberlain, op. cit. n. 28, at p. 36; for a short analysis of this term see also R. O'Keefe, op. cit. n. 39, at p. 103.

safeguarding measure in peacetime' in terms of Article 3 1954 Convention[86]] or mark the respective object with the 'distinctive emblem' introduced by Article 6 of the 1954 Convention to identify it as a cultural property in order to dispel doubts about its classification.[87]

2.1.3. Legal Framework of the 1954 Convention: Safeguarding and Respect

The material core of the 1954 Convention, the protection of tangible cultural property, is founded on two pillars: mechanisms of safeguarding and respect. The first layer refers to an active role to be played by the States Parties with respect to cultural property in their territories. States Parties are asked to take preventive actions in peacetime with the aim of safeguarding cultural properties as defined by Article 1of the 1954 Convention 'against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.'[88] This general obligation is not further defined by the 1954 Convention. Instead the discretion is left to the respective State Party to take any measure which it deems to have a positive impact on the preservation of the cultural property situated in its territory. The States Parties can go to any lengths including such measures as installing protective zones, setting up protective constructions, taking exposed movable objects to safer places or – as shown above[89] – informing other States Parties of identifications of objects as cultural property or marking such objects with the 'distinctive emblem' of Article 6 of the 1954 Convention.

The second layer, referred to as respect for cultural property by the 1954 Convention, relates to the protection of cultural property during armed conflicts and is addressed at States Parties whose territories are struck by armed conflicts as well as at States Parties which take part in armed conflicts in foreign territories. The underlying obligations are to be found primarily in Article 4 of the 1954 Convention. As R. O'Keefe points out one can basically distinguish between four groups of obligations: '[firstly,] refraining from any use of cultural property and its immediate surroundings for purposes which are likely to expose it to destruction or damage in the event of armed conflict; [secondly,] refraining from any act of hostility directed against such property; [thirdly,] prohibiting, preventing and, if necessary,

[86] See also Article 4 (5) 1954 Convention: 'No High Contracting Party may evade the obligations incumbent upon it under the present Article, in respect of another High Contracting Party, by reason of the fact that the latter has not applied the measures of safeguard referred to in Article 3.'

[87] R. O'Keefe, op. cit. n. 39, p. 110 et seq.

[88] Article 3 1954 Convention.

[89] *Supra* I.2.1.2.

putting a stop to theft, pillaging, misappropriation and vandalism of such property, as well as refraining from requisitioning such property; and [fourthly] refraining from reprisals against such property.'[90]

One of the most critical aspects of the 1954 Convention refers to the first to groups of obligations and can be found in Article 4 (2) of the 1954 Convention which states that those obligations 'may be waived only in cases where military necessity imperatively requires such a waiver'. Thus, both subcategories are not to be understood as being absolute obligations, but find their limitations in the undefined case of military necessity for waiving the obligations. The lack of definition of military necessity obviously creates complications and remained to be a hot topic in the drafting process of the supplementary Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, as it possibly can lead to an abuse of the waiver system.[91]

The basic protective mechanism of the 1954 Convention is supplemented by a regime of special protection aimed at providing a higher standard of protection.[92] The regime of special protection applies to the first two of the above-mentioned obligations of Article 4: refraining from using cultural property and its surroundings for military purposes and refraining from directing acts of hostility against it. The possible objects of special protection, refuges to shelter cultural property, have to fulfill two requirements in order to qualify as specially protected cultural property. The first requirement is that the object has to be 'situated at an adequate distance from any large industrial center or from any important military objective constituting a vulnerable point.'[93] The second is that the object may not be used 'for military purposes'[94]. In order to be granted special protection, objects which meet both requirements have to be inscribed on the International Register of Cultural Property under Special Protection (hereafter the 'Hague Register') by UNESCO's Director-General. Inscriptions in the Hague Register are based on applications of either the State Party on whose territory the respective property is situated or by the occupying State Party in the case of belligerent occupation and are subject to limited veto rights of other States Parties.[95] The main, but in fact still

[90] R. O'Keefe, op. cit. n. 39, at p. 120.
[91] See *infra* I.2.3.2. for details.
[92] Chapter II 1954 Convention.
[93] Article 8 (1) (a) 1954 Convention.
[94] Article 8 (1) (b) 1954 Convention.
[95] The inscription process is regulated by Chapter II 1954 Convention.

'extraordinarily minor'[96] difference between the regimes of general and special protection is expressed by the exemption clauses with regard to the waiver option in cases of military necessity, requiring an unavoidable military necessity under the regime of special protection.[97] The vague term unavoidable as well as the undefined requirement of having to be located at an adequate distance and the complex inscription process made the special protective regime extremely unattractive for the States Parties with the result that only a handful of objects can be found in the Hague Register.

The 1954 Convention also tries to strengthen international respect and cooperation, for example by asking occupying States Parties to 'support the competent national authorities' of the occupied States Parties in their protective measures[98], by encouraging States Parties to foster the awareness of the need for respecting cultural property 'of all peoples'[99] and by encouraging States Parties to conclude 'special agreements'[100] aimed at supporting the ideas of the 1954 Convention.

2.2. First Protocol to the 1954 Convention: Dealing With the Threat Of Exploitation

2.2.1. Background and Scope of Application of the First Protocol to the 1954 Convention: The Battle Against a Growing Black Market

World War II showed that destruction of cultural property was not the only threat which had to be averted. Especially the export of cultural property from occupied countries by the Nazi regime and its subsequent commercialization raised the awareness of the need for the regulation of a further area: the battle against the market of illegally exported and distributed cultural property. As the following decades have shown, this aspect has become the main danger to movable cultural property.

Although the issue of illicit removal of cultural property could have been combined with the destruction of cultural property in the main text of the Convention, a different approach was chosen: together with the 1954 Convention a separate legal instrument, the Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereafter

[96] R. O'Keefe, op. cit. n. 39, p. 140 et seq.
[97] Article 11 (2) 1954 Convention.
[98] See Article 5 1954 Convention.
[99] Article 7 1954 Convention.
[100] Article 24 1954 Convention.

the 'First Protocol') was introduced[101]. The main reason for not incorporating provisions on the regulation of illicit removal into the 1954 Convention was its intended scope of application: the respective provisions of the original draft of the First Protocol also alluded to the topic of private law rights of ownership of goods, leading to 'the insistence of some States on maintaining the separation between public and private law'[102], although, as Toman points out, 'the text adopted retained only the aspects of public international law within the international competences of States, the private law aspects having been abandoned. The provisions adopted concerned only the safeguarding of each country's cultural heritage'[103]. Still, by creating a separate document, interference with the main text and possible difficulties for its signing were circumvented.[104]

Disagreements among scholars can be found with respect to the scope of application of the First Protocol. As far as the High Contracting Parties to the First Protocol are concerned, R. O'Keefe's opinion should be followed: in contrast to older views[105] the First Protocol is deeply linked to the 1954 Convention. Contracting Parties to the First Protocol must also be Contracting Parties to the latter one. Despite not having included an explicit regulation dealing with the relationship between the 1954 Convention and the First Protocol one can detect various cross references to the 1954 Convention[106]. This fact leads to the result that High Contracting Parties to the First Protocol must also be High Contracting Parties to the 1954 Convention.

However, R. O'Keefe's view on the scope of application cannot be followed without restriction. Regarding the property protected under Section 1 of the First Protocol as outlined below ('protected property'), the area of application goes beyond his assumption. As various scholars point out, the wording of Section 1 of the First Protocol illustrates that cultural property as a whole is protected regardless of its localization.[107] Articles 1 and 4 (1) of the First Protocol stipulate the States Parties' obligation 'to prevent the

[101] The text is available online at http://portal.unesco.org/en/ev.php-URL_ID=15391&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited on December 31, 2008).

[102] L.V. Prott, 'UNESCO and UNIDROIT: A Partnership Against Trafficking in Cultural Objects', in N. Palmer, ed., *The Recovery of Stolen Art* (London, Kluwer 1998) p. 205 at p. 205.

[103] J. Toman, *The Protection of Cultural Property in the Event of Armed Conflict* (Aldershot, Dartmouth Publishing Company Limited 1996) at p. 344.

[104] R. O'Keefe, op. cit. n. 39, at p. 196.

[105] R. O'Keefe, op. cit. n. 39, at p. 196 referring to P.J. O'Keefe, 'The First Protocol to the Hague Convention Fifty Years on', 9 *Art Antiquity and Law* (2004) p. 99 at p. 113.

[106] E.g. Articles 1 and 10 (c) First Protocol – see R. O'Keefe, op. cit. n. 39, at p. 197 for details.

[107] E.g. Toman 1996, op. cit. n. 103, at p. 344; Williams, op. cit. n. 76, at p. 41.

exportation … from a territory occupied by it', which does not state that that territory must be a State Party's territory. Thus, not only property situated in territories belonging to States Parties, but also property in other territories falls within the regulatory framework of Section 1 of the First Protocol.

Unlike the 1954 Convention, the First Protocol does not distinguish between internal and international armed conflicts; neither of them is mentioned in the text of the First Protocol. As illegal export of cultural properties can occur in both scenarios, Prott suggests it should be 'consider[ed]' that the First Protocol also applies to armed conflicts 'not of an international character'. [108]

2.2.2. Legal Framework of the First Protocol: Short But Better Than Nothing

The First Protocol regulates basically two types of movable cultural properties, namely: (1) properties illegally exported from occupied territories (Section 1 of the First Protocol); and (2) properties which – for the purpose of protecting against the dangers of an armed conflict – were deposited from one state to another state (Section 2 of the First Protocol)[109].

As a basic rule and prime obligation, Paragraph[110] 1 of the First Protocol stresses that Occupying Parties have to ensure that no cultural property as defined in the 1954 Convention[111] will be exported during the time of

[108] L.V. Prott, 'The Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention) 1954', in M. Briat and J.A. Freedberg, eds., *Legal Aspects of International Trade in Art* (The Hague, Kluwer 1996) p. 163 at p. 170.

[109] Although section 3 on the final provision of the First Protocol offers the High Contracting Parties the chance to declare not to be bound by the provisions included either in Section 1 or Section 2 none of the Parties has given such a declaration yet. This can be seen as a sign for the general acceptation of the basic ideas behind the First Protocol.

[110] Unlike the classification usually used by international hard law agreements the first Protocol does not use the term *article* for the enumeration of its provisions, a fact which to the usage of *paragraphs* in relevant illustrations of the First Protocol.

[111] Article 1 1954 Convention:

'For the purposes of the present Convention, the term 'cultural property' shall cover, irrespective of origin or ownership:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

occupation. This applies not only to export by the occupying authorities, but also to exportation by private parties[112]. As this preventive undertaking is very difficult to be accomplished in practice, the First Protocol also introduced further obligations: Illegally exported properties must be taken into custody, either directly or indirectly, by the receiving state[113]. Confiscation may be done automatically, or at the request of the authorities in that territory. In order to accomplish the protection of the origins of the respective cultural property exported during war, each High Contracting State Party shall return illegally exported cultural properties which are in its territory at the close of hostilities to the competent authorities of the territory previously occupied. The appropriation of such cultural property as war reparation is expressly forbidden[114]. The state responsible for preventing such illegal exports from occupied territories shall indemnify holders in good faith of any cultural property which has to be returned. This should be seen as a penalty clause addressed at the High Contracting State Party responsible for the protection pursuant to Paragraph 1 of the First Protocol.

Section 2 of the First Protocol completes the restitution of exported cultural property. Whereas Section 1 refers to more or less aggressive export, Section 2 of the First Protocol, consisting of only one paragraph, refers to the return of cultural property which was transported from the territory of one High Contracting Party to the territory of a second High Contracting Party for protective reasons.

2.3. Second Protocol to the 1954 Convention: an Answer to a Toothless Instrument

2.3.1. Background of the Second Protocol: Dealing With the Shortcomings of the 1954 Convention

Despite the ambitious approaches taken by the 1954 Convention and its First Protocol atrocious acts continued to be committed against cultural properties in the course of many conflicts, particularly during the Iraq-Iran War in 1980

(c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centers containing monuments'.'

[112] R. O'Keefe, op. cit. n. 39, p. 198.

[113] Paragraph 2 First Protocol.

[114] Paragraph 3 First Protocol.

and conflicts in the former Soviet Union and the former Yugoslavia, for which the ICTY was created[115].

These conflicts that took place at the end of the 1980s and the beginning of the 1990s brought to fore the need to introduce a number of improvements for the implementation process of the 1954 Convention. Various parts of the 1954 Convention were considered to be a failure and toothless in their implementation[116]. Criticized aspects of the 1954 Convention included especially its vague and abstract language[117], the almost unconvertible regime of special protection, the lack of unification of international and non-international armed conflicts, the complicated and thus weak international control and the rudimentary sanction system.

The first attempts at improvement were taken in 1991 when the UNESCO Secretariat initiated a revision of the 1954 Convention. Discussions among the negotiating parties turned out to be more complex and difficult than expected. In the end it took eight years to adapt a compromise in the form of a supplementary agreement. In March 1999 the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (hereafter the 'Second Protocol') was implemented. The Second Protocol complements rather than replacing the 1954 Convention. Although it is basically supplementary to the 1954 Convention, it has been 'generally applauded by cultural property protection advocates as an improvement of the 1954 Convention.'[118]

Pursuant to Article 40 in combination with Article 1 (d), the Second Protocol is open to High Contracting Parties, which means that as a prerequisite of joining the Protocol the respective party has to be a High Contracting Party to the 1954 Convention. This clarification was inserted in order to avoid discussions known from and in relation to the First Protocol[119].

[115] *Supra* n. 69.

[116] C. Brenner, 'Cultural Property Law: Reflecting on the Bamiyan Buddhas' Destruction', 29 *Suffolk Transnational Law Review* (2006) p. 237 at p. 257; R. O'Keefe, op. cit. n. 39, p. 236 et seq.

[117] E.A. Posner, 'The International Protection of Cultural Property: Some Skeptical Observations', 8 *Chicago Journal of International Law* (2007) p. 213 at p. 218.

[118] J.C. Johnson, 'Under New Management: The Obligation to Protect Cultural Property During Military Occupation', 190-91 *Military Law Review* (2006/2007) p. 111 at p. 132; See *infra* I.2.3.2. for the major changes.

[119] See *supra* I.2.1.1.

2.3.2. Important Cornerstones of the Second Protocol: Enhancing the 1954 Framework

The Second Protocol tries to cope with the aforementioned problems by introducing new provisions and thus rounding off the 1954 Convention. The Second Protocol led among others to a number of improvements.

Firstly, the Second Protocol revised the complicated institutional international control system of the 1954 Convention[120] and installed a new mechanism: the introduction of the Committee for the Protection of Cultural Property in the Event of Armed Conflict (hereafter the 'Armed Conflict Committee') as a supervisory body with decisive competences regarding the granting, suspension and cancellation of enhanced property (which as outlined later was deemed to replace the weak regime of special protection), as well as supportive functions in the identification process of enhanced property and supervisory tasks for the implementation of the Second Protocol. The Armed Conflict Committee should cooperate with various national and international organizations which cover objectives similar to those of the 1954 Convention and its two subsequent protocols[121]. It was also equipped with core functions in relation to the also newly established Fund for the Protection of Cultural Property in the Event of Armed Conflict, whose function is the provision of financial aid in various cases outlined in Article 29 (1) of the Second Protocol[122]. Unlike under the regime of the Convention for the Protection of the World Cultural and Natural Heritage of 1972 Parties to the Second Protocol are not obliged to contribute to the fund.[123]

Secondly, Chapter 3 of the Second Protocol introduced a new category of protection: the body of enhanced protection with the aim at practically replacing the abortive system of special protection established by the 1954 Convention. The mechanism of the 1954 Convention showed a series of

[120] R. O'Keefe, op. cit. n. 39, at p. 288.

[121] Art 27 (3) Second Protocol lists as examples the International Committee of the Blue Shield (ICBS), the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM) and the International Committee of the Red Cross (ICRC).

[122] Article 29 (1) Second Protocol:

'A Fund is hereby established for the following purposes:

a. to provide financial or other assistance in support of preparatory or other measures to be taken in peacetime in accordance with, *inter alia*, Article 5, Article 10 sub-paragraph (b) and Article 30; and

b. to provide financial or other assistance in relation to emergency, provisional or other measures to be taken in order to protect cultural property during periods of armed conflict or of immediate recovery after the end of hostilities in accordance with, *inter alia*, Article 8 sub-paragraph (a).'

[123] R. O'Keefe, op. cit. n. 39, at p. 293; see also *infra* I.4.3.

flaws and led to only a handful of entries in the International Register of Cultural Property under Special Protection maintained by UNESCO's Director-General.[124] In addition to the complicated institutional mechanism for inclusion on the list which required unanimity of all States Parties, the localization requirements were considered to be the main obstacle to a successful implementation of the special protection category.[125] According to Article 8 (1) (a) of the 1954 Convention the cultural property had to be 'situated at an adequate distance from any large industrial center or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defense, a port or railway station of relative importance or a main line of communication'. The newly established enhanced protective category[126] with its List of Cultural Property under Enhanced Protection (hereafter the 'Enhanced Protection List') tries to overcome the flaws of the special protective regime by renewing the system. In contrast to the 'old' regime and also in contrast to the inclusion on the World Heritage List established by the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage[127] the Enhanced Protection List is basically open to immovable cultural property as well as to movable cultural property. The granting process was transformed into a more institutional one by the installation of the Armed Conflict Committee, a body endowed with the power to make final decisions on inclusion in the Enhanced Protection List. It should also be pointed out that respective decisions of the Armed Conflict Committee require a four-fifths majority instead of unanimity as under the regime of the 1954 Convention. The requirement of localization at an adequate distance from large industrial centers or important military objectives was dropped as well.

[124] J. Hladik, 'The Second Protocol to the 1954 Convention and Progress in International Humanitarian Law', 55 *Museum International* (2003) p. 44 at p. 46.

[125] J. Toman, 'The Hague Convention – A Decisive Step Taken By the International Community', 57 *Museum International* (2005) p. 7 at p. 18; R. O'Keefe, op. cit. n. 39, at p. 144 with reference to points of criticism made by various Member States; *Hladik* mentions further possible obstacles – see Hladik, loc. cit. n. 124, at p. 46.

[126] Article 10 Second Protocol discusses the conditions for *Enhanced Protection,* namely that cultural property:

'(a) is cultural heritage of the greatest importance for humanity;

(b) is protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection;

(c) it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be used.'

[127] See *infra* I.4.2. and I.4.3.

Thirdly, in contrast to the 1954 Convention which for the most part (though not entirely) is only applicable in cases of international armed conflicts[128], the whole of the Second Protocol and not only its 'provisions relating to the respect for cultural property'[129] is applicable in cases of non-international conflicts as well. Thus, as a basic rule, the Second Protocol is equally applicable in both international and internal armed conflicts, an important step forward, as the threats imposed by internal armed conflicts have increased over the past decades[130].

Fourthly, the rudimentary sanction system of the 1954 Convention was reconfigured. Article 28 of the 1954 Convention simply stated that 'the High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present [note: 1954] Convention'. This provision was criticized for its very general wording[131], which did not give any examples of breaches and thus left the interpretation to the discretion of States Parties without providing a framework for its implementation.[132] This led to 'inconsistent decisions due to disparities between countries.'[133] In order to strengthen the implementation of the Second Protocol, new penal aspects concerning the protection of cultural property were established by defining minor offences (other violations[134]), integrating and introducing a group of more dangerous violations (serious violations[135]) and dealing with procedural issues such as extradition[136] and

[128] Article 19 (1) 1954 Convention.

[129] See Article 19 (1) 1954 Convention: 'In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as, a minimum, the provisions of the present Convention which relate to respect for cultural property.'

[130] A. Bos, 'The Importance of the 1899, 1907 and 1999 Hague Conferences for the Legal Protection of Cultural Property in the Event of Armed Conflict', 57 *Museum International* (2005) p. 32 at p. 37.

[131] R. O'Keefe, op. cit. n. 39, at p. 274.

[132] C. Fox, 'The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property', 9 *The American University Journal of International Law & Policy* (1993) p. 225 at p. 248.

[133] J.N. Lehman, 'The Continued Struggle With Stolen Cultural Property: The Hague Convention, The UNESCO Convention, and the UNIDROIT Draft Convention', 14 *Arizona Journal of International and Comparative Law* (1997) p. 527 at p. 535.

[134] Article 21 Second Protocol.

[135] Article 15 Second Protocol defines the acts that are considered serious violations as:

'(a) Making cultural property under enhanced protection the object of an attack;

(b) Using cultural property under enhanced protection or its immediate surroundings in support of military action;

(c) Extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;

(d) Making cultural property protected under the Convention and this Protocol the object of attack;

mutual legal assistance[137]. Francioni calls the newly introduced penal provisions 'the most and detailed provisions on individual criminal liability for serious violations of international norms on the protection of cultural heritage.'[138]

Fifthly, other parts of the 1954 Convention were considered to be formulated in too vague a way, leaving plenty of space for different interpretations by the States Parties. Among those areas the instrument for safeguarding cultural property in peacetime[139] as well as the waiver option concerning general protection during armed conflicts[140] can be pointed out. In relation to the first, the determination of safeguarding measures and the following implementation were left to the discretion of the States Parties. The Second Protocol tried to revive that aspect by giving examples of 'merely indicative and not exhaustive'[141] measures, namely the 'preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate in situ protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property.'[142]

The latter vague formulation which was also heavily discussed in the drafting process of the Second Protocol concerned the waiver option in cases of military necessity regarding the protection of cultural property in armed conflicts[143]. It was criticized that the wording could cause an abuse of the waiver system if States Parties by the means of interpreting the term military necessity in a free way use it 'where it would be more truthful to speak of

(e) Theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.'

The aforesaid chapter also clarifies matters of jurisdiction and requisites of individual criminal responsibility.

[136] Article 18 Second Protocol.

[137] Article 19 Second Protocol.

[138] F. Francioni, 'Beyond State Sovereignty: The Protection of Cultural Heritage As a Shared Interest of Humanity', 25 *Michigan Journal of International Law* (2004) p. 1209 at p. 1216.

[139] Article 3 1954 Convention

[140] Article 4 1954 Convention:

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

(2) The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.'

[141] R. O'Keefe, op. cit. n. 39, at p. 250 citing *CLT/CH/94/608/2,* p.6.

[142] Article 5 Second Protocol.

[143] Article 4 (2) 1954 Convention.

military convenience or even personal convenience,'[144] a threat already known from Article 4 (2) of the 1954 Convention[145]. The compromise which was reached tried to satisfy both the proponents and the opponents of the waiver system. Although the waiver instrument was not abandoned, the Second Protocol provided for a detailed set of requirements for the application of a waiver, trying to restrict and unify the use of that instrument.[146]

Although the Second Protocol has been widely considered to be an important improvement to the 1954 Convention[147], it has to be stressed that the acceptance of the Second Protocol is still rather weak compared to the 1954 Convention. The 1954 Convention currently has 122 States Parties.[148] That number drops to 100 States Parties to the First Protocol[149] and 51 States Parties to the Second Protocol[150] (all numbers as of December 31, 2008). Posner blames the states' attitude towards the protection of cultural property for this decrease. He notes that 'states clearly do not want to take on strong obligations,'[151] illustrating that, as Eagen puts it, the 1954 Convention [note: and its two Protocols] have 'functioned more in a theoretical sense and [have] not rendered [themselves] easily to application

[144] Eagen, loc. cit. n. 66, at p. 426.

[145] See *supra* I.2.1.3.

[146] Article 6 Second Protocol:

'With the goal of ensuring respect for cultural property in accordance with Article 4 of the Convention:

a. a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property when and for as long as:

i. that cultural property has, by its function, been made into a military objective; and

ii. there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective;

b. a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage;

c. the decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise;

d. in case of an attack based on a decision taken in accordance with sub-paragraph (a), an effective advance warning shall be given whenever circumstances permit.'

[147] See e.g. Johnson, loc. cit. n. 118, at p. 132 or R. O'Keefe, op. cit. n. 39, at p. 241.

[148] http://portal.unesco.org/la/convention.asp?KO=13637&language=E&order=alpha (last visited on December 31, 2008).

[149] http://portal.unesco.org/la/convention.asp?KO=15391&language=E&order=alpha (last visited on December 31, 2008).

[150] http://portal.unesco.org/la/convention.asp?KO=15207&language=E&order=alpha (last visited on December 31, 2008).

[151] Posner, loc. cit. n. 117, at p. 421.

when needed.'[152] Still, the Second Protocol obviously increases the chances for a better implementation if it finds more states to join or as R. O'Keefe states, 'a period of consolidation is needed now.'[153]

UNESCO CONVENTION ON THE MEANS OF PROHIBITING AND PREVENTING THE ILLICIT IMPORT, EXPORT AND TRANSFER OF OWNERSHIP OF CULTURAL PROPERTY (1970)[154]

3.1. Background Of The 1970 Convention: Readjusting The Efforts In The Battle Against Illicit Trafficking

Pillaging, theft and illicit export of cultural property have been serious problems for protecting cultural property throughout history, increasing in the colonial area and becoming more and more severe due to the appropriation of cultural property under the Nazi regime. By the 1980s the black-market for stolen or smuggled cultural property had become the 'second [biggest] only to narcotics.'[155]

Controlling the movement of cultural property has been a target for centuries. The first national legislative measures were taken in the nineteenth century mainly by European states[156]. The first international movements on regulating this precarious and enormously complex area were started after World War I by the League of Nations, first alone and later in cooperation with the Office International des Musées[157]. Negotiations and drafting came to a sudden end with the outbreak of World War II. Its course, however, made clear that the need for a legal framework was bigger than ever. Legislation of source states of cultural property alone turned out not to be the best approach, no matter how well-developed it was. International

[152] Eagen, loc. cit. n. 66, at p. 423.

[153] R. O'Keefe, op. cit. n. 39, at p. 360.

[154] If used without any determination, the term *convention* refers to the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* in this chapter.

[155] L.J. Harris, 'From the Collector's Perspective: The Legality of Importing Pre-Columbian Art and Artifacts' in P.M. Messenger, ed., *The Ethics of Collecting Cultural Property* (Albuquerque, University of New Mexico Press 1993) p. 155 at p. 155 citing J.A.R. Nafziger, 'International Penal Aspects of Protecting Cultural Property', 19 *The International Lawyer* (1985) p. 835; Warring, loc. cit. n. 2, at p. 234.

[156] P.J. O'Keefe, *Commentary on the UNESCO 1970 Convention on Illicit Traffic*, 2nd edn. (Leicester, Institute of Art and Law 2007) p. 3.

[157] P.J. O'Keefe 2007, op. cit. n. 156, at p. 3.

cooperation and codification was considered to be the key to solving the problem of illicit traffic of cultural property.

As outlined above[158], the first, but limited provisions dealing with the problem of illicit trafficking of cultural property on an international basis were found in the 1954 Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (First Protocol). The First Protocol covered to some extent the removal and illegal export of cultural property of occupied countries. However, it was very vague in its language and did not cover the problem of illicit trafficking of cultural property comprehensively. Above all it did not regulate the illicit export and import in peacetime, a phenomenon of raised concern.

In 1960, Mexico and Peru, two countries severely hit by exploitation, pushed the discussions about an extensive regulation further within the framework of UNESCO. Two years later UNESCO's Director-General presented a report to the General Conference stressing the importance of adopting an international instrument, leading to the appointment of an experts group for the drafting of preliminary recommendations for a convention in April 1964[159]. Later in the same year the 1964 Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property[160] was adopted by UNESCO. It was considered to be the first step towards drafting the desired convention[161]. Supported by the original initiators of the movement towards a binding international instrument, Mexico and Peru, and other victimized countries the drafting process of the Convention was further promoted. In 1968 a further experts group was installed, this time with the prime task of drafting a convention. The result was an already quite comprehensive draft in 1969[162], which in a revised version based on Member States' comments[163] was to become the basis for the adoption of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer

[158] *Supra* I.2.1.2.

[159] Williams, op. cit. n. 76, at p. 179 referring to UNESCO Doc. 13/PRG/17, Annex 1 (1964).

[160] The text of the 1964 Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property is available online at http://unesdoc.unesco.org/images/0011/001145/114581e.pdf (last visited on December 31, 2008).

[161] P.J. O'Keefe 2007, op. cit. n. 156, at p.5.

[162] UNESCO Doc. SHC/MD/3 Annex; the text is available online at http://unesdoc.unesco.org/images/0006/000686/068688eo.pdf (last visited on December 31, 2008).

[163] UNESCO Doc. SHC/MD/3 Annex 3; the text is available online at http://unesdoc.unesco.org/images/0006/000686/068690eo.pdf (last visited on December 31, 2008).

of Ownership of Cultural Property (hereafter, 1970 Convention)[164] at the 16th General Conference on November 14, 1970[165].

The 1970 Convention became the first international convention to deal with theft and illegal export comprehensively in peacetime and still is the most widely accepted convention covering this area comprehensively with 116 current Member States (as of December 31, 2008)[166].

The drafters of the 1970 Convention had to overcome grave difficulties as they had to merge two opposing interests. On the one hand they had to deal with the driving forces behind the 1970 Convention. These were comparatively poor countries which were rich in cultural property resources and asked for strict international obligations to protect their cultural property. On the other hand, nations with major art markets, such as the United States and several Western European Countries were concerned that licit international art exchange would severely be restrained if the obligations were too tight[167]. As the fight against illicit traffic does not end at the border of the respective nation, but also needs the cooperation of the obtaining country, a compromise had to be found. Compared to the original draft the end product contained mainly obligations for the source nation, import restrictions were cut to an acceptable minimum[168].

3.2. Scope of Application of the 1970 Convention: In Wartime and Peacetime

Although pursuant to the preamble of the 1970 Convention the Convention focuses on protecting both national[169] as well as international interests[170], the general perception is that the source nation's interest in protecting and preserving its cultural property is the main target of the 1970 Convention

[164] The text is available online at http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited on December 31, 2008)

[165] Pursuant to Article 21 of the 1970 Convention the Convention entered into force on April 24, 1972.

[166] See http://portal.unesco.org/la/convention.asp?KO=13039&language=E&order=alpha (last visited on December 31, 2008).

[167] Williams, op. cit. n. 76, at p. 187.

[168] S. Schorlemer, *Internationaler Kulturgüterschutz* [International Protection of Cultural Property] (Berlin, Dunker & Humblot Gmbh 1992) p. 431.

[169] E.g. Preamble (5) 1970 Convention: 'Considering that it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export'.

[170] E.g. Preamble (3) 1970 Convention: 'Considering that the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations'.

with the cultural interchange being only a minor task[171]. Merryman calls this a form of 'cultural nationalism' and contrasts it with the concept of the 1954 Convention which he calls a model of 'cultural internationalism.'[172]

As far as the territorial-personal scope of the 1970 Convention is concerned, the provisions of the Convention apply exclusively to the relationship between States Parties. The States Parties, their authorities and their legislators are the sole addressees of the Convention. Private individuals are not direct addressees of the rights and obligations under the regime of the 1970 Convention[173].

With regard to the period of applicability it should be noted that the 1970 Convention basically does not provide for a general timeframe[174]. Thus, pursuant to Article 28 of the Vienna Convention on the Law of Treaties 1969 the principle of non-retroactivity comes into application[175]. This means that the 1970 Convention binds the respective State Party only after the point of the respective ratification. This aspect caused criticism in the drafting process of the Convention as cultural property illegally exported or imported prior to the entry into force of the 1970 Convention is not protected. Some states, especially those which suffered the most by exploitation of their cultural property, asked for retroactive measures. This approach was, however, opposed by major collecting countries as the introduction of retroactivity 'would have caused international turmoil, as many collections in a large number of states have in the past been acquired by dubious means'[176]. As shown later, UNESCO tried to cope with that issue by the installation of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation[177].

[171] Thorn, op. cit. n. 77, at p. 57.

[172] Merryman 1986, loc. cit. n. 20, p. 842 et seq.; see also Brenner, loc. cit. n. 116, at p. 244 calling it a 'nationalistic approach'.

[173] Thorn, op. cit. n. 77, p. 62 et seq.

[174] Single regulations can be found in Article 7 (a) of the 1970 Convention which refers to cultural property illegally exported or removed after entry into force of this Convention, Article 7 (b) (i) of the 1970 Convention which refers to cultural property stolen after entry into force and Article 7 (b) (ii) of the 1970 with regulations on the restitution of certain cultural property illegally imported after entry into force.

[175] Article 28 Vienna Convention on the Law of Treaties 1969:

'Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party'.

[176] Williams, op. cit. n. 76, at p. 185.

[177] *Infra* I.3.4.

The 1970 Convention recognizes that the 'illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international cooperation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting therefrom.'[178] The protected property (objective scope of application), the cultural property, is defined and outlined in Article 1 of the 1970 Convention. Unlike the exemplary definition for cultural property contained in Article 1 of the 1954 Convention[179] the list of Article 1 of the 1970 Convention is exhaustive[180]. As Prott and P.J. O'Keefe state, 'there is good reason for this distinction. The 1954 definition was designed for general protection of cultural property [only] in times of armed conflict, a principle to which all negotiating parties agreed, and might sensibly be left open to elaboration. The 1970 Convention is dependent on a compromise between exporting and importing states, its definition therefore describes the ambit within which objects are to be selected for expert and import control, thus limiting the kinds of property for which States may be obliged to implement export, and more importantly, reciprocal import controls.'[181]

Williams, referring to Gordon, notes that an object must pass two qualification tests, a 'definitional test' and a 'connection test' to be classed as cultural property under the 1970 Convention[182]. First, each state may and must designate the respective property as being – on religious or secular grounds – of importance for archaeology, prehistory, history, literature, art or science if it falls under one of the categories of Article 1 of the 1970 Convention[183]. It is the general understanding that the term 'specifically

[178] Article 2 1970 Convention.

[179] See *supra* n. 111.

[180] L.V. Prott and P.J. O'Keefe, *Law and the Cultural Heritage Volume 3 – Movement* (London, Butterworth 1989) at p. 729.

[181] Prott and P.J. O'Keefe 1989, op. cit. n. 180, p. 729 et seq.

[182] Williams, op. cit. n. 76, at p. 180 referring to J.B. Gordon, 'The UNESCO Convention on the Illicit Movement of Art Treasures,' 12 *Harvard International Law Journal* (1971) p. 537 at p. 542.

[183] Article 1 1970 Convention:

'For the purposes of this Convention, the term `cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;

(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;

(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries ;

(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;

(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;

designated by each State' (Article 1 of the 1970 Convention) means that it is left to the respective source nation's discretion to decide whether or not a property is of importance in terms of Article 1 of the 1970 Convention[184] ('definitional test'). In addition, designated cultural properties must to some extent be connected to the source nation. In order to be attributable to a State Party, the cultural property must belong to a state's cultural heritage in terms of Article 4 of the 1970 Convention[185]. The categories of cultural property under Article 4 are not necessarily determined by the ownership of the respective property, but rather by the creator's residence or citizenship, its place of finding or by the fact of legal transfer of ownership to the respective state.

Williams also points out that the broad and vague definition of the term cultural property could lead to 'injustice, as it may be read to include any work of art that is in the country lawfully'[186], leaving it to a country's

(f) objects of ethnological interest;

(g) property of artistic interest, such as:

(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);

(ii) original works of statuary art and sculpture in any material;

(iii) original engravings, prints and lithographs ;

(iv) original artistic assemblages and montages in any material;

(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections ;

(i) postage, revenue and similar stamps, singly or in collections;

(j) archives, including sound, photographic and cinematographic archives;

(k) articles of furniture more than one hundred years old and old musical instruments.'

[184] P.J. O'Keefe 2007, op. cit. n. 156, at p. 37; See also Prott 1998 'UNESCO and UNIDROIT', loc. cit. n. 102, at p. 207 for the issue of interdependence of a private owner with state action regarding the declaration of property as *cultural property*; Johnson citing Kote questions the effectiveness of the Convention with regard to poorer countries as 'most of the cultural objects in developing countries are located not in museums but on sites and (are) still unexcavated', thus hard to specifically designate as cultural property under Article 1 1970 Convention – see Johnson, loc. cit. n. 118, at p. 135; going into the same direction I.M. Goldrich, 'Balancing the Need for Repatriation of Illegally Removed Cultural Property with the Interests of Bona Fide Purchasers: Applying the UNIDROIT Convention to the Case of the Gold Phiale', 23 *Fordham International Law Journal* (1999) p. 118 at p. 138.

[185] Article 4 1970 Convention:

'The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State:

(a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory;

(b) cultural property found within the national territory;

(c) cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property;

(d) cultural property which has been the subject of a freely agreed exchange;

(e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.'

[186] Williams, op. cit. n. 76, at p. 188.

discretion whether or not and to which extent it intends to protect property by classifying it as cultural property in the meaning of Article 1 of the 1970 Convention. P.J. O'Keefe, on the other hand, defends the chosen system for giving states which have been heavily victimized by exploitation the chance to protect their cultural property exhaustively[187]. One should not forget one main rationale for the 1970 Convention: the fight against further unlawful export (and import) of cultural property and the need for a system which enables especially poorer countries with rich cultural resources to keep a certain standard of protection for their cultural property in times of globalization.

3.3. The Three Pillars Of The 1970 Convention: Prevention, Restitution And International Cooperation

The structural framework of the 1970 Convention is basically three-fold. Unlike the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995, the 1970 Convention is comprised of extensive provisions on preventive measures mainly addressed at source nations. It also covers restitution related issues and asks for international cooperation to strengthen the protective steps[188].

Prevention of illicit export, import and transfer of ownership is one of the three pillars of the 1970 Convention. The term illicit with regard to export, import and transfer of ownership is defined by Article 3 of the 1970 Convention as means of 'import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this convention by the States Parties thereto'. The decisive criteria for determining whether an import, export or transfer of ownership is illicit is thus the national implementation of the 1970 Convention within the territory of the respective State Party and the related national provisions[189]. In addition, the term illicit also covers the export and transfer of ownership of cultural property under

[187] P.J. O'Keefe 2007, op. cit. n. 156, at p. 37.

[188] Article 15 1970 Convention:

'Nothing in this Convention shall prevent States Parties thereto from concluding special agreements among themselves or from continuing to implement agreements already concluded regarding the restitution of cultural property removed, whatever the reason, from its territory of origin, before the entry into force of this Convention for the States concerned.'

[189] P.J. O'Keefe 2007, op. cit. n. 156, at p. 43; A.F.G. Raschèr, et al., *Cultural Property Transfer* (Zürich, Schulthess Juristische Medien AG 2005) at p. 18.

compulsion arising directly or indirectly from the occupation of a country by a foreign power.[190]

Most preventive obligations are addressed at the source state. They include several mechanisms. Each State Party has to introduce a 'national service' to safeguard its cultural heritage. Its tasks cover a wide range of responsibilities including the installation of national inventories of protected property and contributing to draft laws to secure cultural property[191]. States Parties also have to introduce a special certificate for declaring the export of an authorized property and at the same time the State Parties must take measures to ensure that unauthorized property will not be exported[192]. States Parties also have to introduce penal sanctions for cases of illicit export or import[193] aimed at preventing cultural property from being exported/imported without regard to national export/import provisions.

Preventive measures also affect importing States Parties. Under the regime of the 1970 Convention the prohibition of illicit imports is, however, limited as (only) museums and similar institutions of a State Party must be prevented from acquiring cultural property illegally exported from a source nation and – in addition – only so far as it is 'consistent with national legislation' [194], a clause included at the request of the United States so that the section would be interpreted as 'to confine the effect of this measure to museums whose acquisition policies are controlled by the State'[195]. The exact scope of this provision, especially with regard to the question of what kind of museums and institutions are affected, has been subject to discussions and is still unresolved[196].

Pursuant to Article 7 (b) (i) of the 1970 Convention States Parties also have to provide for the prohibition of 'the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this convention after the entry into force of this

[190] Article 11 1970 Convention.
[191] Article 5 1970 Convention.
[192] Article 6 1970 Convention.
[193] Article 8 1970 Convention.
[194] Article 7 (a) 1970 Convention:
'The States Parties to this Convention undertake:
(a) To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States.'
[195] P.J. O'Keefe 2007, op. cit. n. 156, at p. 56.
[196] See e.g. P.J. O'Keefe 2007, op. cit. n. 156, at p. 57.

Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution.' This provision is a crucial one as it is the basis for an aspect within the second pillar of the 1970 Convention, that being the pillar of restitution of illicitly exported or imported cultural property. Pursuant to Article 7 (b) (ii) the obtaining State Party has 'at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property.' It has been noted that this important provision does not apply in the events of illicit excavations or property stolen from a private home. Moreover, only inventoried property is protected[197].

The wording of Article 7 (b) (ii) with regard to compensation payments has been criticized for being too vague as it stipulates that the 'requesting State shall pay just compensation to an innocent purchaser or to a person who has [a] valid title to that property.' Attempts during the drafting process to define the term just compensation by giving examples, such as 'payment of fair compensation corresponding to the purchase price'[198] were not successful. According to P.J. O'Keefe, the reason for using a quite unspecified term instead of providing for a definition in the text of the convention was the fact that in various nations, the amount of compensation payments is more or less determined by the courts, not being restricted by the price originally paid[199]. Williams argues that the rationale for not incorporating a precise definition might have been 'due to the fact that many states would be unable to pay the compensation.'[200] Still, complications remain as determining the amount of just compensation is subject to national legislation or court judgments and thus could lead to unjustified divergence not intended by the drafters of the 1970 Convention.

One more contentious issue of the 1970 Convention, especially with regard to the implementation of the restitution related provision of its Article 7 (b) (ii), is the question of legal security of a bona fide purchaser of cultural

[197] R.H. Villanueva, 'Free Trade and the Protection of Cultural Property: The Need for an Economic Incentive to Report Newly Discovered Antiquities', 29 *George Washington Journal of International Law & Economics* (1995) p. 547 at p. 553 et seq.

[198] Article 10 (d) of the 1969 draft (first draft) (the text is available online at http://unesdoc.unesco.org/images/0006/000686/068688eo.pdf) (last visited on December 31, 2008).

[199] P.J. O'Keefe 2007, op. cit. n. 156, at p. 65 with reference to D.F. Cameron, *An Introduction to the Cultural Property Export and Import Act* (Ottawa, Department of the Secretary of State 1980) at p. 22.

[200] Williams, op. cit. n. 76, at p. 189.

property. Pursuant to this provision a bona fide purchaser, or – in the wording of the 1970 Convention – an 'innocent purchaser' or a 'person who has [a] valid title to that property'[201] – can be the addressee of restitution claims without any time limit. Not only the lack of a time limit, but also the unrestricted restitution obligation are said to interfere with national private laws of many countries.[202] It will be interesting to see to which extent Article 7 (b) (ii) of the 1970 Convention will be transformed into national law especially by States Parties which in their national legislation strengthen the position of bona fide purchasers.

In addition to the before-mentioned recovery provision contained in Article 7 (b) (ii) of the 1970 Convention, Article 13 of the 1970 Convention[203] provides for further steps in relation to restitution, but only in a limited way, as the implementation of that article is subject to national legislation (arg. 'the States Parties to this Convention also undertake, consistent with the laws of each State').

The third pillar of the 1970 Convention covers the aspects of international cooperation[204]. It is hoped that through international cooperation, e.g. in the form of additional multilateral or bilateral treaties, the protection of cultural property can be fostered, as national regulations alone do not suffice to fight illicit export and import comprehensively. By the means of international collaboration delicate issues of recovery can be solved more effectively, as history has shown.[205]

---

[201] In the original draft of 1969 the term *bona fide* was used, but later on changed to the final wording; see Articles 7 (g) and 10 (d) 1969 draft and P.J. O'Keefe 2007, op. cit. n. 156, at p. 67 et seq. for further information.

[202] E.g. Thorn, op. cit. n. 77, at p. 65 for Germany; Prott 1998 'UNESCO and UNIDROIT', loc. cit. n. 102, at p. 212 for France and Italy.

[203] Article 13 1970 Convention:

'The States Parties to this Convention also undertake, consistent with the laws of each State:

(a) To prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property;

(b) to ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner;

(c) to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners ;

(d) to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.'

[204] See esp. Articles 9 and 15 1970 Convention.

[205] See Williams, op. cit. n. 76, at p. 186 listing the United States – Mexico Treaty of 1970 as an example for a 'concrete measure'; see also K. Pomian, 'Cultural Property, National Treasures, Restitution', 57 *Museum International* (2005) p. 71 at p. 73 referring to the United States – Peru Treaty of 1981.

3.4. Excursus: Intergovernmental Committee For Promoting The Return Of Cultural Property To Its Countries Of Origin Or Its Restitution In Case Of Illicit Appropriation And The Fund Of The Intenational Committee

Not too long after the adoption of the 1970 Convention one of the shortcomings of the Convention, its lack of retroactivity, made UNESCO think about taking further steps in order to facilitate the return of cultural property lost either due to foreign or colonial occupation, or through illicit traffic before the entry into force of the 1970 Convention. In 1976, a committee of experts under the auspices of UNESCO discussed several options resulting in the recommendation to 'set up an Intergovernmental Committee with the task of seeking ways and means of facilitating bilateral negotiations for the restitution of cultural property to the countries having lost such property as a result of colonial or foreign occupation.'[206]

In 1978, at the 20th Session of UNESCO's General Conference the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (hereafter the 'ICPRCP') was introduced[207]. Created as a permanent advisory intergovernmental body consisting of 22 members elected from UNESCO Member States, it was established primarily to promote the return of cultural property. One of its tasks is also to assist in the implementation process of the 1970 Convention by strengthening the awareness of the importance of restitution of cultural property to its original country[208]. The ICPRCP is considered to be a helpful international support in the area of protection and restitution of cultural property.[209]

---

[206] J. Greenfield, *The Return of Cultural Treasures* (Cambridge, Cambridge University Press 1995) at p. 190. Also Maria Cerva Vallterra, 'La lutte internationale contre le traffic illicite des biens culturels et la convention UNESCO de 1970; l'expérience trente-cinq ans après', in Nafziger and Scovazzi, op. cit. n. 10 pp. 559-600, at p. 593.

[207] UNESCO resolution 20 C4/7.6/5; the text is available online at http://unesdoc.unesco.org/images/0011/001140/114032e.pdf#page=92 (last visited on December 31, 2008).

[208] Article 4 of the Statutes (the text is available online at http://unesdoc.unesco.org/images/0014/001459/145960e.pdf - last visited on December 31, 2008):

'The Committee shall be responsible for:

… 2. promoting multilateral and bilateral cooperation with a view to the restitution and return of cultural property to its countries of origin;

… 4. fostering a public information campaign on the real nature, scale and scope of the problem of the restitution or return of cultural property to its countries of origin;

5. guiding the planning and implementation of UNESCO's programme of activities with regard to the restitution or return of cultural property to its countries of origin; …'

[209] UNESCO, *Promote the Return or the Restitution of Cultural Property* (UNESCO information kit on the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation available online at http://unesdoc.unesco.org/

As an important step to facilitate the effective functioning of the ICPRCP, UNESCO's General Conference at its 30th Session in 1999 set the frame for the Fund of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (hereafter the 'Restitution Fund')[210]. The main target of the Restitution Fund, which is fed by voluntary state payments and private donations, is supporting national projects aimed at the return or restitution of cultural property and the fight against illicit traffic in cultural property, especially by co-financing the necessary infrastructure. It can be expected that this will at least indirectly contribute to the poorer states' attempts to successfully implement the 1970 Convention.

CONVENTION FOR THE PROTECTION OF THE WORD CULTURAL AND NATURAL HERITAGE (1972)[211]

4.1. Background Of The 1972 Convention: Combining Treasures Of Culture And Nature

The two UNESCO Conventions on the protection of cultural heritage adopted so far, the 1954 Convention and the 1970 Convention, were limited in their effects as their scope of application covered only a small spectrum of threats for cultural heritage. The 1954 Convention referred solely to risks emerging from armed conflicts and the 1970 Convention covered only the issue of illicit trafficking of cultural property. The developments after World Wars I and II, however, displayed the need for further, more comprehensive international regulations as industrialization, economic and social advancements intensified the already existing natural causes for destruction of natural and cultural heritage.

Two examples for the new international awareness of those threats often mentioned in connection with the Convention for the Protection of the World Cultural and Natural Heritage of 1972 are the construction of the

images/0013/001394/139407eb.pdf; last visited on December 31, 2008) at p. 9 with examples of successful restitution supervisions.

[210] UNESCO General Conference Resolution 27 at its 30th Session, 1999 (the text is available online at http://unesdoc.unesco.org/images/0011/001185/118514e.pdf#page=68; last visited on December 31, 2008).

[211] If used without any determination, the term *convention* refers to the *Convention for the Protection of the World Cultural and Natural Heritage* in this chapter.

Aswan High Dam in Egypt in the late 1950s[212] and the efforts of the world community to rescue Venice from floods in the middle of the 1960s[213]. In both cases the international protection campaigns launched by UNESCO led to a quick and successful response by the world community which donated huge amounts of money for safeguarding the endangered objects. It became obvious that the protection of mankind's heritage required strong international cooperation among states, preferable coordinated by a central authority.

In 1965 the idea of a comprehensive regime of protection of world heritage combining two separate movements, the safeguarding of man-built cultural heritage and the preservation of natural heritage was for the first time expressed by the United States during a White House Conference. It asked for an international 'trust for the world heritage that would be responsible to the world community for the stimulation of international cooperative efforts to identify, establish, develop and manage the world's superb natural and scenic areas and historic sites for the present and future benefits of the entire world citizenry.'[214]

Around the same time various bodies started with the creation of drafts, covering only partial aspects, such as the protection of cultural property or the preservation of nature. The two most prominent drafts were UNESCO's draft treaty entitled International Protection of Monuments, Groups of Buildings and Sites of Universal Value (hereafter the 'Universal Value draft treaty') dealing with cultural facets and a draft instrument based on nature aspects prepared by the International Union for Conservation of Nature (hereafter the 'IUCN and IUCN draft respectively')[215]. In 1971 both drafts were submitted to the Intergovernmental Working Group on Conservation (IWGC) installed by the United Nations General Assembly to carry out research in the area of human environment. It suggested combining both drafts into a unified instrument to cover the issue of world heritage

[212] The construction of the Aswan High Dam in Egypt constituted a big threat for the world-renowned 'Abu Simbel Temples.' As the construction project could not be stopped, UNESCO initiated an unprecedented campaign to move and thus rescue the archaeological highly valuable objects.

[213] F. Francioni, 'The Preamble', in F. Francioni and F. Lenzerini, eds., *The 1972 World Heritage Convention – A Commentary* (Oxford, Oxford University Press 2008) p. 11 at p. 12 et seq.; UNESCO World Heritage Centre, *World Heritage Information Kit* (Paris, UNESCO World Heritage Centre 2005) p. 7. As a concise overview of the Convention, Wahid Ferchichi, 'La convention de l'UNESCO concernant la protection du patrimoine mondial culturel et naturel', in Nafziger and Scovazzi, op. cit. n. 10, pp. 455-486.

[214] Francioni 2008 'Preamble', loc. cit. n. 213, p. 15 et seq.

[215] Founded in 1948, the International Union for the Conservation of Nature and Natural Resources (IUCN; previously World Conservation Union) with its headquarters in Gland, Switzerland, is an international organization with the aim at natural resource conservation.

protection comprehensively. Sent back to UNESCO, an intergovernmental experts group installed by UNESCO revised the Universal Value draft treaty, combining it with provisions of the IUCN draft and also taking into account the World Heritage Trust Convention draft, elaborated by the United States as an answer to the Universal Value draft treaty. The revision resulted in a combined, comprehensive draft which – supported by the Declaration of the United Nations Conference on the Human Environment (also known as 1972 Stockholm Declaration)[216] – was adopted by the UNESCO General Conference in a slightly altered version as the Convention for the Protection of the World Heritage and Natural Heritage (hereafter the '1972 Convention') on November 16, 1972. The 1972 Convention is currently the most popular UNESCO convention on the protection of cultural (and natural) heritage with 186 States Parties (as of December 31, 2008)[217].

4.2. Scope Of Application Of The 1972 Convention And The Concept Of Outstanding Universal Value

The 1972 Convention paved the way for a comprehensive protection movement for world heritage basically by two ideas. First it combined two areas which prima facie do not seem to have much in common - culture and nature, with the aim of protecting and safeguarding both by the means of a single document. Secondly, it took the issue of cultural property protection to a higher level, as it introduced a regime of world heritage. This term unifies cultural and natural aspects and demonstrates that both in their own magnitude should be protected for the sake of 'mankind as a whole'[218] on an international level, thus combining both in one legal instrument. With cultural and natural heritage reaching the international stage, Lenzerini calls the 1972 Convention a convention 'founded on an eclectic approach … combining the co-existing interests of single States to the protection of their own national heritage and those of the international community as a whole to the safeguarding of cultural (and natural) treasures – irrespective of their

[216] The text of the 1972 Stockholm Declaration is available online at http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503 (last visited on December 31, 2008).

[217] The full list of States Parties is available online at http://portal.unesco.org/la/convention.asp?KO=13055&language=E&order=alpha (last visited on December 31, 2008).

[218] See also Preamble (6) 1972 Convention.

origin and/or location – as irreplaceable expressions of the beauty and variety of the human genius and of the magnificence of the world.'[219]

What was in the beginning considered to be merely a matter of property from a legal perspective changed drastically with the help of the 1972 Convention. Francioni felicitously states that 'heritage has become a part of an international movement that aims at transcending the narrow concept of cultural property as the object of private rights of a predominantly economic nature. This movement emphasizes the collective and public character of heritage and its representative value of the totality of creative expressions, practices and spaces that a given community recognizes as part of its cultural tradition and identity.'[220] Prott and P.J. O'Keefe also point out the new approach by stating that 'the term heritage … also embodies the notion of inheritance and handing on,'[221] whereas the term cultural property rather reflects mere legal ideas. Yusuf argues that the use of the term heritage instead of property has 'a number of positive and forward-looking implications'[222] which he classifies in three groups: firstly, it leads to an obligation to preserve the respective objects for future generations; secondly, it [note: basically] 'widens the scope of the subject matter to be protected, opening it up to the possibility of encompassing not only physical elements of culture, but also to its intangible elements, as well as the relationship of humans to cultural objects;'[223] finally, 'as opposed to property, the word 'heritage' implies the existence of a value which potentially transcends national boundaries, may be of interest to humanity as a whole, and may thus deserve protection at the international level.'[224]

The central question which comes to mind is the question of defining the protected objects. What does the 1972 Convention understand under the terms cultural heritage and natural heritage, which together form the world heritage, the objective scope of application of the 1972 Convention? One

[219] F. Lenzerini, 'The Relationship between the Convention on the Diversity of Cultural Expressions and the 1972 World Heritage Convention', in T. Kono, J. Wouters, S. Van Uytsel, eds., *The UNESCO Convention for the Promotion and Protection of Diversity of Cultural Expressions* (Antwerp, Intersentia, forthcoming [2009])

[220] F. Francioni, 'The 1972 World Heritage Convention: An Introduction', in F. Francioni and F. Lenzerini, eds., *The 1972 World Heritage Convention – A Commentary* (Oxford, Oxford University Press 2008) p. 3 at p. 4.

[221] L.V. Prott and P.J. O'Keefe, ''Cultural Heritage' or 'Cultural Property'?', 1 *International Journal of Cultural Property* (1992) p. 307 at p 307.

[222] A.A. Yusuf, 'Article 1– Definition of Cultural Heritage', in F. Francioni and F. Lenzerini, eds., *The 1972 World Heritage Convention – A Commentary* (Oxford, Oxford University Press 2008) at p. 27.

[223] Yusuf 2008, loc. cit. n. 222, at p. 27.

[224] Yusuf 2008, loc. cit. n. 222, at p. 27.

might think that the answer is given by the explanations of its Articles 1 and 2. They go as follows:

Article 1 1972 Convention:

'for the purposes of this Convention, the following shall be considered as 'cultural heritage':

monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science ;

sites: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.'

Article 2 1972 Convention:

'For the purposes of this Convention, the following shall be considered as 'natural heritage':

natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;

geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.'

Especially with reference to the 'definition' of cultural heritage by Article 1 of the 1972 Convention one should be aware of the fact that this term is not exclusive in the sense that it covers every possible facet of what can be called cultural heritage in a broad sense. It does not refer to mere movable objects; neither does it refer to mere intangible heritage. In addition, taking a closer look at the cited provisions one can see that the terms cultural heritage and natural heritage are not exactly defined, but rather interact with another

term first introduced by the 1972 Convention, namely the attribute of having an outstanding universal value to function as a further limitation to the scope of application. This term can also be found in other places of the Convention, above all in its Preamble, where it says that 'it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding universal value'[225] and that 'it is essential for this purpose to adopt new provisions in the form of a convention establishing an effective system of collective protection of the cultural and natural heritage of outstanding universal value.'[226]

Although being the core factor for determining whether a potential object falls under the protectoral regime of the 1972 Convention, the term outstanding universal value is left undefined by the Convention.

The link which leads to a clarification of this impasse is to be found in Article 11 of the 1972 Convention. Its fifth Paragraph grants the decisive competences of defining the term to the World Heritage Committee[227] by stipulating that it 'shall define the criteria on the basis of which a property belonging to the cultural or natural heritage may be included in either of the lists mentioned in paragraphs 2 [note: the World Heritage List][228] and 4 [note: the List of World Heritage in Danger][229] of this article.' Pursuant to this provision the World Heritage Committee[230] has elaborated a complex set of criteria in the course of its WHC Operational Guidelines[231], which it revises and further develops periodically, and by doing this, also takes into account recent developments and possible balances.

As a basic principle the World Heritage Committee defines outstanding universal value as being of 'cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity.'[232] To justify such a classification, a potential object must – first of all – meet at least one of ten criteria introduced by Chapter II.D of the WHC Operational Guidelines[233]. Combined with the WHC Operational Guidelines of 2005 the

[225] Preamble (7) 1972 Convention.
[226] Preamble (8) 1972 Convention.
[227] See *infra* I.4.3. for its functions.
[228] See *infra* I.4.3. for details.
[229] See *infra* I.4.3. for details.
[230] See *infra* I.4.3. for details.
[231] See *infra* I.4.3. for details.
[232] Paragraph 49 WHC Operational Guidelines.
[233] Paragraph 77 WHC Operational Guidelines:
'(i) represent a masterpiece of human creative genius;

ten criteria are now applicable to both groups, to cultural heritage as well as to natural heritage[234]. Especially with regard to the first group, the set of criteria had to be as precise as possible in order to provide for an objective framework for its application. At the same time, however, it also had to be as diverse as possible in order to cope with an inherent issue: although heritage as defined by the 1972 Convention is an expression of mankind as a whole, the fact that every culture, influenced by various factors such as regional, epochal and developmental aspects, is different and unique must not be ignored,

One can see that the meaning, scope and wording of the criteria has changed over the last 31 years since their first adoption by the WHC Operational Guidelines 1977. Thus – with regard to its wording – the unrevised constitutional framework of Articles 1 and 2 of the 1972 Convention has been given a new dimension in trying to adopt to the before-mentioned diversity and current needs and responding to imbalances which have arisen due to the implementation of the Convention[235]. It has become an important

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

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

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

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

(vi) be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance.

(note: The Committee considers that this criterion should preferably be used in conjunction with other criteria);

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

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

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

(x) contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of outstanding universal value from the point of view of science or conservation.'

[234] A complete listing of the first two sets of criteria of the WHC Operational Guidelines of 1977 can be found in UNESCO, 'The World Heritage Convention' (Paris, UNESCO Publishing 1980) p. 22 or at http://whc.unesco.org/archive/out/opgu77.htm (last visited on December 31, 2008).

[235] See e.g. Yusuf 2008, loc. cit. n. 222, p. 23 et seq., especially Table 1 at p. 38 et seq.; K. Whitby-Last, 'Article 1 – Cultural Landscapes', in F. Francioni and F. Lenzerini, eds., *The 1972 World Heritage Convention – A Commentary* (Oxford, Oxford University Press 2008) p. 51 et seq.; C. Redgwell, 'Article 2 – Definition of Natural Heritage, in F. Francioni and F. Lenzerini, eds., *The 1972 World Heritage*

tool for a flexible application of the fixed scaffolding provided by the Convention.

In the early stages of its application the set of criteria clearly led to an over-representation of European sites, historic towns and Christian monuments[236]. Ten years after the implementation of the set of criteria, the World Heritage Committee installed an experts group to find answers to the imbalance of inscriptions on the World Heritage List[237]. As a result of the final report, the Global Strategy for a Representative, Balanced and Credible World Heritage List[238] was adopted by the committee in 1994, its underlying idea further developed by the Budapest Declaration on World Heritage (also known as Budapest Declaration)[239].

The basic idea of the new movements was the wish to strengthen the credibility of the concept of World Heritage by adopting a better-balanced system of incorporation and encouraging less-represented States Parties to contribute to the inscription process by providing more – and above all more promising – nominations. The scope of application of the criteria set was expanded and shifted to meet a wider spectrum of cultural and natural sites, according to Yusuf constituting 'a clear move away from a purely monumental view of cultural heritage of humanity towards a more anthropological, comprehensive, and diversified conception of the wealth and diversity of human cultures,'[240] or – in Pressouyre's words – leading to a 'significant change in our concept of heritage. By finally questioning the idea inherited from ancient times and firmly rooted in European culture of what a masterpiece is, the World Heritage Committee opened the way to a more balanced picture of humanity's heritage.'[241] Francioni comes to the conclusion that the implementation process by the World Heritage Committee is based on two ideas: firstly, 'the ability of the property to exercise universal appeal by virtue of its exceptional qualities, including its authenticity, its resonance in terms of human experience, and its capacity to

Convention – A Commentary (Oxford, Oxford University Press 2008) p. 63 et seq., especially Table 2 at p. 69 et seq.'

[236] H. Cleere, 'The Concept of 'Outstanding Universal Value' in the World Heritage Convention', 1 *Conservation and Management of Archaeological Sites* (1996) p. 227, especially Table 1 at p. 229.

[237] See *infra* I.4.3.

[238] See Chapter II.B of the WHC Operational Guidelines and http://whc.unesco.org/en/globalstrategy (last visited on December 31, 2008) with links to the experts group reports.

[239] The text of the Budapest Declaration is available online at http://whc.unesco.org/en/budapestdeclaration (last visited on December 31, 2008).

[240] Yusuf 2008, loc. cit. n. 222, at p. 37.

[241] L. Pressouyre, 'The Past is not Just Made of Stone', 53 *The UNESCO Courier* (December 2000) p. 18 at p. 19.

interpret in an exceptional manner one of the eternal themes of the human condition, such as the mystery of life, the struggle for survival, death, the search for beauty;' [242] secondly, 'the concept of universality must be linked to the capacity to represent the diversity of the cultures and traditions of the world, both in space and time dimensions. It requires a careful selection of heritage sites, so as to provide a truthful and complete picture of the works of humanity in the great variety of their expressions.'[243]

The World Heritage Committee also tried to further strengthen the interaction between the two cornerstones of the 1972 Convention, the two categories of cultural and natural heritage, by creating a new subcategory of the first one in 1992. This was the category of cultural landscapes[244], representing the 'combined works of nature and man,'[245] being the place 'in which culture and nature inseparably come together'[246] as it is 'impossible to consider nature and culture as two separate entities.'[247]

Meeting the requirements set forth by the set of criteria and thus showing an outstanding universal value might be the most important, but yet not final step to qualify a prospective object as world heritage under the regime of the 1972 Convention. In addition, cultural objects also have to undergo an 'authenticity test', introduced by the International Charter for the Conservation and Restoration of Monuments and Sites (the Venice Charter - 1964) adopted by the second International Congress of Architects and Technicians of Historic Monuments in 1965 and developed by the Nara Document on Authenticity[248] in 1994, both categories an 'integrity test'[249]. While the first one is an important factor for determining whether or not a nominated cultural heritage site is genuine and thus not a replica or copy of the original, the latter one is 'a measure of the wholeness and intactness of the natural and/or cultural heritage and its attributes.'[250] Both are in so far complementary as 'authenticity is related to heritage as a qualifier, while

[242] Francioni 2008 'Preamble', loc. cit. n. 213, at p. 21.
[243] Francioni 2008 'Preamble', loc. cit. n. 213, at p. 21.
[244] See Paragraph 47 WHC Operational Guidelines.
[245] Paragraph 47 WHC Operational Guidelines; for a detailed analysis of this subgroup refer to Whitby-Last, loc. cit. n. 235, p. 51 et seq.
[246] S.I. Dailoo and F. Pannekoek, 'Nature and Culture: A New World Heritage Context', 15 *International Journal of Cultural Property* (2008) p. 25 at p. 27.
[247] Dailoo and Pannekoek, loc. cit. n. 246, at p. 27.
[248] The text of the Venice Charter can be obtained at http://www.international.icomos.org/charters/venice_e.htm (last visited on December 31, 2008). The text of the Nara Document on Authenticity is available online at http://whc.unesco.org/archive/nara94.htm (last visited on December 31, 2008); see also Paragraphs 79 et seq. WHC Operational Guidelines for details.
[249] See Paragraphs 87 et seq. WHC Operational Guidelines for details.
[250] See Paragraph 88 WHC Operational Guidelines for details.

integrity is referred to the identification of the functional and historical condition.'[251]

4.3. Legal Framework And Mechanism Of The 1972 Convention: The Creation Of A Model Convention

The 1972 Convention as shown above is very broad in its scope of application by combining for the first time two areas of protection which have so far been considered separate objects of interest: cultural heritage and natural heritage, forming together the world heritage. For the purposes of a comprehensive regulation with supervision and control of the implementation of its goals, the 1972 Convention introduced a sophisticated and complex mechanism of instruments. It is therefore referred to as being 'essentially operational in character'[252] and at the same time 'designed to complement, to aid and to stimulate national efforts rather than compete with or replace them.'[253] The 1972 Convention neither aims at unifying its States Parties' national legal provisions nor does it introduce a framework which regulates matters of ownership of the respective objects. Thus, it should be noted that the 1972 Convention, though providing for an international framework of protection and safeguarding, nevertheless gives full respect to national sovereignty and for private property rights provided by state legislation over the objects protected under the regime of the 1972 Convention, thus striking 'a delicate balance between national sovereignty and international intervention.'[254]

The 1972 Convention also does not contain any provision dealing with the issue of illicit trafficking of cultural heritage. This might be primarily explained by the fact that it is aimed at the protection of immovable objects as described in its Article 1. It should, however, not be ignored that cultural heritage can be 'de facto man-made,'[255] making it a potential target for thefts and illicit trafficking in general. This shows the interdependence with other conventions in the area of cultural heritage protection, above all the 1970 Convention and the 1995 UNIDROIT Convention or how Carducci

[251] J. Jokilehto, 'World Heritage: Defining the Outstanding Universal Value', 2 *City & Time* (2006) p. 1 at p. 3.

[252] Ambio, 'How the World Heritage Convention Works', 12 *Ambio* (1983) p. 140 at p. 140.

[253] Ambio, loc. cit. n. 252, at p. 140.

[254] Ch. Cameron, 'The Strengths and Weaknesses of the World Heritage Convention', 28 *Nature & Resources* (1992) p. 18 at p. 18.

[255] G. Carducci, 'The 1972 World Heritage Convention in the Framework of Other UNESCO Conventions on Cultural Heritage', in F. Francioni and F. Lenzerini, eds., *The 1972 World Heritage Convention – A Commentary* (Oxford, Oxford University Press 2008) p. 363 at p. 370.

puts it: 'this [note: the lack of the 1972 Convention of providing for a restitution mechanism] explains the crucial importance of other international instruments each time that preventive measures … fail to prevent theft and export of cultural objects and these objects are then identified abroad.'[256]

Key factors for the implementation of the 1972 Convention and indispensable bodies for the protection of the World Heritage are the States Parties. The Convention defines several rights and obligations of the States Parties. Obligations are basically twofold: firstly, States Parties have to take every necessary step to guarantee the protection of World Heritage situated in their territories and are encouraged to protect their national heritage in general on a national level[257]. This obligation comprises various aspects, such as the implementation of a national legal framework, carrying out studies to identify possible dangers to the heritage located in the territory of the respective State Party or establishing practical services for the preservation of that heritage. Important obligations in this process are the duties of the States Parties to identify potential objects for the inscription on the World Heritage List[258] and report obligations with regard to the

[256] Carducci 2008, loc. cit. n. 255, at p. 371.

[257] See Article 4 1972 Convention:

'Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.'

Article 5 1972 Convention:

'To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country:

(a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;

(b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation, and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;

(c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;

(d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and

(e) to foster the establishment or development of national or regional centers for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.'

[258] Article 11 (1) 1972 Convention: 'Every State Party to this Convention shall, in so far as possible, submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the list provided for in paragraph 2 of this Article. This inventory, which shall not be considered exhaustive, shall include documentation about the location of the property in question and its significance.'

measures taken for the protection of the heritage and in implementing the 1972 Convention[259].

On the other hand, the 1972 Convention also recognizes that international cooperation is necessary for making the convention work. Thus, it incorporates several obligations for the States Parties on an international level. They include contributions to the Fund for the Protection of the World Cultural and Natural Heritage (hereafter the 'World Heritage Fund')[260], the duty to refrain from taking 'any deliberate measures which might damage directly or indirectly the cultural and natural heritage ... situated on the territory of other States Parties,'[261] as well as the obligation to offer 'their help in the identification, protection, conservation and presentation of the cultural and natural heritage … if the States on whose territory it is situated so request.'[262]

The institutional heart of the 1972 Convention is formed by the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage (commonly referred to as World Heritage Committee). The World Heritage Committee[263], which is comprised of 21 States Parties' representatives elected by the General Assembly of States Parties to the Convention[264] for terms up to six years, is the central authority in the framework of the 1972 Convention. The main tasks of the World Heritage Committee include the implementation of the Convention, initiating and coordinating international cooperation in conservation matters with relation

[259] Article 29 1972 Convention:

'(1) The States Parties to this Convention shall, in the reports which they submit to the General Conference of the United Nations Educational, Scientific and Cultural Organization on dates and in a manner to be determined by it, give information on the legislative and administrative provisions which they have adopted and other action which they have taken for the application of this Convention, together with details of the experience acquired in this field.

(2) These reports shall be brought to the attention of the World Heritage Committee.'

[260] Article 15 1972 Convention:

'(1) A Fund for the Protection of the World Cultural and Natural Heritage of Outstanding Universal Value, called 'the World Heritage Fund', is hereby established.

(3) The resources of the Fund shall consist of:

(a) compulsory and voluntary contributions made by the States Parties to this Convention,'

[261] Article 6 (3) 1972 Convention.

[262] Article 6 (2) 1972 Convention.

[263] The text of its current Rules of Procedure can be found at http://whc.unesco.org/pg.cfm?cid=223 (last visited on December 31, 2008).

[264] The General Assembly of States Parties to the Convention meets during the session of the General Conference of UNESCO. Its main functions are the election of members of the *World Heritage Committee* pursuant to Article 8 (1) 1972 Convention and the determination of the uniform percentage of contributions to the *World Heritage Fund* applicable to all States Parties pursuant to Article 16 (1) 1972 Convention.

to cultural heritage[265] and the definition of the use of the World Heritage Fund[266] as well as the allocation of financial aid to States Parties on their request[267]. The World Heritage Committee is also well-known for its strong competences in relation to the inscription and deletion of potential cultural and natural sites on the World Heritage List, being the basis for comprehensive protection under the regime of the 1972 Convention, and the List of World Heritage in Danger, 'a list of the property appearing in the World Heritage List for the conservation of which major operations are necessary and for which assistance has been requested under this Convention.'[268] The World Heritage Committee has developed guidelines for the implementation of the 1972 Convention, providing certain criteria for the inscription of objects to the two lists as well as provisions for international assistance. This 'bible of World Heritage' entitled Operational Guidelines for the Implementation of the World Heritage Convention (hereafter the 'WHC Operational Guidelines') is revised on a regular basis[269].

The process of inscription on the World Heritage List can be divided into four stages.

Firstly, pursuant to Article 11 of the 1972 Convention States Parties shall create, update and submit inventories with the inclusion of potential heritage objects to the World Heritage Committee. Pursuant to Paragraph 65 WHC Operational Guidelines States Parties are requested to submit their respective list, also known as the tentative list[270], to the Secretariat to the World Heritage Committee (hereafter the World Heritage Centre)[271] 'at least one year prior to the submission of any nomination' and are also 'encouraged to re-examine and re-submit their tentative list at least every ten years.'[272] Creation and submission of tentative lists is important as – for the purpose of

[265] In this area, the *World Heritage Committee* is supported by one of its three advisory bodies, the '*International Centre for the Study of the Preservation and Restoration of Cultural Property*' (*ICCROM*) with its headquarters in Rome.

[266] Article 15 (4) 1972 Convention.

[267] Article 13 (6) 1972 Convention.

[268] Article 11 (4) 1972 Convention.

[269] The current version of the WHC Operational Guidelines dated January 2008 can be found at http://whc.unesco.org/archive/opguide08-en.pdf (last visited on December 31, 2008).

[270] Chapter II.C WHC Operational Guidelines.

[271] Established in 1992, the *World Heritage Centre* is the current body which functions as the *Secretariat* of the *World Heritage Committee*. It is the link between the States Parties, the advisory bodies and *World Heritage Committee* covering various tasks in the implementation process of the 1972 Convention and described in Chapter I.F of the WHC Operational Guidelines.

[272] The complete tentative lists can be found at http://whc.unesco.org/en/tentativelists/state=vu (last visited on December 31, 2008).

inscription on the World Heritage List – the World Heritage Committee only examines potential sites which are inscribed on the national tentative lists.

Secondly, the States Parties can choose objects from their tentative lists and nominate them for inscription on the World Heritage List. Annex 3 to the WHC Operational Guidelines provides for an extensive guidance for the creation of the nomination documents. The respective document is submitted to the World Heritage Centre, which also offers assistance in the nomination process.

Thirdly, after a formal control of the nomination document by the World Heritage Centre the respective nominated object will be independently evaluated by one of two advisory bodies of the World Heritage Committee: by the International Council in Monuments and Sites (hereafter 'ICOMOS')[273] in the case of a cultural property[274] or by IUCN[275] in the case of a natural site[276]. The respective advisory body submits its evaluation results in the form of recommendations to the World Heritage Centre. It can not only recommend the inscription or the rejection of a nominated property, but it can also recommend referring or deferring a decision to a point where the respective State Party adds more information about the object[277].

Fourthly, the World Heritage Committee has the decisive power to declare whether or not a nominated property will be inscribed on the World Heritage List. The Committee is, however, not bound by the recommendation of its advisory bodies. Overruling by the World Heritage Committee is not rare[278] and is due to the fact that the criteria for the selection and determination of outstanding universal value used by the World Heritage Committee and its advisory bodies, the ten selection criteria developed by the committee and outlined in Paragraph 77 WHC Operational Guidelines[279] are applied and interpreted by the relevant body in its own way[280]. Recent parameters for the

[273] Established in 1965 and having its current headquarters in Paris, ICOMOS focuses on the conservation and protection of cultural heritage places around the world.

[274] See Paragraph 144 WHC Operational Guidelines.

[275] See *supra* n. 215.

[276] See Paragraph 145 WHC Operational Guidelines.

[277] See Paragraph 151 WHC Operational Guidelines.

[278] One current example is the Iwami Ginzan Silver Mine and its Cultural Landscape, which was inscribed as forming a cultural heritage in 2007 against the recommendation by ICOMOS; see http://whc.unesco.org/archive/advisory_body_evaluation/1246.pdf for the recommendation (last visited on December 31, 2008).

[279] See also *supra* I.4.2.

[280] For a discussion of the early approaches of the *World Heritage Committee*, ICOMOS and IUCN see Cleere, loc. cit. n. 236, p. 227 et seq.

advisory bodies' understanding of the term outstanding universal value were discussed during the UNESCO-initiated Special Expert Meeting of the World Heritage Convention: The Concept of Outstanding Universal Value in 2005. In relation to cultural heritage ICOMOS expressed its opinion that the selection of objects should be 'based upon the enormous wealth and diversity of cultural heritage worldwide.'[281] It points out that the addition of the term outstanding to universal value, meaning that 'a monument, site or group of buildings has a value that rises above local or regional value to a value that may be considered universal'[282] gives it a special meaning in the sense that an object must not only possess a universal value, but must also be considered 'to be marked out by singularities that accentuate their value to a degree that they become of Outstanding Universal Value. In other words the site is so valuable that it 'belongs' to all humankind in that they believe it should be transmitted to future generations'[283]. With respect to natural heritage IUCN, generally considered as being stricter in its approach[284], stresses that 'maintaining the credibility of the World Heritage List is intrinsically linked to a proper understanding, and the strict and rigorous application, of the OUV [note: Outstanding Universal Value] concept'[285]. It goes on to define the term outstanding universal value as follows:

'(1) Outstanding: For properties to be of OUV they should be exceptional. IUCN has noted in several expert meetings that the World Heritage Convention sets out to define the geography of the superlative – the most outstanding natural and cultural places on Earth,

(2) Universal: The scope of the Convention is global in relation to the significance of the properties to be protected as well as its importance to all people of the world. By definition properties cannot be considered for OUV from a national or regional perspective;

(3) Value: What makes a property outstanding and universal is its "value" which implies clearly defining the worth of a property, ranking its

[281] ICOMOS, *Special Expert Meeting of the World Heritage Convention: The Concept of Outstanding Universal Value – Background Paper* (2005; available online at http://whc.unesco.org/temp/POL/ICOMOS%20OUV%20Paper%20final.doc; last visited on December 31, 2008) p. 6.

[282] ICOMOS, op. cit. 278, at p. 10.

[283] ICOMOS, op. cit. 278, at p. 10.

[284] Cleere, loc. cit. n. 236, at p. 230.

[285] IUCN, *Special Expert Meeting of the World Heritage Convention: The Concept of Outstanding Universal Value – Background Paper* (2005; available online at http://whc.unesco.org/temp/POL/FINAL%20IUCN%20Background%20Document%20for%20Kazan%2004.04.05.doc; last visited on December 31, 2008) at p. 1.

importance based on clear and consistent standards, and assessing its quality.'[286]

As outlined above[287], the World Heritage Committee assesses nominated objects by the means of various legal criteria, the most prominent one being the set of ten criteria for determining whether or not a nomination has an outstanding universal value. Further decisive criteria for the inscription on the World Heritage List include the test of authenticity – applicable only in relation to cultural heritage nominations –, an integrity test and, also installed by the World Heritage Committee, the decision whether or not a buffer zone is required. The latter one was introduced by the first WHC Operational Guidelines in 1977[288] with the aim of providing the best possible protection for an object 'wherever necessary for the proper conservation.'[289] Paragraphs 103 and 104 of the WHC Operational Guidelines define this area as an 'adequate zone surrounding the nominated property which has complementary legal and/or customary restrictions placed on its use and development to give an added layer of protection to the property,' thus leaving the further determination with regard to the exact size open for a case-by-case decision.[290]

Once inscribed on the World Heritage List, cultural and natural heritage is subject to a centralized protective regime. Although the protection and safeguarding obligations are addressed at the respective State Party, the World Heritage Committee can influence the protection process by various means. States Parties are obliged to report periodically about the implementation of the 1972 Convention and the state of protection and conservation of the cultural and natural properties located in their territories[291]. In addition, the World Heritage Committee may also receive special reports by the World Heritage Centre, the advisory bodies or other sectors of UNESCO, based on national reports and including information on endangered cultural and natural properties inscribed on the World Heritage List with the aim of preventing endangered properties from deteriorating ('monitoring process')[292]. For these purposes the World Heritage Committee

[286] IUCN, op. cit. n. 285, at p. 3.
[287] See *supra* I.4.2.
[288] See Paragraphs 103 to 107 WHC Operational Guidelines.
[289] Paragraph 103 WHC Operational Guidelines. The concept of buffer zones has been clarified through revisions of the Operational Guidelines.
[290] T. Kono, 'The Significance of the Buffer Zone under the World Heritage Convention', 5 *Art Antiquity and Law* (2000), pp. 177-184.
[291] See Article 29 1972 Convention and Paragraphs 199 to 210 WHC Operational Guidelines.
[292] See Chapter IV of the WHC Operational Guidelines.

can ask the respective State Party to take all necessary measures to resolve problems, can suggest and coordinate international cooperation, may inscribe severely threatened properties on the List of World Heritage in Danger and allocate financial assistance by means of the Fund for the Protection of the World Cultural and Natural Heritage (hereafter the 'World Heritage Fund').

The List of World Heritage in Danger[293] installed and updated by the World Heritage Committee pursuant to Article 11 (4) of the 1972 Convention[294] and Chapter IV.B WHC Operational Guidelines contains cultural and natural heritage sites also inscribed on the World Heritage List. In contrast to inscription on the World Heritage List inscription on the List of World Heritage in Danger as exercised by the World Heritage Committee can be done without the consent of the respective State Party[295], as the inscription of the old city of Dubrovnik in 1991 shows[296]. The World Heritage Committee by inscribing a site on that list can foster its recovery as an inscribed site is given priority regarding mechanisms of International Assistance[297], e.g. financial support, and is also subject to raised international awareness, alerting the international community to the need to respond to the threats and join in international efforts of protecting and safeguarding endangered sites.

Protecting and safeguarding heritage sites is expensive. Especially poorer States Parties do not have enough financial resources to cover the arising costs. That is why the 1972 Convention installed a special funding and

[293] As of December 31, 2008, the List of World Heritage in Danger comprises 30 sites, mainly, but not exclusively, situated in regions of armed conflicts and/or developing countries (Full list available online at http://whc.unesco.org/en/danger; last visited on December 31, 2008).

[294] Article 11 (4) 1972 Convention: 'The Committee shall establish, keep up to date and publish, whenever circumstances shall so require, under the title of List of World Heritage in Danger, a list of the property appearing in the World Heritage List for the conservation of which major operations are necessary and for which assistance has been requested under this Convention. This list shall contain an estimate of the cost of such operations. The list may include only such property forming part of the cultural and natural heritage as is threatened by serious and specific dangers, such as the threat of disappearance caused by accelerated deterioration, large-scale public or private projects or rapid urban or tourist development projects; destruction caused by changes in the use or ownership of the land; major alterations due to unknown causes; abandonment for any reason whatsoever; the outbreak or the threat of an armed conflict; calamities and cataclysms; serious fires, earthquakes, landslides; volcanic eruptions; changes in water level, floods, and tidal waves. The Committee may at any time, in case of urgent need, make a new entry in the List of World Heritage in Danger and publicize such entry immediately.'

[295] Paragraph 183 WHC Operational Guidelines just states that 'when considering the inscription of a property on the List of World Heritage in Danger, the Committee shall develop, and adopt, as far as possible, in consultation with the State Party concerned, a programme for corrective measures.'

[296] See N. Affolder, 'Democratising or Demonising the World Heritage Convention', 38 *Victoria University of Wellington Law Review* (2007) p. 341 at p. 354 et seq. for details.

[297] See Chapter VII.C WHC Operational Guidelines.

supporting system in the form of the World Heritage Fund. The World Heritage Fund[298], fed by compulsory national contributions as well as by voluntary contributions in total amounting to approximately US$ 4 million[299], aims at providing comprehensive financial support for the States Parties to the 1972 Convention in all stages of the protection and safeguarding process. Pursuant to Paragraph 241 of the WHC Operational Guidelines, States Parties can ask for international assistance in three cases. Firstly, assistance might be granted to States Parties on a preparatory level, including the creation of tentative lists and the nomination process as well as the preparation for requests in relation to training and research activities. Secondly, in the phase of implementation, conservation and management assistance can be granted to States Parties, among others for the purposes of covering parts of the costs of protection and safeguarding projects, the training of experts or supplying equipment. Thirdly, the World Heritage Fund was also installed to provide immediate help in cases of emergency as an answer to imminent threats to cultural and natural sites inscribed on the World Heritage List.

The third aspect is especially important for sites inscribed on the List of World Heritage in Danger, as most of those sites are located in areas with no or limited infrastructure for reacting to respective threats properly. A just balance has tried to be found through the introduction of a hierarchy of allocation by the World Heritage Committee[300]. Thus, sites in danger are given the priority over 'normal' sites and States Parties with special needs due to a lack of sufficient national financial resources not only in terms of protecting sites, but also in terms of drafting tentative lists and nominating sites[301] are given priority over richer countries.

UNESCO stresses that although the World Heritage Fund is an important factor for the preservation of the World Heritage, its resources are limited. The World Heritage Concept based on the mechanism of its lists and the Fund is, however, 'so well understood that sites on the [note: World Heritage] List are a magnet for international cooperation and may thus

[298] See Chapter IV 1972 Convention.
[299] See http://whc.unesco.org/en/funding/ (last visited on December 31, 2008).
[300] See Chapter VII.D 1972 Convention.
[301] See. L. Pressouyre, *The World Heritage Convention, Twenty Years Later* (Paris, UNESCO Publishing 1993/1996) at p. 34 for a comparison of developed and developing countries, showing the problems of the latter ones in the implementation process.

receive financial assistance for heritage conservation projects from a variety of sources.'[302]

UNIDROIT CONVENTION ON STOLEN OR ILLEGALY EXPORTED CULTURAL OBJECTS(1995)[303]

5.1. Background Of The 1995 Unidroit Convention: Private Law As The Key To Regulating The Black Market

For many years the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property was the most prominent international instrument to deal with the complex issue of fighting the illegal international transfer of cultural property. However, criticism concerning the 1970 Convention did not abate. In addition to its vague language, the shortcomings of the 1970 Convention concerned especially aspects related to private law[304]. A solution was urgently needed, as a successful fight against the illicit trafficking of cultural property asked for more than just public law based provisions. The 1970 Convention – though being a tool of public international law – also raised questions in relation to private law but could not solve them. Especially the return of stolen property as laid down in Article 7 (b) (ii) had to be supplemented in order to work properly on an international level. It did not distinguish between issues related to public law aspects, such as export regulations, and questions in relation to private law, above all questions in connection with bona fide purchase, in a satisfactory way[305].

Another big obstacle to a successful fight against illegal export and thefts of cultural property was the scope of Article 7 (b) (ii) of the 1970 Convention. It only covered 'appropriate steps to recover and return'[306] cultural property which – pursuant to Article 7 (b) (i) of the 1970 Convention was 'stolen from a museum or a religious or secular public monument or similar institution in another State Party to (that) Convention … provided that such property is documented as appertaining to the inventory of that institution.' The black-market for cultural property, however, comprised a much wider

[302] UNESCO World Heritage Centre 2005, op. cit. n. 213, at p. 10.

[303] If used without any determination, the term *convention* refers to the *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* in this chapter.

[304] See *supra* I.3.3. for some points of criticism.

[305] Thorn, op. cit. n. 77, at p. 81 et seq.

[306] Article 7 (b) (ii) 1970 Convention.

range of illegal import/export of cultural property. Threats to the protection of cultural property which had to be contained also included cultural objects stolen from museums or other institutions even if they were not inventoried[307], cultural property in the hand of private parties and also illegal excavations of cultural property.

It was obvious that the question of return of illegally exported or stolen cultural property touched especially on the area of private law. What was needed was a codification and unification of private law provisions dealing exclusively with those issues. Such an international instrument had to meet the interests of as many nations as possible, not only on a regional level, in order to work properly.

5.2. Drafting Of The 1995 Unidroit Convention: The Long And Winding Road

The adoption of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995 (hereafter the '1995 UNIDROIT Convention') was 'the end of a long process.'[308] Already in the early 1980s UNESCO came to the conclusion that the protection of cultural property had to focus on a wider range and also should cover private law aspects more closely.[309] As the desired international framework of private law had to be accepted by nations with diverse interests and national regulations on the protection of cultural property and property law, UNESCO finally mandated UNIDROIT[310] to elaborate an international instrument to supplement the 1970 Convention.[311]

---

[307] A possible problem for the implementation of the 1970 Convention was the question whether poorer States Parties to that convention had the financial resources and infrastructure to introduce comprehensive inventories for the protection of cultural properties legally possessed by them.

[308] L.V. Prott, *Commentary on the UNIDROIT Convention* (Leicester, Institute of Art and Law 1997) at p. 12.

[309] Prott 1997, op. loc. n. 308, at p. 12, referring to L.V. Prott and P.J. O'Keefe, *National Legal Control of Illicit Traffic in Cultural Property 'commissioned by UNESCO and discussed at a Consultation of Experts on Illicit Traffic*' in Paris March 1-4, 1983, UNESCO Doc. CLT/83/WS/16 (available online at http://unesdoc.unesco.org/images/0005/000548/054854eo.pdf; last visited on December 31, 2008).

[310] The UNIDROIT (International Institute for the Unification of Private Law), which has its seat in Rome, was set up in 1926 as an auxiliary organ of the League of Nations an reestablished in 1940 on the grounds of a multilateral agreement, the UNIDROIT Statute (available online at http://www.unidroit.org/english/presentation/statute.pdf; last visited on December 31, 2008). Its purposes are 'to examine ways of harmonizing and coordinating the private law of States and of groups of States, and to prepare gradually for the adoption by the various States of uniform rules of private law' (Art. 1 of the UNIDROIT Statute). Membership of UNIDROIT is restricted to States acceding to the UNIDROIT Statute. UNIDROIT's 63 Member States (as of December 31, 2008, full list available online at http://www.unidroit.org/english/members/main.htm; last visited on December 31, 2008) are drawn from five continents, and

In 1988, UNIDROIT with its expertise in questions concerning the issue of good faith acquisition of movables in general[312] established an experts group consisting of members with various legal backgrounds. Though profiting from UNIDROIT's research results in relation to bona fide purchase of movables, it was clear that cultural property had to be dealt with in a separate form as it was recognized as a 'special category of property.'[313] The general understanding was that a separate instrument in contemplation to the 1970 Convention had to be drafted, as an annex to the 1970 Convention probably would have slowed down the ratification process of that Convention[314]. The experts group had to face a similar problem as the drafters of the 1970 Convention: it had to merge opposing interests. On the one hand were the interests of negotiating states which strongly favored the principle of a strict and comprehensive protection of cultural property and on the other were the opposing interests of nations with important art markets, which feared that strict rules would lead to problems for those markets. In addition, as the research work had to cover private law aspects of transfer of property, bona fide purchase and restitution of cultural property, the experts group also had to find a way to unify national legislation concerning those issues, national legislation with different approaches and regulations. The result of the negotiations was the Preliminary Draft Convention on the Restitution of Cultural Objects. This draft, which was a pragmatic compromise, included only minimum requirements for further studies and led to the drafting of the Final Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects (hereafter the 'final UNIDROIT draft') in 1993.

The final UNIDROIT Draft left some core parts of the instrument open for final discussions during the adoption phase in 1995, some of which had also been heavily disputed in the drafting process of the 1970 Convention. These included the question of retroactivity, issues of compensation payments to bona fide purchasers and termination to claims as well as transnational

represent a variety of different legal, economic, and political systems as well as different cultural backgrounds.

[311] Thorn, op. cit. n. 77, at p. 88.

[312] Already in 1974, UNIDROIT drafted the *UNIFORM Law on the Acquisition in Good Faith of Corporeal Movables (LUAB)*, discussing the issue of acquisition of movables in general; see M. Schneider, 'UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report', 6 *Uniform Law Review* (2001) p. 476 at p. 480.

[313] M.E. Phelan, 'The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects Confirms a Separate Property Status for Cultural Treasures', 5 *Villanova Sports and Entertainment Law Journal* (1998) p. 31 chapter I.

[314] Thorn, op. cit. n. 77, at p. 89.

export limitations[315]. Again, compromises had to be made in order to make the Convention acceptable to as a large number of different states as possible. The final compromise reached resulted in the adoption of the 1995 UNIDROIT Convention on June 24, 1995. The 1995 UNIDROIT Convention, which entered into force on July 1, 1998, currently has 29 States Parties (as of December 31, 2008)[316].

5.3. Scope Of Application Of The 1995 Unidroit Convention: Focus On Recovery

In contrast to the 1970 Convention which created an international public law framework for both the prevention of illicit traffic and the question of recovery, the 1995 UNIDROIT Convention concentrates on the second aspect, the recovery phase, by introducing an instrument concerning private law, thus contemplating the 1970 Convention rather than replacing it[317]. It focuses on two groups in relation to illicit trafficking of cultural property: restitutions claims concerning stolen cultural property[318] and return claims concerning illicitly exported cultural property[319]. It thus attempts 'to establish an unified private law code for resolving international claims demanding the restitution of stolen cultural objects and the return of illegally exported objects.'[320]

As far as the objective scope of application is concerned, the 1995 UNIDROIT Convention adopted verbatim the definition of Article 1 of the

[315] Thorn, op. cit. n. 77, at p. 90 et seq. with reference to the *Diplomatic Conference for the Adoption of the Draft UNIDOIRT Convention on the international Return of Stolen or Illegally Exported Cultural Objects, Rome, June 7 to 24, 1995, Acts and Proceedings.*

[316] See http://www.unidroit.org/english/implement/i-95.pdf (last visited on December 31, 2008).

[317] Preamble (9) 1995 UNIDROIT Convention.

[318] For the purpose of easier understanding the author uses the term *cultural property* instead of *cultural objects* used by the 1995 UNIDROIT Convention. It shall be noted that in the French version cultural property/cultural objects is referred to as *biens culturels*, a term already used in previous Conventions, especially the 1970 Convention. For an explanation why the 1995 UNIDROIT Convention uses the English expression *cultural objects* see e.g. Schneider, loc. cit. n. 312, at p. 488.

[319] Article 1 1995 UNIDROIT Convention:

'This Convention applies to claims of an international character for:

(a) the restitution of stolen cultural objects;

(b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage (hereinafter, illegally exported cultural objects).'

[320] M. Olivier, 'The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property', 26 *Golden State University Law Review* (1996) p. 627 at p. 655 referring to B.T. Hoffman, 'How UNIDROIT Protects Cultural Property (pt. 1)', 23 *New York Law Journal* (1995) p. 5 at p. 10.

1970 Convention[321]. Still, the objective scope differs from the respective provision of the 1970 Convention and also varies within the scope of the 1995 UNIDROIT Convention depending on whether a cultural object was stolen or illegally exported.

Unlike under the regime of the 1970 Convention[322] neither inventories of the respective cultural properties nor their source location at 'museums, religious or secular public monuments or similar institutions' are prerequisites for the application of the 1995 UNIDROIT Convention in relation to stolen objects. The 1995 UNIDROIT Convention also regulates thefts of privately owned properties and/or not inventoried property. It also differentiates between the restitution of stolen cultural property and illicitly exported cultural property, as the general definition of Article 2 of the 1995 UNIDROIT Convention only applies to the first category, whereas claims for the return of illicitly exported property require in addition that the requesting state declares that the respective cultural property is of significant cultural importance or that its removal infringes interests set forth in Article 5 (3) (a) to (d) of the 1995 UNIDROIT Convention[323]. Commentators on the 1995 UNIDROIT Convention state that the difference with respect to the two main categories of protected cultural property can be found in the underlying rationale of the two groups. The extensive term in relation to stolen cultural objects is justified by the fact that 'the theft of movables per se is considered illegal all over the world, irrespective of its classification.'[324] The limitation with respect to the illegal export, on the

[321] Article 2 1995 UNIDROIT Convention; see also Article 1 1970 Convention.

[322] Article 7 (b) (i) and (ii); see *supra* I.3.3. and I.5.1.

[323] Article 5 (3) 1995 UNIDROIT Convention:

'The court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests:

(a) the physical preservation of the object or of its context;

(b) the integrity of a complex object;

(c) the preservation of information of, for example, a scientific or historical character;

(d) the traditional or ritual use of the object by a tribal or indigenous community,

or establishers that the object is of significant cultural importance for the requesting State.'

[324] Thorn, op. cit. n. 77, at p. 90 et seq. with reference to A.F.G. Raschèr, 'Grundlagen, Entstehung und Inhalt der UNIDROIT-Konvention' [*Basic Principles, Emergence and Contents of the UNIDROIT Convention*], in Schweizerische Akademie der Geistes- und Sozialwissenschaften, ed., *Unidroit: Recht und Ethik im Handel mit Kulturgut. Tagung der Schweizerischen Akademie der Geistes- und Sozialwissenschaften gemeinsam mit der Schweizerischen Ethnologischen Gesellschaft Bern, den 27. Juni 1998* [*Unidroit: Law and Ethics in Trade with Art Objects. Conference of the Swiss Academy of Humanities and Social Sciences and of the Swiss Ethnological Society, Berne June 27, 1998*] (Bern, Schweizerische Akademie der Geistes- und Sozialwissenschaften 1998) p. 13 at p. 18; Schneider, loc. cit. n. 312, at p. 498; E. Sidorsky, 'The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: The Role of International Arbitration', 5 *International Journal of Cultural Property* (1996) p. 19 at p. 31.

other hand, is explained by the wish that States Parties should not be obliged to be bound by stricter export regulations of other states[325].

In contrast to the original plans of the drafting experts group, which favored a comprehensive instrument of law by expanding the scope of application also to purely domestic cases of theft, the territorial scope of application is limited to 'claims of an international character.'[326] Here, once again, one can point out regulatory differences between the two main categories: theft of cultural property and illegal export of cultural property. Whereas the second category requires that the respective cultural property is illegally transported from one State Party and – at the time of the return request – is located in the territory of another State Party[327], it is argued that with respect to stolen cultural property the 1995 UNIDROIT Convention can also be applied to cases in which cultural property is stolen from non-contracting states, if the property is found in the territory of a State Party, provided that there must be a 'certain connection between the source nation and the State Party.'[328]

The personal scope of application covers a much wider range than in the 1970 Convention. Not only the States Parties,[329] but also the respective (original) owner of the concerning stolen cultural property is entitled to file a lawsuit for restitution purposes. Due to the fact that the 1995 UNIDROIT Convention provides direct access to the courts of a State Party by the (original) owner, it contemplates the public law provisions of Article 7 (b) (ii) of the 1970 Convention which deals with the problem of stolen cultural property by the means of States Parties' action and administrative instruments (arg.: 'at the request of the State Party of origin'). With regard to the second category of protected cultural property, the illegal export of such property, not the owner, but the respective State Party is entitled to make use

[325] Thorn, op. cit. n. 77, at p. 90 et seq. with reference to R. Streinz, *Handbuch des Museumsrechts 4: Internationaler Schutz von Museumsgut* [Handbook of Museum Law 4: International Protection for Museum Property].

[326] Article 1 1995 UNIDROIT Convention – see *supra* n. 310. The issue of definition of *international character* is not solved yet; for interpretive suggestions refer to Prott 1997, op. loc. n. 308, p.22 et seq.; Thorn, op. cit. n. 77, at p. 93 et seq., Schneider, loc. cit. n. 312, p. 492 et seq.

[327] Articles 1 (b) and 5 (1) 1995 UNIDROIT Convention.

[328] Thorn, op. cit. n. 77, at p. 94 with reference to the wording of Article 10 (1) (b) 1995 UNIDROIT Convention.

[329] Thorn, op. cit. n. 77, at p. 96 with reference to Article 5 (1) 1995 UNIDROIT Convention, supplementary to Article 3 1995 Convention.

of court action[330], as the originator of export regulations is the state itself and not the owner.

The period of applicability was the object of similar discussions as already known from the drafting process of the 1970 Convention[331]. The result of the discussions resembled its outcome as well: pursuant to Articles 10 (1) and (2) of the 1995 UNIDROIT Convention[332] the principle of non-retroactivity was adopted.

An interesting and important question raised by various scholars is the question whether or not the 1995 UNIDROIT Convention is directly applicable (self-executing) in its contracting states. In contrast to UNIDROIT commentaries on the draft version of the convention[333], the 1995 UNIDROIT Convention itself does not refer to this issue, neither in a negative nor in an affirmative way. The prevailing perception concerning the question of self-execution is the understanding that the respective international agreement must be precise enough for direct application by national courts or other state authorities[334]. In addition to the text of the instrument the intention of the signing parties has also to be taken into account[335]. If, however, an international instrument just exclaims legal principles by setting a legal framework clearly envisaging national implementing legislation, no doubt can be left that a convention is not self-executing.

As far as the 1995 UNIDROIT Convention is concerned, one has to distinguish between provisions on substantive law, including and supplementing the key provisions of Articles 3 (1) and 5 (1) of the 1995 UNIDROIT Convention and those of a procedural law character. Whereas the 1995 UNIDROIT Convention does not aim at creating standard rules in relation to procedural law, the wording and contents of the provisions on

[330] Article 10 (2) 1995 UNIDROIT Convention: 'The provisions of Chapter III shall apply only in respect of a cultural object that is illegally exported after this Convention enters into force for the requesting State as well as the State where the request is brought.'

[331] See *supra* I.3.1.

[332] Article 10 1995 UNIDROIT Convention:

'(1) The provisions of Chapter II shall apply only in respect of a cultural object that is stolen after this Convention enters into force in respect of the State where the claim is brought, …

(2) The provisions of Chapter III shall apply only in respect of a cultural object that is illegally exported after this Convention enters into force for the requesting State as well as the State where the request is brought).

[333] Thorn, op. cit. n. 77, at p. 97 with reference to UNIDROIT 1993, Etude LXX Doc. 36, 1 and 42, 3 which state that – in relation to its provisions on procedural law – 'the Convention is not self-executing.'

[334] A. Aust, *Modern Treaty Law and Practice* (Cambridge, Cambridge University Press 2007) p. 183 et seq. with reference to various national perceptions; Thorn, op. cit. n. 77, at p. 99.

[335] Aust, op. cit. n. 334, p. 183 et seq.

substantive law are well determined. In addition, the Preamble expresses in its fourth paragraph that by adopting the Convention the States Parties intend to introduce 'common, minimal legal rules,'[336] thus pointing out that the Convention does not just stipulate programmatic principles in the fight against theft and illicit export of cultural property, but that it – in contrast to the 1970 Convention[337] – should be directly applicable by the courts and authorities upon ratification by the respective State Party[338].

5.4. Legal Framework And Basic Principles Of The 1995 Unidroit Convention: Acts Of Balancing

The main purpose of the 1995 UNIDROIT Convention can be described as being an attempt to establish a unified private law code with minimum provisions[339] for solving international claims concerning the restitution of stolen cultural property regardless of its origin, be it a private owner or not (Chapter II of the 1995 UNIDROIT Convention), and the return of illegally exported cultural property (Chapter III of the 1995 UNIDROIT Convention). Pursuant to Article 3 (2) of the 1995 UNIDROIT Convention the regulations on stolen property also apply to illegally excavated or illegally retained excavated cultural property. By providing provisions for as wide a range as possible, the issue of illicit trafficking of cultural property by means of an instrument concerning private law was addressed comprehensively for the first time. In order to make it acceptable especially to art market nations, the 1995 UNIDROIT Convention, however, had to introduce certain limitations to claims with regard to both categories, thus resulting in compromise results in various areas.

In principle, stolen cultural property has to be restituted to its original owner. The drafters of the 1995 UNIDROIT Convention had to 'balance'[340] and 'harmonize'[341] opposing, but nevertheless equally legitimate interests: the interest of the owner whose property was stolen and, in the case of a bona fide purchase, the interest of the purchaser not to return the respective object. In addition, it also had to make concessions to the interests of those

[336] Preamble (5) 1995 UNIDROIT Convention.
[337] A.F.G. Raschèr, *Kulturgütertransfer und Globalisierung* ['Transfer of Cultural Property and Globalization'] (Zürich, Schulthess Juristische Medien AG 2000) at p. 70.
[338] Raschèr 2000, op. cit. n. 337, at p. 70; Thorn, op. cit. n. 77, at p. 102.
[339] Preamble (4) 1995 UNIDROIT Convention.
[340] C. Fox, loc. cit. n. 132, at p. 231.
[341] Warring, loc. cit. n. 2, p. 252 et seq.

drafting parties which in accordance with their national laws asked for a time limitation to respective claims.

The result was the following: both categories of possible claims, restitution claims concerning to stolen cultural property and return claims concerning illegally exported cultural property are subject to restrictions. Claims for restitution of stolen cultural property pursuant to Article 3 1995 of the UNIDROIT Convention are subject to time limitations, in most cases of application subject to shorter relative and longer absolute time limitations[342], with the exact limitation varying due to the nature of the respective cultural property[343] and, to some extent, also overruled by national legislation[344]. A similar system of relative and absolute time limitation, yet without distinction between various forms of cultural property applies in the cases of illegal export of cultural property[345].

In addition, the finally adopted version of the 1995 UNIDROIT Convention sets the frame for compensation payments to bona fide purchasers, thus accommodating those nations which in their national laws provide for the transfer of ownership in the case of 'good faith acquisition' of property. Like the 1970 Convention, the 1995 UNIDROIT Convention uses a rather general termination by stipulating that 'the possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that he exercised due diligence when acquiring the object,'[346] leaving the determining discretion in relation to the amount of compensation to the

[342] Article 3 1995 UNIDROIT Convention:

'… (3) Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft.

(4) However, a claim for restitution of a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor.

(5) Notwithstanding the provisions of the preceding paragraph, any Contracting State may declare that a claim is subject to a time limitation of 75 years or such longer period as is provided in its law. A claim made in another Contracting State for restitution of a cultural object displaced from a monument, archaeological site or public collection in a Contracting State making such a declaration shall also be subject to that time limitation. …

(8) In addition, a claim for restitution of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community's traditional or ritual use, shall be subject to the time limitation applicable to public collections.'

[343] Article 3 (4) and (8) of the 1995 UNIDROIT Convention.

[344] Article 3 (5) 1995 UNIDROIT Convention.

[345] Article 5 (5) 1995 UNIDROIT Convention.

[346] Article 4 (1) 1995 UNIDROIT Convention.

courts and allowing for a 'certain degree of flexibility.'[347] An important aspect and point of criticism in various countries is the fact that – compared to some national legal systems[348] – pursuant to Article 4 of the 1995 UNIDROIT Convention the burden of proof in relation to the two conditions for compensation claims is reversed. The purchaser has to prove both that he neither knew nor ought reasonably to have known that the respective property was stolen and that he exercised due diligence when acquiring the object. For the purpose of decision making by the respective court Article 4 (4) of the 1995 UNIDROIT Convention offers an explanatory outline of the term due diligence[349], a term which can also be found in newer versions of international applicative instruments, such as ICOM's Code of Ethics[350]. The active approach chosen by the 1995 UNIDROIT Convention is hoped to 'impede the market in stolen works of art.'[351]

The second category of protected property covering the issue of illegal export of cultural property[352] includes provisions for compensation payments to bona fide purchasers, as well. The basis for a compensation claim is, however, eased as Article 6 (1) of the 1995 UNIDROIT Convention differs from Article 4 (1) of the 1995 UNIDROIT Convention on two counts. Firstly, the purchaser does not need to prove that he acted 'in due diligence' when acquiring the illegally exported cultural property in dispute. Secondly, regarding the requirement that the purchaser did not

[347] Raschèr 2000, op. cit. n. 337, at p. 85.

[348] Thorn, op. cit. n. 77, at p. 106 with reference to J.A. Winter, 'The Application of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects in Relations between Member States of the European Union', in E. Denters and N. Schrijver, eds., *Reflections on International Law from the Low Countries in Honour of Paul de Waart* (Den Haag 1998) p. 347 at p. 362); A. Weidner, *Kulturgueter als res extra commercium im internationalen Rechtsverkehr* ['Cultural Porperty as res extra commercium in international legal relations'] (Berlin 2001) at p. 135.

[349] Article 4 (4) 1995 UNIDROIT Convention: 'In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.'

[350] See e.g. chapter 2.3 of the newest version available online at http://icom.museum/code2006_eng.pdf (last visited on December 31, 2008).

[351] N. R. Lenzner, 'The Illicit International Trade in Cultural Property: Does the UNIDROIT Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?', 15 *University of Pennsylvania Journal of International Business Law* (1994) p. 469 at p. 497.

[352] Pursuant Article 7 (1) 1995 UNIDROIT Convention chapter III is not applicable in cases in which 'the export of a cultural object is no longer illegal at the time at which the return is requested' or 'the object was exported during the lifetime of the person who created it or within a period of fifty years following the death of that person.'

know or did not ought to have known about the illegal export, the burden of proof is subject to the applicable domestic law[353].

It should be stressed again that the 1995 UNIDROIT Convention attempts to introduce a least common denominator for return and restitution purposes in cases of theft and illegal export. It had to offer concessions to those states which opposed a too generous protection of cultural property, such as regulations on time limitations and compensations payments. In this context and as an answer to the concessions made, Article 9 (1) of the 1995 UNIDROIT Convention enables the supporters of a strict regime to implement/maintain restitution-/return-friendlier national provisions as it states that 'nothing in this Convention shall prevent a Contracting State from applying any rules more favorable to the restitution or the return of stolen or illegally exported cultural objects than provided for by this Convention'. The application of such an option, of course, must not infringe the framework of the 1995 UNIDROIT Convention. In order to prevent the forum shopping which could result from choosing a jurisdiction in accordance with Article 8 (1) of the 1995 UNIDROIT Convention[354], the decision-making courts are bound by the respective rules of conflict of laws. A court can choose to apply a more favorable applicable law if such an application is provided for in the rules of conflict of laws.

Despite the fact that the 1995 UNIDROIT Convention is currently (as of December 31, 2008) in force between less than 30 States Parties[355], it has to be considered an important international instrument for providing directly applicable standards for a worldwide fight against thefts and illegal exports of cultural property. As one can see by analyzing the contents of the Convention it 'has not achieved uniform law, but it has (at least) achieved a minimum uniform rules'[356] for restitution and return claims in relation to cultural property. Being a compromise of the before-mentioned antitheses of interests and different legal approaches towards the transfer of ownership and the issue of bona fide purchase, it is logical that the convention could not perfectly satisfy every single interest, leading to the result that the

[353] Article 6 (1) 1995 UNIDROIT Convention: 'The possessor of a cultural object who acquired the object after it was illegally exported shall be entitled, at the time of its return, to payment by the requesting State of fair and reason compensation, provided that the possessor neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported.'

[354] Article 8 (1) 1995 UNIDROIT Convention: 'A claim under Chapter II and a request under Chapter III may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States.'

[355] See *supra* I.5.2.

[356] Prott 1997, op. loc. n. 308, at p. 87.

attitude among many states towards the Convention is still more than a reserved one. Nevertheless, the 1995 UNIDROIT Convention created an international, private-law framework which could give an answer to not all, but at least a large number of so far unsolved cases. It extends the scope of application to basically any kind of theft of cultural property, irrespective of private or public ownership including cases of illegal excavations and it tries to also take into account the interests of bona fide purchasers by stipulating the right to compensation payments and introducing an international standard of due diligence for the acquisition of cultural property based on objective criteria. Giving an explanatory outline for the interpretation of good faith using the active approach of due diligence, the Convention – under the premise that it will be subject to ratification by a growing number of art market influential nations – could be an effective instrument to prohibit the 'cultural property laundering,'[357] at least to a greater extent than now.

The 1995 UNIDROIT Convention also addresses and tries to regulate the return of illegally exported cultural property. By doing so, it at the same time provides for moderation as its Article 5 (3)[358] is aimed at preventing an 'enforcement and acceptance of too excessive national export prohibitions.'[359]

The 1995 UNIDROIT Convention obviously still needs time to show grave effects. For this purpose it will be of extreme importance whether or not those countries which are still reluctant to ratify the convention for various reasons, be it an interference with existing national laws regarding the position of purchasers of property, questions concerning time limitations to claims, the issue of compensation payments or the wide scope of application of the Convention, will rethink their position and accept the instrument.

[357] Thorn, op. cit. n. 77, at p. 194.
[358] *Supra* n. 323.
[359] Raschèr 2000, op. cit. n. 337, at p. 99.

CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE (2001)[360]

6.1. Excursus: The United Nations Convention On The Law Of The Sea Of 1982 Or Mission Incomplete

Before examining the Convention on the Protection of the Underwater Cultural Heritage of 2001 (hereafter the '2001 Convention') we should take a short look back on another convention often discussed in relation to underwater cultural heritage and the 2001 Convention[361]: the United Nations Convention on the Law of the Sea of 1982[362] (hereafter the '1982 Convention'). Adopted in 1982 with the purpose of defining the rights and responsibilities of nations in their use of the world's oceans, it established guidelines for the management of marine natural resources, business and the environment. Two of its provisions, Articles 149 and 303, alluded to the topic of protection of the underwater cultural heritage. Whereas Article 149 of the 1982 Convention expresses programmatically that '[a]ll objects of an archaeological and historical nature found in the Area[363] shall be preserved or disposed of for the benefit of mankind as a whole,' Article 303 of the 1982 Convention introduces a general obligation of States Parties to protect and cooperate with regard to archaeological and historical objects irrespective of their location at sea.

Although it is said that 'theses general principles form the basis upon which the new Convention [note: 2001 Convention] is structured,'[364] their contents

[360] If used without any determination, the term *convention* refers to the *Convention on the Protection of Underwater Cultural Heritage* in this chapter.

[361] E.g. T. Scovazzi, 'Convention on the Protection of Underwater Cultural Heritage', *32 Environmental Policy and Law* (2002) p. 152 at p. 152 et seq.; A. Strati, *The Protection of the Underwater Cultural Heritage: An emerging Objective of the Contemporary Law of the Sea* (The Hague, Kluwer Law 1995) p. 327 et seq.; C.J.S. Forrest, 'A New International Regime for the Protection of Underwater Cultural Heritage', 51 *International and Comparative Law Quarterly* (2002) p. 511 at p. 513; T. Scovazzi, 'A Contradictory and Counterproductive Regime', in R. Garabello and T. Scovazzi, eds., *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Leiden, Martinus Nijhoff Publishers 2003) p. 3; Ya-juan Zhao, 'The Relationship among the Three Multilateral Regimes concerning the Underwater Cultural Heritage', in Nafziger and Scovazzi, op. cit. n. 10, pp. 601-642.

[362] The text of the United Nations Convention on the Law of the Sea of 1982 is available online at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm (last visited on December 31, 2008).

[363] Also referred to as the 'International Deep Seabed' – see Strati, op. cit. n. 361, at p. 295; Article 1 (5) 2001 Convention defines it as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.'

[364] Forrest 2002 'New International Regime', loc. cit. n. 361, at p. 514.

and vague language were subject to criticism. P.J. O'Keefe states that 'there are significant problems of interpretation'[365] of Article 149 of the 1982 Convention with its limitation to objects in the 'Area', arguing that it causes more questions instead of giving answers. Scovazzi[366] and Strati[367] criticize Article 303 of the 1982 Convention for various reasons, among others for the lack of a definition of the protected cultural property, the use of the term removal in connection with the coastal state's control of traffic of the before-mentioned objects[368], giving no answer to the threat of destruction of objects in the very place, for not clarifying the rules of protection with reference to found objects on the continental shelf[369], the exclusive economic zone[370] and the Area and the reservation of the Law of Salvage.[371] The said provisions of the 1982 Convention left important questions in relation to the protection of underwater cultural heritage unanswered, but at the same time made an arrangement for further regulations by the stipulation in Article 303 (4) of the 1982 Convention that 'this article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature'.

[365] P.J. O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (Leicester, Institute of Art and Law 2002) at p. 19 with further details.

[366] Scovazzi 2002, loc. cit. n. 361, p. 152 et seq.

[367] Strati, op. cit. n. 361, p. 330 et seq.

[368] Article 303 (2) 1982 Convention: 'In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.'

[369] The continental zone of a coastal nation extends out to its continental margin, but at least to 200 nautical miles from the baselines of its territorial sea. Article 76 1982 Convention defines the Continental Shelf as comprising 'the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that Distance;' an illustration of the maritime zones established under the regime of the 1982 regime can be found in C. Lund, 'The Making of the 2001 UNESCO Convention', in L.V. Prott, ed., *Finishing the Interrupted Voyage: Papers of the UNESCO Asia-Pacific Workshop on the 2001 Convention on the Protection of the Underwater Cultural Heritage* (Leicester, Institute of Art and Law 2006) p. 14 at p. 15.

[370] In principle, the Exclusive Economic Zone extends to a distance of 200 nautical miles out from its coast. Article 57 of the 1982 Convention defines the breadth of the Exclusive Economic Zone as a zone which 'shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured'.

[371] Norris defines salvage as 'the compensation allowed to persons by whose voluntary assistance, a ship at sea or her cargo, or both have been saved in whole or in part from impending sea peril; or in recovering such property from actual peril or loss, as in cases of shipwreck, derelict or recapture'; see Forrest 2002 'New International Regime', loc. cit. n. 361, at p. 534 with reference to M.J. Norris, *The Law of Salvage* (Mount Kisco, Baker Voorhis 1958) p. 157.

6.2. Background Of The 2001 Convention: Fishing For A Solution

The call for a comprehensive protection of underwater cultural heritage by an international binding tool did not emerge just a couple of years ago. The first international instrument to provide for some recognition of the need to preserve underwater cultural heritage is said to be the UNESCO Recommendation on International Principles Applicable to Archaeological Excavations[372] of 1956.[373]

As shown above[374], the 1982 United Nations Convention on the Law of the Sea touched on the issue, but could not give a satisfying answer. The complex framework of the 1982 Convention was not suitable for the extensive regulation of underwater cultural heritage.

It was a regional movement which finally initiated the promotion of a comprehensive international instrument on the protection of underwater cultural heritage. In 1985 the Council of Europe unsuccessfully tried to adopt the European Convention on Offences Relating to Cultural Property[375]. The Council of Europe recommended that the drafters of that convention should provide for the following: the exclusion of the application of salvage law to underwater cultural heritage, an extension of national legislation to a 200-mile-distance into the sea and a definition of underwater cultural heritage by comprising all objects older than 100 years[376]. Due to internal disputes among Member States to the European Council, not only were the recommendations to a certain extent omitted, but the mitigated draft version was also left unaccepted.

Attempts to establish an international instrument were not scotched. Only a couple of years later the International Law Association[377] (hereafter the 'ILA') began with the elaboration of a draft convention, based on some of

[372] The text of the 1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations is available online at http://portal.unesco.org/en/ev.php-URL_ID=13062&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited on December 31, 2008).

[373] C.J.S. Forrest, 'Defining 'Underwater Cultural Heritage'', 31 *The International Journal of Nautical Archaeology* (2002) p. 3 at p. 6 et seq.

[374] See *supra* I.6.1.

[375] The text of the European Convention on Offences Relating to Cultural Property is available online at http://conventions.coe.int/Treaty/EN/Treaties/Html/119.htm (last visited on December 31, 2008).

[376] Forrest 2002 'New International Regime', loc. cit. n. 361, at p. 514.

[377] Founded in 1873 as a consultative, non-governmental organization with its current headquarters in London, the aims of the ILA are 'the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law' (Art. 3.1 of its current constitution, available online at http://www.ila-hq.org/en/about_us/index.cfm; last visited on December 31, 2008).

the recommendations of the Council of Europe. Once again, one focus was put on the jurisdiction of the coastal state, extending its competences to a 200-mile-radius. In addition, salvage law should not be applicable and the draft also pointed out that the contained provisions should only apply to abandoned property 'to avoid any problems related to private property rights.'[378] In 1994 ILA adopted the Draft Convention on the Protection of the Underwater Cultural Heritage[379] (hereafter the 'ILA Draft'). Together with an annex including objective archaeological standards for the means of interpreting the 'appropriateness of activities affecting the Underwater Cultural Heritage'[380] drafted by the International Council for Monuments and Sites (ICOMOS)[381], that draft was submitted to UNESCO in 1994 as UNESCO was considered the best choice for the adoption of a convention.

Encouraged by the ILA Draft and its annex, UNESCO established an experts group which would further develop the drafting process. The first UNESCO draft was finished in 1998, but due to divergence in the approaches of maritime powers on the one hand and mere coastal states on the other hand it had to be revised several times. Heavily discussed issues concerned the scope of application, the definition of the protected property, questions in relation to salvage law and jurisdiction[382]. The result of the negotiations was again a compromise solution, significantly differing from the ILA Draft and the UNSECO Drafts. It led to the adoption of the Convention on the Protection of the Underwater Cultural Heritage of 2001 on November 6, 2001. As of December 31, 2008 the 2001 Convention has 20 States Parties[383], but has not yet entered into force[384].

[378] Forrest 2002 'New International Regime', loc. cit. n. 361, at p. 515.

[379] The text of the ILA Draft is available in P.J. O'Keefe and J.A.R. Nafziger, 'The Draft Convention on the Protection of the Underwater Cultural Heritage', 25 *Ocean Development and International Law* (1994) p. 391 at p. 404 et seq.; this article also comments the draft in detail.

[380] S. Dromgoole, '2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage', 18 *The International Journal of Marine and Coastal Law* (2003) p. 59 at p. 62.

[381] See *supra* n. 273.

[382] For details on the negotiation process in general see e.g. R. Garabello, 'The Negotiating History of the Provisions of the Convention on the Protection of the Underwater Cultural Heritage', in R. Garabello and T. Scovazzi, eds., *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Leiden, Martinus Nijhoff Publishers 2003) p. 89.

[383] See http://portal.unesco.org/la/convention.asp?KO=13520&language=E&order=alpha (last visited on December 31, 2008).

[384] Pursuant to Article 27 the 2001 Convention will enter into force three months after the deposit of the twentieth instrument of ratification, acceptance or approval.

6.3. Scope Of Application Of The 2001 Convention: Underwater Richness

The main focus of the 2001 Convention, which like the other conventions discussed so far is not retroactively applicable, lies on the preservation and protection of underwater cultural heritage for the benefit of humanity[385]. It tries to accomplish this by introducing a three-fold scheme: providing for basic principles and rules for the protection of underwater cultural heritage, establishing an international cooperation system and introducing a set of practical standards for dealing with such heritage. In this context the prime question is defining the objective scope of application.

The answer can be found in Article 1 (a) of the 2001 Convention: Underwater cultural heritage means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years. Article 1 (a) of the 2001 Convention gives some non-exclusive examples: (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character.

Compared to precedent drafts, the final definition of cultural heritage, though still wide in its meaning, shows both extensions of and limitations to the objective scope of application. The time limit of 100 years was obviously taken from the European Convention on Offences Relating to Cultural Property of 1985 and the ILA Draft and according to Forrest appears 'as if the trend in both national and international protection measures tend to be inclusive in scope, covering objects that have been submerged for more than 100 years as objects of an archaeological and historical nature. The definition of underwater cultural heritage has emerged from this trend.'[386] It constitutes a limitation to the vague formulation used by the 1982 Convention and to proposals of early UNESCO drafts which intended to also include objects which have been underwater for less than 100 years if designated by a State Party.[387]

Another – but as Dromgoole points out[388], only prima facie – limitation is the insertion of the second qualifying criterion, the requirement of 'having a

[385] See Article 2 (1) and Preamble (1) et seq. 2001 Underwater Convention.
[386] Forrest 2002 'Defining', loc. cit. n. 373, at p. 7.
[387] Forrest 2002 'Defining', loc. cit. n. 373, at p. 10.
[388] Dromgoole, loc. cit. n. 380, at p. 64.

cultural, historical or archaeological character'. This aspect was not found in previous drafts, but was finally introduced on demand of some common law countries. Dromgoole, however, doubts that this could be a further limitation to the scope of application, as 'arguably anything over 100 years of age has a cultural, historical or archaeological character,'[389] calling its insertion a 'fudge.'[390] It is indeed a vague term which could lead to problems in its interpretation.

A further limitation of the scope of application can be seen in the term activities directed at underwater cultural heritage in connection with the regulation of such activities for the sake of protecting underwater cultural heritage as prime focus[391]. The approach chosen by the drafters of the early UNESCO drafts was a different one: the scope of regulations compromised activities affecting underwater cultural heritage, which obviously has a wider meaning than the incorporated primary one affecting only activities 'having underwater cultural heritage as their primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage.'[392]

The adoption of the 2001 Convention also led to extensions of the objective scope of application. Whereas the ILA Draft and early UNESCO drafts focused on abandoned property to circumnavigate potential problems in the implementation of the Convention concerning questions of ownership of affected underwater cultural heritage, the 2001 Convention does not distinguish between abandoned and not abandoned objects and thus does not explicitly regulate the ownership of a cultural property between the respective States Parties. In addition, unlike initial plans[393] the 2001 Convention is also applicable to warships and other state-owned vessels[394].

[389] Dromgoole, loc. cit. n. 380, at p. 64.

[390] Dromgoole, loc. cit. n. 380, at p. 64.

[391] For the term *activities directed at underwater cultural heritage* see Preamble (7), Articles 1 (6), 1 (9), 2 (5), 7 (1), 7 (2), 8, 9 (1) (a), 11 (1), 12 (7), 13 2001 Convention; but see also Article 5 2001 Convention: 'Each State Party shall use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage.'

[392] Article 1 (6) 2001 Convention; see also Preamble (6), Articles 2 (5), 7 (1), 7 (2), 8, 9 (1) (a), 10 (1), 10 (2), 10 (3), 10 (7), 11 (1), 12 (1), 13, 15 and 16 2001 Convention.

[393] Forrest 2002 'New International Regime', loc. cit. n. 361, at p. 523.

[394] See Article 1 (1) (a) (ii) 2001 Convention which does not differentiate between various forms of ownership and purposes of vessels, aircrafts and other vehicles.

6.4. Legal Framework Of The 2001 Convention: Preservation And Prohibition Of Exploitation

The 2001 Convention with its main text and Annex with its 'Rules concerning activities directed at underwater cultural heritage'[395] (hereafter the '2001 Annex'), forming an 'integral part to the Convention'[396], provide for a complex framework of protection and preservation of underwater cultural heritage as outlined by Article 1, regardless of where the respective object is located in the world's oceans. The location of such an object is, however, not unimportant to the implementation of the 2001 Convention, as the means of execution of the protective and preventive measures depend on the zone of location.

Two basic principles can be found in Article 2 (5) and (7) of the 2001 Convention: the general means of preservation of underwater cultural heritage and the prohibition of economic exploitation of such objects.

As far as the preservation is concerned, the Convention stipulates that in situ preservation shall be the first option[397]. This approach was chosen in order to leave the respective object untouched, as – due to the underwater conditions – under normal circumstances it is a cheap, but nevertheless effective way of keeping underwater cultural heritage intact. This principle is said to be 'in accordance with established archaeological principles, under which excavation should take place in two circumstances only: where a site is under threat, or for legitimate research purposes.'[398] The principle as well as its exemptions are also reflected in the 2001 Annex, as its Rule 1 says that 'activities directed at underwater cultural heritage shall be authorized in a manner consistent with the protection of that heritage, and subject to that requirement may be authorized for the purpose of making a significant contribution to protection or knowledge or enhancement of underwater cultural heritage.' Rule 2 states that 'professional archaeological services or necessary services incidental thereto whose nature and purpose are in full conformity with this Convention and [which] are subject to the authorization of the competent authorities' shall not be prevented. Rule 4 of the 2001 Annex finally states that excavations and/or recovery can under certain

[395] Subtitle of the Annex; despite the fact that the 2001 Convention has not entered into force yet, the Annex has already become important as an international reference document in the discipline of underwater archaeology providing for operation schemes for interventions underwater.

[396] Article 33 2001 Convention.

[397] Article 2 (5) 2001 Convention: 'The preservation in situ of underwater cultural heritage shall be considered as the first option before allowing or engaging in any activities directed at this heritage.'

[398] Dromgoole, loc. cit. n. 380, at p. 65.

circumstances be possible under the Convention where they are 'necessary for the purpose of scientific studies or for the ultimate protection of the underwater cultural heritage'.

The second basic principle declares that the economic exploitation of underwater cultural heritage is not permissible[399]. This rule is also important for the often criticized open approach of the 1982 Convention towards the laws of salvage and finds. Under the new regime of the 2001 Convention[400] both are basically excluded, unless an activity relating to underwater cultural heritage '(a) is authorized by the competent authorities, (b) is in full conformity with this Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.'[401] In further combination with Rule 2 of the 2001 Annex[402] the result is the 'prevention of all the undesirable effects of the application of the law of salvage and finds. Freedom of fishing for archaeological and historical objects is banned.'[403]

Although the 2001 Convention neither explicitly touches upon the question of ownership of underwater cultural heritage nor provides for restitution claims in cases of illicit trafficking, it contains several regulations concerning the prevention of the illicit trafficking of cultural property recovered from the world's oceans,[404] comprising obligations for States Parties to prevent the engagement of its nationals or vessels under its flag in activities which could have a negative impact on underwater cultural heritage as well as an obligation addressed at States Parties to take appropriate measures to prevent the entry into its territory and the trafficking

[399] Article 2 (7) 2001 Convention: 'Underwater cultural heritage shall not be commercially exploited'; see also Rule 2 Annex: 'The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods'.

[400] For details about the new regime see G. Carducci, 'The Crucial Compromise on Salvage Law and the Law of Finds', in R. Garabello and T. Scovazzi, eds., *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Leiden, Martinus Nijhoff Publishers 2003) p. 193 et seq. or G. Carducci, 'The UNESCO Convention 2001: A Crucial Compromise on Salvage Law and the Law of Finds', in L.V. Prott, ed., *Finishing the Interrupted Voyage: Papers of the UNESCO Asia-Pacific Workshop on the 2001 Convention on the Protection of the Underwater Cultural Heritage* (Leicester, Institute of Art and Law 2006) p. 27 et seq.

[401] Article 4 2001 Convention.

[402] *Supra* n. 395.

[403] Scovazzi 2002, loc. cit. n. 361, at p. 154.

[404] Articles 14 to 18 2001 Convention; see E. Clement, 'The Convention Provisions on Illicit Traffic', in L.V. Prott, ed., *Finishing the Interrupted Voyage: Papers of the UNESCO Asia-Pacific Workshop on the 2001 Convention on the Protection of the Underwater Cultural Heritage* (Leicester, Institute of Art and Law 2006) p. 100 or P.J. O'Keefe 2002, op. cit. 365, p. 103 et seq., for details.

of illicitly exported, recovered or excavated underwater cultural heritage. Such measures should be supported by the adoption of sanctions on a national level. It should be pointed out that the contained provisions have to be seen as complementary and in the context of other UNESCO or UNIDROIT Conventions dealing with this issue, namely the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995.

An important question heavily discussed in the drafting process and solved by the 2001 Convention by establishing a graduated system of international cooperation concerned the issues of jurisdiction and means of cooperation between States Parties. From the beginning of the drafting process it was clear that international cooperation is the best way of assuring the comprehensive regime of protection of underwater cultural heritage. For this purpose, however, conflicts among the negotiating nations with regard to the best approach balancing national jurisdiction of coastal states and the interest of naval powers had to be resolved. Coastal states supported an extension of state jurisdiction which was also suggested by the ILA Draft in the form of a 'Cultural Heritage Zone.'[405] Maritime Powers, on the other hand, feared that an extension of jurisdiction could interfere with their own interests and called the plans 'creeping jurisdiction.'[406] In the end, comprehensive state cooperation was given the preference over an extension of national jurisdiction of coastal states beyond the already existing jurisdiction.

The system introduced by the 2001 Convention differentiates between already well-known maritime zones as set forth in the 1982 Convention, but adopts a regime with the prime focus on protecting and preventing underwater cultural heritage.[407] By doing this it basically classifies the zones

[405] Article 1 (3) ILA Draft: 'Cultural Heritage Zone means an area beyond the territorial sea of the State up to the outer limits of its continental shelf as defined in accordance with relevant rules and principles of international law;' Article 5 (1) ILA Draft: 'A State Party to this Convention may establish a cultural heritage zone and notify other State Party of its action. Within this zone, the State Party shall have jurisdiction over activities affecting the underwater cultural heritage;' see also G. Carducci, 'New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage', 96 *American Journal of International Law* (2002) p. 419 at p. 428.

[406] Forrest 2002 'New International Regime', loc. cit. n. 361, at p. 542.

[407] For the relationship of the 2001 Convention and the 1982 Convention see K. Lee, 'An Inquiry into the Compatibility of the UNESCO Convention 2001 With UNCLOS 1982', in L.V. Prott, ed., *Finishing the Interrupted Voyage: Papers of the UNESCO Asia-Pacific Workshop on the 2001 Convention on the Protection of the Underwater Cultural Heritage* (Leicester, Institute of Art and Law 2006) p. 20 et seq.

in two groups: the first group with more or less exclusive rights of the coastal state comprising internal waters, archipelagic waters, the territorial sea[408] and – if implemented by the coastal state[409] – the contiguous zone[410] and a second group consisting of the (remaining) economic exclusive zone[411], the continental shelf and the Area with the newly established complex regime of international cooperation between the States Parties, a system which Scovazzi felicitously calls an 'exclusion of a 'First Come, First Served' Approach for the Heritage Found.'[412] Especially the provisions regarding the contiguous zone are clearly an advancement in the right direction compared to the vague language of Article 303 (2) of the 1982 Convention[413]. Whereas the latter was addressed merely at the removal of underwater cultural heritage, the coastal state now at large has the right to regulate and authorize activities directed at underwater cultural heritage, thus not only preventing its removal but also providing for comprehensive protection. In addition, while Article 303 (2) of the 1982 Convention did not give instructions of how to prevent unauthorized removal, the new regime with its obligation to follow the rules of the 2001 Annex might lead to a uniformed approach among the States Parties.

With respect to the first group, coastal states generally speaking have the exclusive right to regulate activities directed at underwater cultural heritage localized in waters of the first group[414]. However, in exercising their rights they are bound by the principles of the protective and preventive regime set forth in the 2001 Convention and 'should inform the flag State Party to this Convention and, if applicable, other States with a verifiable link, especially a

[408] As outlined in the 1982 Convention the territorial sea comprises in principle a belt of coastal waters extending up to 12 nautical miles from the baseline of a coastal state. It is regarded as the sovereign territory of the state, though foreign ships are usually allowed to pass through it.

[409] Carducci 2002, loc. cit. n. 405, at p. 428; see also Article 8 2001 Convention.

[410] The contiguous zone usually extends from the outer edge of the territorial sea to up to 24 nautical miles from the baseline, a zone in which pursuant to Article 33 1982 Convention 'prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea and punish infringement of the above laws and regulations committed within its territory or territorial sea.'

[411] Generally, the economic exclusive zone extends from the coast to up to 200 nautical miles.

[412] Scovazzi 2002, loc. cit. n. 361, at p. 154.

[413] See *supra* I.6.1.

[414] Article 7 (1) 2001 Convention: 'States Parties, in the exercise of their sovereignty, have the exclusive right to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea.'

Article 8 2001 Convention: 'Without prejudice to and in addition to Articles 9 and 10, and in accordance with Article 303, paragraph 2, of the United Nations Convention on the Law of the Sea, States Parties may regulate and authorize activities directed at underwater cultural heritage within their contiguous zone. In so doing, they shall require that the Rules be applied.'

cultural, historical or archaeological link, with respect to the discovery of such identifiable State vessels and aircraft'.[415]

In contrast to this, the jurisdictional structure concerning maritime zones beyond the contiguous zone relies on a unique system of reporting and consulting on the one hand and taking urgent and necessary steps without undergoing a consultation process focused on the protection of underwater cultural heritage on the other hand[416]. In principle and as outlined before, each State Party has the obligation to prohibit its nationals and vessels from engaging in activities contradicting the 2001 Convention and harming Underwater Cultural Heritage. In cases in which its nationals and vessels discover or intend to engage in activities directed at underwater cultural heritage the respective State Party has to require them to report to it and – if located in the exclusive economic zone or on the continental shelf of another State Party – also to inform the concerned coastal state[417] or require them to report to it and 'ensure the rapid and effective transmission of such report to all other States Parties.'[418] In a second step, usually a consultation process regarding the protection of the respective underwater cultural heritage has to be undertaken by the States Parties outlined in Articles 10 (3)[419] and 12 (2)[420] of the 2001 Convention. A Coordinating State as described in the same provisions has to ensure that the measures of protection which have

[415] Article 7 (3) 2001 Convention; see P.J. O'Keefe 2002, op. cit. 365, p. 76 et seq. for details.

[416] Note that the procedures applicable for the exclusive economic zone and the continental shelf on the one hand and the Area on the other hand are not identical, but to a great extent similar. For the reason of better understanding and simplification, this report does not distinguish between the two regimes in this respect. For further information refer to e.g. Carducci 2002, loc. cit. n. 405, at p. 428 et seq. or P.J. O'Keefe 2002, op. cit. 365, p. 80 et seq.

[417] Article 9 (1) (b) (i) 2001 Convention: 'in the exclusive economic zone or on the continental shelf of another State Party: States Parties shall require the national or the master of the vessel to report such discovery or activity to them and to that other State Party.'

[418] Article 9 (1) (b) (ii) 2001 Convention: 'alternatively, a State Party shall require the national or master of the vessel to report such discovery or activity to it and shall ensure the rapid and effective transmission of such reports to all other States Parties;' in addition, pursuant Article 9 (4) and (5) 2001 Convention, the respective State Party shall also inform the Director-General of UNESCO, who shall promptly inform all States Parties.

[419] Article 10 (3) 2001 Convention: 'Where there is a discovery of underwater cultural heritage or it is intended that activity shall be directed at underwater cultural heritage in a State Party's exclusive economic zone or on its continental shelf, that State Party shall:

(a) consult all other States Parties which have declared an interest under Article 9, paragraph 5, on how best to protect the underwater cultural heritage;

(b) coordinate such consultations as 'Coordinating State', unless it expressly declares that it does not wish to do so, in which case the States Parties which have declared an interest under Article 9, paragraph 5, shall appoint a Coordinating State.'

[420] Article 12 (2) 2001 Convention: 'The Director-General shall invite all States Parties which have declared an interest under Article 11, paragraph 4, to consult on how best to protect the underwater cultural heritage, and to appoint a State Party to coordinate such consultations as the 'Coordinating State'. The Director-General shall also invite the International Seabed Authority to participate in such consultations.'

been agreed to by the consulting States will be implemented with the competence of preliminary research on the underwater cultural heritage. The consultation process is subject to limitation in the case of urgent protection. The reporting and protective systems in relation to objects found in the Area resemble the regime introduced for the exclusive economic zone and the continental shelf with, as Carducci states, 'the main difference … that the role played by the coastal state in the context of the EEZ [note: the exclusive economic zone] and the continental shelf is generally entrusted to the UNESCO Director-General for the notification and reporting regime and to an appointed state for the protective regime with respect to the Area'[421].

As coordination and negotiation among States Parties usually take some time, a mechanism had to be found to react in cases of immediate threat to underwater cultural heritage. Thus, for the sake of effective protection the Coordinating State or – if located in the Area – all States Parties is/are allowed to take all necessary means to prevent the object under risk respecting the principles of the 2001 Convention[422].

Supplementing the regime of international cooperation the 2001 Convention also encourages States Parties to conclude bilateral or multilateral agreements in order to 'ensure better protection of underwater cultural heritage than those adopted in this [note the 2001] Convention.'[423] It is obvious that the 2001 Convention could not fully address the interests of every single state. By installing this provision States Parties, especially when it comes to regional protection, may be encouraged to install further measures in order to protect underwater cultural heritage appropriately.

The decisive factor for the functioning of the 2001 Convention is obviously the question of its international acceptance. Underwater Cultural Heritage can only be protected effectively if the 'main players' are willing to make concessions and accept the compromise of the 2001 Convention. Major

[421] Carducci 2002, loc. cit. n. 405, at p. 431.

[422] Article 10 (4) 2001 Convention: 'Without prejudice to the duty of all States Parties to protect underwater cultural heritage by way of all practicable measures taken in accordance with international law to prevent immediate danger to the underwater cultural heritage, including looting, the Coordinating State may take all practicable measures, and/or issue any necessary authorizations in conformity with this Convention and, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activities or any other cause, including looting. In taking such measures assistance may be requested from other States Parties.'

Article 12 (3) 2001 Convention: 'All States Parties may take all practicable measures in conformity with this Convention, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activity or any other cause including looting.'

[423] Article 6 (1) 2001 Convention.

maritime powers, however, have already shown their reluctance to do so[424]. The 2001 Convention entered into force in January 2010. It will soon be put through a test stage. One has to see whether the results will influence the position taken by the opponents to the convention in a protective-friendly way or, how Nafziger puts it: 'It … remains to be seen if and when compromise and domestic legal adjustments will triumph over lingering skepticism by some government toward the UNESCO Convention 2001.'[425]

CONVECTION FOR THE SAFEGUARDING OF INTANGIBLE CULUTURAL HERITAGE (2003)[426]

7.1. Brief Overview And The Drafting Process Of The 2003 Convention: What About Intangibles?

UNESCO's standard-setting instruments and the 1995 UNIDROIT Convention have widened the scope of protection of cultural heritage, comprised of movable and immovable tangible heritage. Yet, they have left an important part for a holistic campaign more or less unregulated: the aspect of safeguarding intangible heritage[427]. Its addition to the international protectoral regime, however, this has been an issue for more than three decades, with the first attempts to raise it to an international level in the early 1970s[428].

[424] See e.g. Dromgoole, loc. cit. n. 380, at p. 74 and p. 77/78 for the position of the UK; Scovazzi 2002, loc. cit. n. 361, at p. 156 for the position of the United States.

[425] J.A.R. Nafziger, 'Foreword', in S. Dromgoole, ed., *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001* 2nd edn. (Leiden, Martinus Nijhoff Publishers 2006) p. ix at p. xii.

[426] If used without any determination, the term *convention* refers to the *Convention for the Safeguarding of Intangible Cultural Heritage* in this chapter.

[427] See e.g. F. Francioni, 'The Protection of Intangible Cultural Heritage: A New Challenge for UNESCO and International Law', in Japan-Italy Association of World Heritage Studies, ed., *Symposium: The Transmission and Present State of Cultural Heritage* (Kyoto, Japan-Italy Association of World Heritage Studies 2002) p. 68 et seq. for stressing the need of an international instrument on the protection of intangible cultural heritage.

[428] N. Aikawa, 'An Historical Overview of the Preparation of the UNESCO International Convention for the Safeguarding of the Intangible Cultural Heritage', 56 *Museum International* (2004) p. 137 at p. 138.; see also M.F. Brown, 'Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property', 12 *International Journal of Cultural Property* (2005) p. 40 pointing out the shift from mere tangible subjects of interest to also include intangible aspects of cultural heritage. Also see Angélica Sola, 'Quelques réflexion à propos de la Convention pour la sauvegarde du patrimoine culturel immatériel', in Nafziger and Scovazzi, op. cit. n. 10, pp. 487-528.

Already during the drafting of the 1972 Convention inclusion of intangible cultural heritage into the scope of application was debated[429]. Although discussions were not successful, the influence of intangible cultural heritage on the 1972 Convention as adopted, especially with regard to its application, cannot be denied. As can be seen in the development of the set of criteria used by the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage for incorporating cultural objects on the World Heritage List[430] the idea of intangible heritage has heavily influenced the decision-making process of the World Heritage Committee, as the relationship between objects on the World Heritage List and intangible values associated to those properties has been deepened.[431]

In 1971 UNESCO drafted the first independent document related to the protection of intangible cultural heritage, a draft dealing with the question of protecting folklore by applying copyright on an international basis, an approach which was called 'unrealistic'[432]. A couple of years later WIPO joined UNESCO in a further similar attempt producing various research documents and guidelines, such as the Tunis Model Law on Copyright for Developing Countries[433] in 1976 or the 1982 Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit and Other Prejudicial Actions.[434] All these approaches can be described as very ambitious, maybe overambitious for that time[435] as can be judged from the fact that none of the elaborated drafts was adopted.

The first major step towards the new convention was the 1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore, as it was the first international attempt to introduce regulations concentrating on intangible cultural heritage from a cultural perspective leaving the

[429] Blake 2006, op. cit. n. 11, at p. 5.

[430] See *supra* I.4.2. and I.4.3.

[431] For the current set of criteria see *supra* n. 233.

[432] S. Sherkin, 'A Historical Study on the Preparation of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore', in P. Seitel, ed., *Safeguarding Traditional Cultures: A Global Assessment of the 1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore* (Washington, Smithsonian Center for Folklife and Cultural Heritage 2001) p. 42 at p. 45.

[433] The text of the Tunis Model Law on Copyright for Developing Countries is available online at http://portal.unesco.org/culture/en/files/31318/11866635053tunis_model_law_en-web.pdf/tunis_model_law_en-web.pdf (last visited on December 31, 2008).

[434] Aikawa 2004, loc. cit. n. 428, at p. 138.; see also W. Wendland, 'Intangible Heritage and Intellectual Property: Challenges and Future Prospects', 56 *Museum International* (2004) p. 97 for the cooperation work between UNESCO and WIPO and WIPO's further work in this area.

[435] For a detailed analysis of the early relationship between Intellectual Property Rights and Intangible Heritage and its influence on the further proceedings see e.g. J. Blake, *Developing a New Standard-setting Instrument for the Safeguarding of Intangible Cultural Heritage*, rev. ed. (Paris, UNESCO Publishing 2002) p. 13 et seq.

intellectual property aspects approach aside.[436] It encouraged international cooperation in the fields of intangible cultural heritage protection, but was criticized by the international community not only for its lack of binding power, but, as Blake points out, also for 'the heavy emphasis on the needs of the scientific community,'[437] the too narrow definition of its scope and the fact that the recommendation 'fails to safeguard folklore through the social and economic empowerment of its creators.'[438]

In 1993 UNESCO launched a program that fostered the focus on the protection of intangible cultural heritage on the operational side. The Living Human Treasures Program was designed to safeguard intangible cultural heritage by acknowledging the individual bearers of traditional knowledge and skills, and encouraging them to pass on such knowledge and skills to younger generations by encouraging the creation of national systems of 'living cultural properties'[439], motivated by the fact that this aspect of cultural heritage has not been targeted by international instruments so far. These tradition bearers were sentimentally labeled as 'Living Human Treasures' and defined under the guidelines at that time as '… persons who embody, who have in the very highest degree, the skills and techniques necessary for the production of selected aspects of the cultural life of a people and the continued existence of their material cultural heritage.'[440] The Living Human Treasures Program slowly raised the awareness of the needs to regulate the intangible aspects of cultural heritage and to get control of the grave threats thereto. Member States were mandated to submit their national lists of living human treasures 'for inclusion in a future UNESCO World List.'[441] Selection of living human treasures took into account 'the danger of extinction of the associated knowledge and skills due to disuse or lack of recognition.'[442] The program effectively acknowledged that the existence of intangible cultural heritage depended on the 'social and

[436] Aikawa 2004, loc. cit. n. 428, at p. 138.

[437] J. Blake 'Safeguarding Traditional Culture and Folklore – Existing International Law and Future Developments', in P. Seitel, ed., *Safeguarding Traditional Cultures: A Global Assessment of the 1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore* (Washington, Smithsonian Center for Folklife and Cultural Heritage 2001) p. 149 at p. 151 with further details.

[438] Blake 2001, loc. cit. n. 437, at p. 151.

[439] Blake 2001, loc. cit. n. 437, at p. 151. Also see Burra Srinvas, 'The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage', Nafziger and Scovazzi, op. cit. n. 10, pp. 529-558, at p. 532.

[440] P. Kuruk, 'Cultural Heritage, Traditional Knowledge and Indigenous Rights', 1 *Macquire Journal of International and Comparative Environmental Law* (2004) p. 111 at p. 116 citing UNESCO, *Operational Guidelines: Human Living Treasures*, paragraph 9, undated publication.

[441] Kuruk, loc. cit. n. 440, at p. 116.

[442] Kuruk, loc. cit. n. 440, at p. 116.

economic well-being of its holders and their way of life.'[443] This approach marked a significant departure from valuing the material products of human creativity to valuing the artists or craftsmen themselves.

In 1998 UNESCO adopted a program entitled Masterpieces of the Oral and Intangible Heritage of Humanity (hereafter the 'Masterpieces Program'), another program that encouraged governments, non-governmental organizations (NGOs) and local communities to identify, safeguard, revitalize and promote their oral intangible cultural heritage[444]. Although not constructed as a binding international instrument, but rather being based on a voluntary concept, it was an important step forward, as it was highly accepted by more than 100 countries and already designed in a way that should ease the further works for creating a standard-setting instrument. By installing a list comprising two groups of intangible heritage: (1) forms of popular or traditional expressions and (2) cultural spaces with the meaning of 'places in which popular and traditional activities are concentrated,'[445] this program became the foundation of more global attention to the urgency of safeguarding living heritage. Its close relationship to the 1972 Convention is striking, as can be seen from the introduction of the 'Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity – Guide for the presentation of candidature files.'[446] It also introduced a set of criteria[447]

[443] Blake 2002, op. cit. 435, at p. 45.

[444] According to Paragraph 4 *Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity – Guide for the presentation of candidature files* (hereafter, Proclamation of Masterpieces Guide; available online at http://unesdoc.unesco.org/images/0012/001246/124628eo.pdf; last visited on December 31, 2008) the main purposes were:

'(a) to sensitize and mobilize opinion in favour of the recognition of the value of oral and intangible heritage and of the need to safeguard and revitalize it;

(b) to evaluate and list the oral and intangible heritage sites in the world;

(c) to encourage countries to establish national inventories of the oral and intangible heritage and to take legal and administrative measures to protect it;

(d) to promote the participation of traditional artists and local practitioners in the identification and renewal of the intangible heritage.'

[445] Paragraph 1 (c) Annex I Proclamation of Masterpieces Guide; see also F. Lenzerini, 'Intangible Cultural Heritage in Danger: A Part of the Human Memory that Is Disappearing', in Japan-Italy Association of World Heritage Studies, ed., *Symposium : The Transmission and Present State of Cultural Heritage* (Kyoto, Japan-Italy Association of World Heritage Studies 2002) p. 75.

[446] Paragraph 1 Proclamation of Masterpieces Guide: 'The 1972 Convention on World Cultural and Natural Heritage identified monuments, sites and landscapes of outstanding value for the whole of humanity by inscribing them in the World Heritage List. However, that Convention is not applicable to intangible cultural heritage.'

Paragraph 2 Proclamation of Masterpieces Guide: 'The oral and intangible heritage has become internationally recognized as a vital factor for cultural identity, the promotion of creativity and the preservation of cultural diversity. It plays a crucial role in national and international development, in tolerance and harmonious interaction between cultures. With present-day globalization, numerous forms of cultural heritage are in danger of disappearing, threatened by cultural standardization, armed conflicts, tourism, industrialization, the rural exodus, migrations and the degradation of the environment.'

for the incorporation of prospective objects, stipulating as a main requirement outstanding value with the meaning of 'demonstrating either a high concentration of outstanding intangible cultural heritage or a popular and traditional cultural expression with outstanding value from a historical, artistic, ethnological, sociological, anthropological, linguistic or literary point of view.'[448] Blake states that this set of criteria will be 'a useful basis for the development of criteria for listing under the new international Convention [note: the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage].' However, one should keep clearly in mind that the approach of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage towards inscription of intangible cultural heritage differs from the approach chosen by the Masterpieces Program. Having outstanding universal value will not be a prerequisite for inscription under the auspices of the 2003 Convention[449]. During its time of operation the Masterpieces Program led to the inscription of in total 90 masterpieces from 2001 to 2005. As shown later[450], these objects are also influential for the implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage whose coming into force also led to the end of the Masterpieces Program[451].

In 1999, based on the latest developments, the UNESCO General Conference in its 30th session furthered the pursuit of a new standard-setting instrument regulating intangible cultural heritage protection on an international level by initiating preliminary studies on the development of an according instrument. Studies were carried out by a group of legal experts in Turin in 2001, shaping the perspectives of the drafting process which was

Paragraph 3 Proclamation of Masterpieces Guide: 'In order to respond to the emergency of the disappearance of the intangible cultural heritage, the General Conference, at its 29th session in November 1997, adopted resolution 23 which created this distinction.'

[447] Prospective objects have to '(i) possess outstanding value as a Masterpiece of the human creative genius, (ii) are rooted in the cultural tradition or cultural history of the community concerned, (iii) play a role as a means of affirming the cultural identity of the community concerned, (iv) are distinguished by excellence in the application of skills and technical qualities displayed, (v) constitute a unique testimony of a living cultural tradition, and (vi) are threatened with disappearance due to insufficient means for safeguarding or to processes of rapid change' – see UNESCO Doc. CLT/CH/ITH/PROC/BR3 '*Masterpieces of the Oral and Intangible Heritage of Humanity*' p. 4 and Paragraph 22 Proclamation of Masterpieces Guide; for a discussion of the conceptual development of this set of criteria see N. Aikawa, 'Conceptual Development of UNESCO's Programme on ICH', in J. Blake, ed., *Safeguarding Intangible Cultural Heritage: Challenges and Approaches* (Crickadarn, Institute of Art and Law and contributors 2007) p. 43 at p. 59.

[448] Paragraph 21 *Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity – Guide for the presentation of candidature files.*

[449] For details see *infra* I.7.3.

[450] *Infra* I.7.2.

[451] *Infra* I.7.2.

officially initiated later in 2001 during the 31st session of the UNESCO General Conference[452] and the follow-up 2002 Istanbul Declaration[453]. Out of three possible options, drafting a convention based on the successful model of the 1972 Convention was given preference over two other approaches: one inspired by intellectual property rules and the other one a sui generis model with an outline based on general cultural heritage rules. The intellectual property approach was dropped as it was said to be 'too limited in its aims and generally inappropriate to this [note: intangible cultural] heritage.'[454] In addition, any interference with the work of WIPO as well as cooperation with WIPO were avoided, as it was intended to let UNESCO work more or less independently. The other dropped option did not gain much attention to avoid unnecessary and time-consuming research work for a totally new structure – the model of the 1972 Convention worked too well. However, it was clear that it needed some adaptation in order to make it applicable for the field of intangible cultural heritage protection[455]. It was the task of three Intergovernmental Meetings of Experts in late 2002 and early 2003 and a meeting of a subgroup to put the research results of the Turin roundtable, the outcome of a further study group consisting mainly of anthropologists and earlier attempts into one draft and at the same time elaborate and define delicate areas such as the scope of application or the working mechanism of the planned convention[456].The final draft presented to UNESCO's General Conference was based on the following important characteristics: as outlined below[457], the term intangible cultural heritage was given an inclusive, but still applicable meaning; the important role of the States Parties in relation to the protection of intangible cultural heritage was stressed as well as the principle of international cooperation; a listing system was also incorporated as well as a comprehensive means of financial assistance and a institutional framework. The final version was adopted by the General Conference on October 17, 2003 as the Convention for the Safeguarding of the Intangible Cultural Heritage (hereafter the '2003 Convention') which entered into force on April 20, 2006. Currently (as of December 31, 2008) the 2003 Convention has 107 States Parties[458].

[452] Aikawa 2004, loc. cit. n. 428, at p. 143.

[453] Blake 2006, op. cit. n. 11, at p. 12.

[454] Blake 2006, op. cit. n. 11, at p. 13.

[455] J. Blake, 'Introduction', in J. Blake, ed., *Safeguarding Intangible Cultural Heritage: Challenges and Approaches* (Crickadarn, Institute of Art and Law and contributors 2007) p. 1 at p. 4.

[456] For a detailed analysis refer to Blake 2006, op. cit. n. 11, p. 15 et seq.

[457] See *infra* I.7.2. and I.7.3.

[458] A full list of States Parties is available online at http://portal.unesco.org/la/convention.asp?language=E&KO=17116&order=alpha (last visited on December 31, 2008).

7.2. Scope Of Application Of The 2003 Convention: Safeguarding, Not Just Protecting

Article 1 of the 2003 Convention describes in brief the main focuses of the convention as it says:

The purposes of this Convention are:

(a) to safeguard the intangible cultural heritage;

(b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned;

(c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;

(d) to provide for international cooperation and assistance.'

Bedjaoui sums those four layers up to felicitously state that 'the main objective of the [note: 2003] Convention was to prevent humankind's intangible heritage from disappearing,'[459] especially in times of globalization which 'could only undermine cultural diversity in all its forms.'[460]

One can point out two characteristics: firstly, the 2003 Convention clearly refrains from using the term protecting in combination with intangible cultural heritage; secondly, the term intangible cultural heritage forms the cornerstone of the objective scope of application and thus has to be defined.

With regard to the first point, the 2003 Convention gives up on using the term protecting commonly used in other conventions concerning cultural heritage so far, as it was said that safeguarding goes beyond mere protection and was also used in the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore[461]. According to Blake safeguarding 'suggests a broader approach than 'protection', whereby not only is intangible cultural heritage protected from direct threats to it but positive actions that contribute to its continuance are also taken.'[462] Indeed, the

[459] M. Bedjaoui, 'The Convention for the Safeguarding of the Intangible Cultural Heritage: the Legal Framework and Universally Recognized Principles', 56 *Museum International* (2004) p. 150 at p. 153.

[460] Bedjaoui, loc. cit. n. 459, at p. 153.

[461] The text of this recommendation is available online at http://portal.unesco.org/en/ev.php-URL_ID=13141&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html (last visited on December 31, 2008).

[462] Blake 2006, op. cit. n. 11, at p. 23.

2003 Convention gives it a more comprehensive range than the literal meaning of protection could allow for. As defined in Article 2 (3) of the 2003 Convention, the term also refers to all necessary means of 'identification, documentation, research, preservation, … promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such [note intangible cultural] heritage' and should not have an exhaustive meaning, but rather ensure the viability of the intangible cultural heritage.'[463]

The other and much more difficult question in the drafting process was related to the terminology used for the subject matter. In the end the single term intangible cultural heritage was chosen, a term which obviously goes beyond the scope of other possible terms, such as folklore used in the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore. The latter was heavily criticized for its narrow application, for not taking into account 'the social, cultural and intellectual context of the creation and maintenance of folklore'[464] and for its 'limited reference … to traditional knowledge and indigenous cultural heritage.'[465] The drafters of the 2003 Convention were convinced that it would be better to use and further develop the term intangible cultural heritage successfully used for 1998 Masterpieces Program, as it already put the emphasis on a comprehensive part of cultural heritage. Prott also notes that the terminology used in the 2003 Convention reflects a change in the attitude towards the nature of cultural heritage in the late 1980s, as it puts a clear normative, but modern, sign to the subject matter of the Convention[466]. The 2003 Convention itself provides for a definition of the term intangible cultural heritage stating that:

'The 'intangible cultural heritage' means the 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. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention,

[463] Article 2 (3) 2003 Convention.
[464] Blake 2006, op. cit. n.11, at p. 32.
[465] Blake 2006, op. cit. n. 11, at p. 32.
[466] L.V. Prott, 'International Standards for Cultural Heritage', in *UNESCO World Cultural Report* (Paris, UNESCO Publishing 1998) p. 222 at p. 224 et seq.

consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.'[467]

As this definition shows, intangible cultural heritage refers to a great number of various forms and methods of cultural identity. It is also linked to its origin, mostly local, but not bound to the territory of a single State Party as it assigns the respective object 'to communities, groups and, in some cases, individuals,' thus giving them a central role in the process of safeguarding intangible cultural heritage. The Convention's explanation describes the term further by pointing out its important place at the interface of the past, present and future, as expression of a diversity which has to be retained in order to guarantee the evolvement of the respective bearer being a dynamic process also described as preserving 'living traditions that are constantly evolving in response to new circumstances.'[468] Thus – in contrast to the protection of tangible heritage in its status quo – not a fixed status of intangible culture, but, according to Kurin, rather the intangible cultural heritage itself in the form of a 'dynamic social process of creativity, of identity-making, of taking and respecting the historically received and remaking it as one's own'[469] is to be safeguarded. Francioni goes in a similar direction by stating that intangible cultural heritage covers a 'variety of manifestations of a living culture'[470] which have to be distinguished from 'material products – movable or immovable – that have been the object of international protection in the past.'[471]

At the same time, the 2003 Convention clarifies that its scope is limited. Its borders are set to conform and be compatible with human rights instruments and to avoid any infringement of international standards of human rights[472]. It is also limited by the need to balance mutual interrelationships between communities, groups and individuals as well as by the requirements of sustainable development, defined by the 1987 Our Common Future Report of the World Commission on Environment and Development (usually

[467] Article 2 (1) 2003 Convention.

[468] Blake 2006, op. cit. n. 11, at p. 35.

[469] R. Kurin, 'Safeguarding Intangible Cultural Heritage: Key Factors in Implementing the 2003 Convention', 2 *International Journal of Intangible Heritage* (2007) p. 10 at p. 13.

[470] Francioni 2004, loc. cit. n. 138, at p. 1222.

[471] Francioni 2004, loc. cit. n. 138, at p. 1222.

[472] For a detailed analysis of the relationship between the 2003 Convention and human rights see T. Kono and J. Cornett, 'An Analysis of the 2003 Convention and the Requirement of Compatibility with Human Rights', in J. Blake, ed., *Safeguarding Intangible Cultural Heritage: Challenges and Approaches* (Crickadarn, Institute of Art and Law and contributors 2007) pp. 143-174.

referred to as Brundtland Report) as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concept; the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organizations on the environment's ability to meet present and the future needs.'[473]

Article 2 (2) of the 2003 Convention refers to intangible cultural heritage more closely by giving examples of its most important domains comprised of the following:

'(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage[474];

(b) performing arts;

(c) social practices, rituals and festive events;

(d) knowledge and practices concerning nature and the universe;

(e) traditional craftsmanship.'

This provision supplements the definition clause of Article 2 (1) of the 2003 Convention as it clarifies the practical fields of application, characterizing and categorizing the term intangible cultural heritage more closely. In combination with Article 2 (1) of the 2003 Convention it goes far beyond the possible scope of mere IP related protection as it emphasizes the cultural aspect of intangible manifestations as well as the objective personal scope by including not only individuals, a group with a fixed number of members or a legal entity [note: depending on the respective IP area the addressees of IP rights], but also – and primarily – communities and groups as such. This is an important step forward as intangible cultural heritage is usually not the 'unique creation of an individual.'[475]

[473] World Commission on Environment and Development, *Our Common Future* (New York 1987); for an analysis of the 2003 Convention in relation to *sustainable development* see T. Kono, 'UNESCO and Intangible Cultural Heritage from the Viewpoint of Sustainable Development', in A.A. Yusuf, ed., *Standard-Setting in UNESCO Vol.1* (Paris, UNESCO Publishing and Martinus Nijhoff Publishers 2007) p. 237. at p. 251 et seq.

[474] For an analysis of this term and its meaning see e.g. R. Smeets, 'Language as a Vehicle of the Intangible Cultural Heritage', 56 *Museum International* (2004) p. 156

[475] B. Kirshenblatt-Gimblett, 'Intangible Heritage as Metacultural Production', 56 *Museum International* (2004) p. 52 at p. 53.; see also E.K. Slattery, 'Preserving the United States' Intangible Cultural Heritage: An Evaluation of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage as a Means to Overcome the Problems Posed by Intellectual Property Law', 16 *DePaul*

At the same time, Article 3 of the 2003 Convention clarifies that the status or level of protection provided for by the 1972 Convention should not be diminished, nor should the 2003 Convention infringe or interfere with the States Parties' rights and obligations deriving from other instruments in the fields of intellectual property or the use of biological and ecological resources.

7.3. Legal Framework And Mechanism Of The 2003 Convention: Adopting And Adapting The 1972 Model

As pointed out before, the 2003 Convention was built on the model of the successful and highly accepted 1972 Convention. This becomes obvious when it comes to the framework and operational mechanism of the 2003 Convention. The model was, however, adapted to fit the needs of safeguarding intangible cultural heritage[476].

Addressees of the 2003 Convention are its States Parties. The primary task of the respective State Party is to guarantee 'the safeguarding of the intangible cultural heritage present in its territory.'[477] Safeguarding intangible cultural heritage on a national level shall be understood as a comprehensive project, not limited to safeguarding measures related to heritage inscribed on the Representative List of Intangible Cultural Heritage of Humanity, and should be carried out in close cooperation with local communities, groups and individuals as bearers of such heritage[478]. To facilitate the safeguarding work, States Parties are asked to install and update national inventories of the intangible cultural heritage present in their territories[479], an idea also supported by the general 'shall endeavor' obligation of Article 15 of the 2003 Convention stipulating that the States Parties '[w]ithin the framework of its safeguarding activities of the intangible cultural heritage … shall endeavor to ensure the widest possible

University Journal of Art and Entertainment Law (2006) p. 201 at p. 231 who stresses that 'the (note: IP laws') requirements of individual authorship, originality, and fixation pose potential problems to members of cultures seeking to preserve their intangible cultural heritage'; see also W. Wendland, 'Intellectual Property Implications of Inventory Making', in J. Blake, ed., *Safeguarding Intangible Cultural Heritage: Challenges and Approaches* (Crickadarn, Institute of Art and Law and contributors 2007) p. 129 et seq. who nevertheless stresses that safeguarding programmes have also to take IP issues into account in order to work effectively.

[476] In this respect it should also be noted that the implementation process has just started roughly two years ago when the convention entered into force. The heart of this process, the operational guidelines, is still in drafting and not adopted yet.

[477] Article 11 (a) 2003 Convention.

[478] Article 11 (b) 2003 Convention.

[479] Article 12 (1) 2003 Convention.

participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management'. The mechanism of collaboration is further defined in the Operational Directives adopted at the 2nd ordinary session of the General Assembly in June 2008[480].

The function of the national inventories differs from the 'tentative lists' of the regime of the 1972 Convention[481], as inscription on the latter one is a prerequisite for the incorporation on the international list, whereas the inventories under the regime of the 2003 Convention regime are rather aimed at identifying intangible cultural heritage in a State Party's territory regardless of whether or not it is intended to promote the respective object to an international level.

The 2003 Convention also establishes two new bodies, the General Assembly of States Parties (hereafter the 'ICH General Assembly') as the 'sovereign body of the convention'[482] and the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage (hereafter the 'ICH Committee') as the core institution equipped with various competences and

[480] See '3.1 Participation of communities, groups and, where applicable, individuals, as well as experts, centres of expertise and research institutes' of the Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage (June 2008) available online **at** http://www.unesco.org/culture/ich/index.php?pg=00026 (last visited on December 31, 2008). For, as its basis, the recommendation on the issue of involvement of communities and their representatives, practitioners, experts, centres of expertise and research institutes in the implementation of the 2003 Convention refer to the report UNESCO Doc. H/08/2.EXT.COM/CONF.201/6 elaborated by a subordinate body to the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, the Subsidiary Body on Possible Modalities for the Participation of Communities and Others (available online at http://www.unesco.org/culture/ich/doc/src/00289-EN-WORD.doc; last visited on December 31, 2008); during a meeting in March 2007, the UNESCO-ACCU Expert Meeting on Community Involvement in Safeguarding Intangible Cultural Heritage, the experts group also dealt with defining the terms *communities*, *groups* and *individuals* under the regime of the 2003 Convention. It came to the following definitions:

'*Communities* are networks of people whose sense of identity or connectedness emerges from a shared historical relationship that is rooted in the practice and transmission of, or engagement with, their ICH;

Groups comprise people within or across communities who share characteristics such as skills, experience and special knowledge, and thus perform specific roles in the present and future practice, re-creation and/or transmission of their intangible cultural heritage as, for example, cultural custodians, practitioners or apprentices.

Individuals are those within or across communities who have distinct skills, knowledge, experience or other characteristics, and thus perform specific roles in the present and future practice, re-creation and/or transmission of their intangible cultural heritage as, for example, cultural custodians, practitioners and, where appropriate, apprentices;' see UNESCO and ACCU, Expert Meeting on Community Involvement in Safeguarding Intangible Cultural Heritage: Towards the Implementation of the 2003 Convention (UNESCO doc. CLT/CH/ITH/DOCEM0306 REV.1; online publication at http://unesdoc.unesco.org/images/0014/001459/145919e.pdf; last visited on December 31, 2008) at p. 9.

[481] See *supra* I.4.3

[482] Article 4 (1) 2003 Convention.

mandated with various tasks such as the promotion and guiding functions for the implementation of the Convention, decisive power with regard to the inscription on the two lists introduced by the Convention and the allocation of international financial aid[483]. The ICH Committee, like its counterpart under the regime of the 1972 Convention, the World Heritage Committee, can be assisted by non-governmental organizations[484]. The 2003 Convention, however, does not recommend certain advisory bodies itself, but leaves the decision to the ICH Committee. The NGOs accredited by the ICH Committee in accordance with the Operational Directives shall have advisory functions[485].

The 2003 Convention also installed two lists of intangible cultural heritage, a system taken from the 1972 Convention, but altered to some extent. With the aim of raising the awareness of the significance of intangible cultural heritage, the ICH Committee creates, updates and maintains a list of representative pieces of intangible cultural heritage, the Representative List of the Intangible Cultural Heritage of Humanity (hereafter the 'Representative ICH List'). Potential candidates to the Representative ICH List are nominated by the 'States Parties concerned'[486], which can also apply in cases of trans-border intangible cultural heritage and could possibly also be interpreted in a way which allows for the proposals of a single State Party in trans-border cases. In contrast to the 1972 Convention inscription on a tentative list prior to the proposal for inscription on the Representative ICH

[483] Article 7 2003 Convention:

'Without prejudice to other prerogatives granted to it by this Convention, the functions of the Committee shall be to:

(a) promote the objectives of the Convention, and to encourage and monitor the implementation thereof;

(b) provide guidance on best practices and make recommendations on measures for the safeguarding of the intangible cultural heritage;

(c) prepare and submit to the General Assembly for approval a draft plan for the use of the resources of the Fund, in accordance with Article 25;

(d) seek means of increasing its resources, and to take the necessary measures to this end, in accordance with Article 25;

(e) prepare and submit to the General Assembly for approval operational directives for the implementation of this Convention;

(f) examine, in accordance with Article 29, the reports submitted by States Parties, and to summarize them for the General Assembly;

(g) examine requests submitted by States Parties, and to decide thereon, in accordance with objective selection criteria to be established by the Committee and approved by the General Assembly for:

(i) inscription on the lists and proposals mentioned under Articles 16, 17 and 18;

(ii) the granting of international assistance in accordance with Article 22.'

[484] See *supra* I.4.3 for details.

[485] See 93 of the Operational Directive, available online at http://www.unesco.org/culture/ich/index.php?pg=00026 (last visited on December 31, 2008)

[486] Article 16 (1) 2003 Convention.

List is not required. A remarkable difference to the 1972 Convention is also the fact that the 2003 Convention does not use the term outstanding, but instead puts the emphasis on the character of representation. This term, however, needs clarification as it was feared that it could cause some misunderstanding and lead to some unwanted hierarchy within the group of intangible cultural heritage and thus would replace the term outstanding value of the 1972 Convention which means 'exceptional'[487] or to some extent being of higher value than the others. This concept was also used by the 1998 Masterpieces Program as the first of its six criteria for selecting masterpieces referred to as 'outstanding value as a masterpiece of the human creative genius.'[488] The drafters of the 2003 Convention, however, wanted to avoid a ranking system[489] and instead intended to show the richness of cultural diversity and the importance and significance of intangible cultural heritage for its bearers - the communities, groups or individuals - an idea which is also reflected by the draft criteria for the inscription of intangible cultural heritage on the Representative ICH List[490]. Thus, representative should be rather understood as illustrating a wide range of creativity of humankind. One of the five criteria for the inscription in the Representative ICH List in the Operational Directive (R2) states 'Inscription of the element will contribute to ensuring visibility and awareness of the significance of the intangible heritage and to encouraging dialogue, thus reflecting cultural diversity worldwide and testifying to human creativity.'[491] Another important question was the question of whether the inscription on the Representative ICH List should be subject to a time limit or not[492], but the inscription subject to time limit was not adopted in the Operational Directive.

The second list, the List of Intangible Cultural Heritage in Need of Urgent Safeguarding (hereafter the 'Endangered ICH List') is also to be established and maintained by the ICH Committee. The 2003 Convention does not

[487] *Supra* I.4.2.
[488] See *supra* n. 447.
[489] Blake 2006, op. cit. n. 11, p. 80 et seq.
[490] UNESCO Doc. H/07/1.EXT.COM/CONF.207/6 (available online at http://www.unesco.org/culture/ich/doc/src/00134-EN-DOC.doc; last visited on December 31, 2008).
[491] See 19 of the Operational Directives, available online at http://www.unesco.org/culture/ich/index.php?pg=00026 (last visited on December 31, 2008).
[492] See R. Smeets, 'Living Heritage: To Be Listed Forever?', in J. Blake, ed., *Safeguarding Intangible Cultural Heritage: Challenges and Approaches* (Crickadarn, Institute of Art and Law and contributors 2007) p. 137.; for the latest discussion within the ICH Committee see UNESCO Docs. ITH/07/1.EXT.COM/CONF.207/5 (available online at http://www.unesco.org/culture/ich/doc/src/00133-EN-DOC.doc; last visited on December 31, 2008) and ITH/07/2.COM/CONF.208/6 Rev (available online at http://www.unesco.org/culture/ich/doc/src/00225-EN-WORD-Rev.doc; last visited on December 31, 2008).

explicitly stipulate that inscription on the Representative ICH List is a prerequisite for inscription on the Endangered ICH List, thus providing for faster reaction by the ICH Committee, which – with the exception of 'extreme urgency'[493] – inscribes objects 'at the request of the State Party concerned.'[494] The Operational Directives make it clear that the same ICH may not be inscribed in the Representative ICH List and the Endangered ICH List at the same time[495]. Inscription on the Endangered ICH List should foster the awareness of the need for safeguarding, thus facilitating national measures as well as international cooperation and providing for financial aid.

In order to support the implementation process and functioning of the 2003 Convention the Fund for the Safeguarding of the Intangible Cultural Heritage (hereafter the 'ICH Fund'), an international fund with various sources ranging from obligatory national contributions to voluntary payments[496], was introduced. Once defined by the ICH Committee and approved by the ICH General Assembly, the main tasks of the ICH Fund will primarily comprise financial assistance for the creation of national inventories and support of safeguarding projects on national and international levels based on a priority system taking the special needs of urgent safeguarding into account. Closely related to the funding mechanism is the feature of international cooperation and safeguarding of intangible cultural heritage (international assistance). In addition to allocating financial aid on an international basis, international assistance[497] also includes infrastructural and capacity-building instruments giving support to States Parties with limited practical and technical knowledge.

The 2003 Convention also had to clarify its relationship to the 1998 Masterpieces Program[498]. This was done by the transitional clause contained in Article 31 of the 2003 Convention which stipulates that the ICH Committee 'shall incorporate in the Representative List of the Intangible Cultural Heritage of Humanity the items proclaimed 'Masterpieces of the Oral and Intangible Heritage of Humanity' (hereafter the 'masterpieces') before the entry into force of this Convention', making the Masterpieces

[493] Article 17 (3) 2003 Convention; a set of criteria for determining whether or not such a case exists will be elaborated by the ICH Committee and needs approval of the General Assembly.

[494] Article 17 (1) 2003 Convention; pursuant to Article 17 (3) 2003 Convention, in cases of extreme emergency the inscription should be done 'in consultation with the State Party concerned'; see also Blake 2006, op. cit. n. 11, p. 83 et seq. for further explanation.

[495] See 14 and 30 of the Operational Guidelines, available online at http://www.unesco.org/culture/ich/index.php?pg=00026 (last visited on December 31, 2008).

[496] Article 25 (3) 2003 Convention.

[497] See Articles 19 to 24 2003 Convention for details.

[498] See *supra* I.7.1.

Program a 'purveyor'[499] to the 2003 Convention[500]. It also clarifies that no further proclamation under the regime of the Masterpieces Program will be made after the entry into force of the 2003 Convention[501] and that the incorporation of the masterpieces on the Representative ICH List shall in no way be a prejudgment for further inscriptions on the Representative ICH List[502]. This is an important provision as the set of criteria for the incorporation decision will not be the same as under the regime of the Masterpieces Program due to the fact that the characterization of having an outstanding value will be avoided under the new regime.

CONVENTION ON THE PROTECTION AND PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS (2005)[503]

8.1. Background Of The 2005 Convention[504]: Cultural Diversity And The Threat Of Globalization

UNESCO's mandate on the cultural sector includes a large variety of different aspects. As has been shown so far, UNESCO has dealt with the protection and/or safeguarding of cultural heritage in various forms, beginning with movable and immovable tangible objects in the early stages and from there progressing to intangible forms of cultural heritage as shown in the 2003 Convention. The latter one also illustrates the awareness of the importance of safeguarding cultural diversity in times of globalization and unification[505], an idea which dates back to the early beginnings of

[499] D. Munjeri, 'Tangible and Intangible Heritage: From Difference to Convergence', 56 *Museum International* (2004) p. 12 at p. 18.

[500] For how to implement this transfer, see 1.3: Incorporation of items proclaimed "Masterpieces of the Oral and Intangible Heritage of Humanity" in the Representative List, in the Operational Directives, available online at http://www.unesco.org/culture/ich/index.php?pg=00026 (last visited on December 31, 2008).

[501] Article 31 (3) 2003 Convention.

[502] Article 31 (2) 2003 Convention.

[503] If used without any determination, the term *convention* refers to the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* in this chapter.

[504] For the history since the beginning of the 20th century, see T. Kono, 'The UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions", in K. Alexander and M. Andenas, *The World Trade Organization and Trade in Services* (Leiden, Martinus Nijhoff Publishers, 2008), pp. 845-902.

[505] E.g. Preamble (2) 2003 Convention: 'Considering the importance of the intangible cultural heritage as a mainspring of cultural diversity and a guarantee of sustainable development, …'; Preamble (6) 2003 Convention: 'Recognizing that communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity' or Article 2

UNESCO's work. Already UNESCO's Constitution of 1946 alludes to the richness and worth of culture as its Article 1 (3) refers to the 'fruitful diversity of culture'[506], constituting a central issue in UNESCO's work.

As UNESCO's initiated 1994 in-depth analysis of the development of the cultural diversity concept[507] shows, the developing process can be divided into four stages. In the beginning during the 1950s and early 1960s, during the period of decolonization, it was primarily considered as reflecting 'artistic production and external practices (rather) than (being understood) as deeply internalized and identity-creating ways of thinking, feeling, perceiving, and being in the world.'[508] Once decolonized the cultural pluralism of the nations was seen as a sign of 'justification of their independence and their international existence.'[509] Cultural pluralism then became a synonym for combining and explaining the interdependence of culture and 'development generated arguments for financial and administrative support to developing countries'[510] by attaching the notion of culture to 'the idea of endogenous development.'[511] The fourth period is marked by the interaction of culture, democracy and tolerance in a broader and holistic perspective, taking various international, intra-national, regional and local forms of culture into account. The first result of this process was the foundation of the World Commission on Culture and Development in 1991 with the main task of 'preparing a world report on culture and development and proposals for both urgent and long-term action to meet cultural needs in the context of development.'[512] The outcome of the

(1) 2003 Convention: 'This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity'.

[506] Article 1 (3) UNESCO Constitution: 'With a view to preserving the independence, integrity and fruitful diversity of the cultures and educational systems of the States Members of the Organization, the Organization is prohibited from intervening in matters which are essentially within their domestic jurisdiction.'

[507] K. Stenou, *UNESCO and the Issue of Cultural Diversity – Review and Strategy, 1946 – 2007, revised edition* (Paris, UNESCO Publishing 2007; available online at http://portal.unesco.org/culture/en/ev.php-URL_ID=36955&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html; last visited on December 31, 2008).

[508] Stenou, op. cit. 507, at p. 3.

[509] Stenou, op. cit. 507, at p. 3.

[510] Stenou, op. cit. 507, at p. 4.

[511] Stenou, op. cit. 507, at p. 4.

[512] Paragraph 2 (a) Resolution A/RES/46/158 adopted by the General Assembly of the United Nations (the text is available online at http://www.un.org/documents/ga/res/46/a46r158.htm; last visited on December 31, 2008).

research was the elaboration of the report Our Creative Diversity[513] in 1995, which is said to be a key factor in the creation of the new convention as it concentrated on two aspects closely related to the concept of cultural pluralism: cultural diversity as a foundation for the well-functioning of democratic societies and the threat globalization poses to the existence of cultural diversity[514].

In 1998, based on and motivated by that report, UNESCO convoked the Intergovernmental Conference on Cultural Policies for Development, better known as Stockholm Conference, which aimed at transforming the ideas presented by the 1995 report into practice. The outcome of the Stockholm Conference was the Action Plan on Cultural Policies for Development[515] addressed at UNESCO's Member States[516] as well as at UNESCO's Director-General[517] in order to promote the basic ideas of cultural diversity and to facilitate future programs in the area of cultural development.

Three years later, in 2001, following various international statements[518], UNESCO's Universal Declaration on Cultural Diversity[519] and its Action Plan[520] with provisions on the Declaration's implementation set the next important benchmark. The Declaration stresses the interrelationship between cultural diversity and human rights and further discusses the impact of globalization on diversity and development, calling the preservation and promotion of cultural diversity the 'key to sustainable human development.'[521] It also links cultural diversity to the term heritage as its Article 1 states that 'culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the

[513] The text of Our Creative Diversity is available online at http://unesdoc.unesco.org/images/0010/001016/101651e.pdf (last visited on December 31, 2008).

[514] C.B. Graber, 'The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?', 9 *Journal of International Economic Law* (2006) p. 553 at p. 557.

[515] The text of the Action Plan on Cultural Policies for Development is available online at http://unesdoc.unesco.org/images/0011/001130/113036e.pdf (last visited on December 31, 2008); see also N. Obuljen, 'From Our Creative Diversity to the Convention on Cultural Diversity: Introduction to the Debate', in N. Obuljen and J. Smiers, eds., *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Croatia, Institute for International Relations 2006).

[516] Chapter I Action Plan on Cultural Policies for Development.

[517] Chapter II Action Plan on Cultural Policies for Development.

[518] E.g. several UNESCO initiated experts' compositions in 1999 and 2000, UN's General Assembly Resolution 54/160 in 2000 or the Council of Europe's Declaration on Cultural Diversity in 2000 – for details see Obuljen, loc. cit. n. 515, p. 26 et seq.

[519] The text of UNESCO's Universal Declaration on Cultural Diversity is available online at http://unesdoc.unesco.org/images/0012/001271/127160m.pdf (last visited on December 31, 2008).

[520] The text of this Action Plan is available online at http://www.sdnpbd.org/sdi/international_days/literacy/2005/document/leg_t_gats_unesco_decl_cultural_diversity_021101_tcm6-4303.pdf (last visited on December 31, 2008).

[521] Article 11 Universal Declaration on Cultural Diversity.

groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations.' According to Matsuura the declaration aimed primarily at 'preserving cultural diversity as a living, and thus renewable treasure that must not be perceived as being unchanging heritage but as a process guaranteeing the survival of humanity and preventing segregation and fundamentalism.'[522] Together with its Action Plan the Universal Declaration on Cultural Diversity supported the idea of creating a legally binding international instrument on cultural diversity as it is expressed by Article 1 of the Action Plan[523] to achieve these goals.

Parallel to these international developments several national and regional movements[524] also deepened the discussions in this area pushing the international community to take appropriate steps to protect cultural diversity extensively on the international level by means of a standard-setting instrument. Smith points out four main objectives of the countries supporting the creation of a new convention[525]: (1) promoting and protecting cultural diversity as an 'overarching objective'; (2) identifying measures to reach that goal; (3) ensuring 'as far as possible that international trade rules do not prevent such intervention' [note: safeguarding cultural diversity]; and (4) this all be accomplished 'through a process of international cooperation, to assist developing countries, as well as smaller cultural and linguistic regions, to preserve and fully exploit their cultural heritage.'

These national and international initiatives resulted in the adoption of Resolution 32C/34 of UNESCO's General Assembly in 2003[526] mandating

[522] K. Matsuura, *Introduction to the Universal Declaration on Cultural Diversity* (available online at http://unesdoc.unesco.org/images/0012/001271/127160m.pdf; last visited on December 31, 2008) at p. 11.

[523] Article 1 Action Plan: 'Deepening the international debate on questions relating to cultural diversity, particularly in respect of its links with development and its impact on policy-making, at both national and international level; taking forward notably consideration of the opportunity of an international legal instrument on cultural diversity.'

[524] Obuljen summarizes fruitful elaborations of numerous bodies including the International Network on Cultural Policy, the International Network for Cultural Diversity, the Valencia Forum on Globalisation and Cultural Diversity and the World Social Forum – see Obuljen, loc. cit. n. 515, p. 26 et seq.; see also K. Acheson and C. Maule, 'Convention on Cultural Diversity', 28 *Journal of Cultural Economics* (2004) p. 243 et seq. for information on the works of the International Network on Cultural Policy and the International Network for Cultural Diversity.

[525] R.C. Smith, 'The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order?', 1 *International Journal of Communication* (2007) p. 24 at p. 27.

[526] The text of UNESCO's Resolution 32C/34 is available online at http://unesdoc.unesco.org/images/0013/001321/132141e.pdf (last visited on December 31, 2008).

the Director-General with the elaboration of a preliminary draft convention on the protection of cultural diversity. The Director-General in return invited a group of independent experts to elaborate a suitable instrument. Discussions concentrated on the scope of the draft convention stating that the new instrument should not only protect, but also promote cultural diversity and thus should not only take a passive but also an active role. The debate also related to the possible obligations and supportive mechanisms and to a large extent to the relationship between the future instrument and other international legally binding instruments, primarily trade related treaties, as the 'dual nature of cultural goods and services'[527] was pointed out, including both economic and cultural values.

The experts group's draft, the [note: first] Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions[528], was presented by the Director-General in 2004 and after consultations with the WTO, WIPO and UNCTAD the drafting process reached its final stages at three intergovernmental meetings in late 2004 and 2005. The outcome of these meetings, the revised draft of the experts group, the [note: second] Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions[529], was adopted by UNESCO's General Conference on October 20, 2005 as the Convention on the Protection and Promotion of the Diversity of Cultural Expressions[530]. The convention entered into force on March 17, 2008 and currently has (as of December 31, 2008) 94 Parties[531].

[527] Obuljen, loc. cit. n. 515, p. 30 et seq.; for an analysis of the *dual nature* of cultural activities, goods and services see O. G. Hansen, 'Co-operation for Development: Building Cultural Capacity', in N. Obuljen and J. Smiers, eds., *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Croatia, Institute for International Relations 2006) p. 111 at p. 116 et seq.

[528] The text of this first Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions is available online at http://unesdoc.unesco.org/images/0013/001356/135649e.pdf (last visited on December 31, 2008).

[529] The text of this second Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions is available online at http://unesdoc.unesco.org/images/0014/001416/141610e.pdf (last visited on December 31, 2008).

[530] The text is available online at http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited on December 31, 2008).

[531] The term *Parties* is used by the authors instead of *States Parties* as pursuant to Article 27 2005 Convention, the convention is not limited to the accession of states; a list of Parties is available online at http://portal.unesco.org/la/convention.asp?KO=31038&language=E&order=alpha (last visited on December 31, 2008). In addition to 94 States Parties the European Community joined as a regional economic integration organization according to Article 27 (3) (a) 2005 Convention.

8.2. Scope Of Application And The Terms Cultural Diversity And Cultural Expressions: Building The Third Pillar

The Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereafter the '2005 Convention') is the first ever legally binding international instrument 'recognizing the pursuit of the diversity of cultural expressions as a legitimate goal of governmental policy.'[532] According to UNESCO it forms the third pillar of preserving and promoting creative diversity, the other two being the 1972 Convention[533] concentrating on the (mainly tangible) world cultural and natural heritage and the 2003 Convention[534] focusing on intangible cultural heritage. In doing so it creates an eco-cultural framework that aims to 'strengthen the five inseparable links of the same chain: creation, production, distribution/dissemination, access and enjoyment of cultural expressions, as conveyed by cultural activities, goods and services.'[535] With regard to the 2003 Convention, Lenzerini states that the 2005 Convention complemented it, as 'the richness and worth of living-culture is particularly appreciable through understanding the value of diversity as a tool of mutual enrichment among peoples.'[536] Obuljen sums the purposes of the 2005 Convention up by stating that it is 'concerned equally with the need to promote diversity within nations, to act collectively to protect forms of cultural expression that are threatened with extinction and to develop creative capacity and cultural industries in the developing world, as well as the need to find ways to encourage balanced exchanges between cultures and to preserve and promote their own artists, cultural industries and cultural expressions.'[537]

The 2005 Convention itself describes as its scope of application the 'policies and measures[538] adopted by the Parties related to the protection and promotion of the diversity of cultural expressions.'[539] It also provides for definitions of the terms cultural diversity and cultural expressions, playing

[532] Graber, loc. cit. n. 514, at p. 559.
[533] See *supra* I.4.
[534] See *supra* I.7.
[535] UNESCO at http://portal.unesco.org/culture/en/ev.php-URL_ID=11281&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited December 31, 2008).
[536] Lenzerini forthcoming [2009], loc. cit. n. 219.
[537] Obuljen, loc. cit. n. 515, at p. 23.
[538] Pursuant to Article 4 (6) 2005 Convention ''Cultural policies and measures' refers to those policies and measures relating to culture, whether at the local, national, regional or international level that are either focused on culture as such or are designed to have a direct effect on cultural expressions of individuals, groups or societies, including on the creation, production, dissemination, distribution of and access to cultural activities, goods and services.'
[539] Article 3 2005 Convention.

an imminent role in the scope of application of the Convention. The first one in the understanding of the 2005 Convention refers to the 'manifold ways in which the cultures of groups and societies find expression … passed on within and among groups and societies and made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used,'[540] whereas cultural expressions under the regime of the 2005 Convention are 'expressions that result from the creativity of individuals, groups and societies, and that have cultural content.'[541] According to Neil the definitions set forth by the 2005 Convention 'draw an effective perimeter around the [note: 2005] Convention and confirm that it is dealing with a portion of the intellectual output of a society.'[542]

The before-mentioned scope of application is also reflected by the objectives set forth by Article 1 of the 2005 Convention[543] which makes clear that the main aim of the Convention is protecting and promoting the diversity and richness of cultural expressions embodied especially in cultural activities,

[540] Article 4 (1) 2005 Convention.

[541] Article 4 (3) 2005 Convention; Article 4 (2) describes the term *cultural content* as referring to 'symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities.'

[542] G. Neil, 'The Convention as a Response to the Cultural Challenges of Economic Globalisation', in N. Obuljen and J. Smiers, eds., *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Croatia, Institute for International Relations 2006) p. 41 at p. 54.

[543] Article 1 2005 Convention:

'(a) to protect and promote the diversity of cultural expressions;

(b) to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner;

(c) to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace;

(d) to foster interculturality in order to develop cultural interaction in the spirit of building bridges among peoples;

(e) to promote respect for the diversity of cultural expressions and raise awareness of its value at the local, national and international levels;

(f) to reaffirm the importance of the link between culture and development for all countries, particularly for developing countries, and to support actions undertaken nationally and internationally to secure recognition of the true value of this link;

(g) to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning;

(h) to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory;

(i) to strengthen international cooperation and solidarity in a spirit of partnership with a view, in particular, to enhancing the capacities of developing countries in order to protect and promote the diversity of cultural expressions.'

goods and services, a predominant term found throughout the Convention[544], on a national and international level in times of globalization and unification. It also clarifies that the 2005 Convention is not aimed at dealing with cultural diversity as a whole through a holistic approach, but rather it focuses on cultural expressions as a means of cultural language and identity disseminated by the said forms, namely through cultural activities, goods and services.

The 2005 Convention also makes clear that the protection and promotion of the diversity of cultural expressions has to follow certain rules and limitations, basic principles which are more closely described by Article 2[545]. One important aspect of the Convention is that the sovereignty of States Parties in relation to the adoption of cultural policies and measures is stressed and reaffirmed, a sovereignty which nevertheless should be exercised in accordance with the purposes and goals set forth by the

[544] See Preamble (18) and Articles 1 (g), 6 (2) (b), 6 (2) (c), 6 (2) (e), 14 (a) (ii), 14 (a) (iv), 15 and 16 2005 Convention; Article 4 (4) 2005 Convention defines this term as 'those activities, goods and services, which at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have. Cultural activities may be an end in themselves, or they may contribute to the production of cultural goods and services'.

[545] Article 2 2005 Convention:

'1. Principle of respect for human rights and fundamental freedoms: Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.

2. Principle of sovereignty: States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory.

3. Principle of equal dignity of and respect for all cultures: The protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples.

4. Principle of international solidarity and cooperation: International cooperation and solidarity should be aimed at enabling countries, especially developing countries, to create and strengthen their means of cultural expression, including their cultural industries, whether nascent or established, at the local, national and international levels.

5. Principle of the complementarity of economic and cultural aspects of development: Since culture is one of the mainsprings of development, the cultural aspects of development are as important as its economic aspects, which individuals and peoples have the fundamental right to participate in and enjoy.

6. Principle of sustainable development: Cultural diversity is a rich asset for individuals and societies. The protection, promotion and maintenance of cultural diversity are an essential requirement for sustainable development for the benefit of present and future generations.

7. Principle of equitable access: Equitable access to a rich and diversified range of cultural expressions from all over the world and access of cultures to the means of expressions and dissemination constitute important elements for enhancing cultural diversity and encouraging mutual understanding.

8. Principle of openness and balance: When States adopt measures to support the diversity of cultural expressions, they should seek to promote, in an appropriate manner, openness to other cultures of the world and to ensure that these measures are geared to the objectives pursued under the present Convention.'

2005 Convention and 'in conformity with the Charter of the United Nations, the principles of international law and universally recognized human rights instruments.'[546] Fabri comments on this relationship between basic party sovereignty and the regulatory framework of the 2005 Convention by stating that 'the [note: 2005] Convention seeks to control the exercise of the sovereign right of States to take the measures that they consider necessary to protect and promote the diversity of cultural expressions, so as to ensure that the corresponding policies are consistent with the objective of diversity as conceived in the text.'[547]

Although, as will be shown later, the 2005 Convention provides for a kind of operational guidance, it does not intend to unify or prescribe certain regulations which have to be transformed into national law. It rather focuses on the goal itself leaving the question of how to reach it to the States Parties' discretion and best efforts. The sovereignty of States Parties forms one pillar of the 2005 Convention, but it does not stand alone. It is joined by an international aspect, the principle of international cooperation and solidarity aimed at the awareness-raising for the need of an environment in which the diversity of expression can flourish, develop and pertain.

8.3. Legal Framework And Mechanism Of The 2005 Convention: How To Handle The Dual Nature Of Cultural Goods And Services

As mentioned earlier[548], the 2005 Convention is considered to be the third pillar of the preservation and promotion of creative diversity. Like the other two pillars, the 1972 and 2003 Conventions, it introduces an institutional mechanism, establishes a funding system and asks for international cooperation. Taking a closer look at the 2005 Convention though, it becomes obvious that the set-up differs from the other two conventions due to the different approach taken by the 2005 Convention. It aims specifically and directly at the issue of 'diversity of cultural expressions disseminated and

[546] Article 5 (1) 2005 Convention; see also R.J. Neuwirth, 'United in Divergency: A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions', 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law* (2006) p. 819 at p. 839.

[547] H.R. Fabri, 'Reflections on Possible Future Legal Implications of the Convention', in N. Obuljen and J. Smiers, eds., *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Croatia, Institute for International Relations 2006) p. 73 at p. 79.

[548] See *supra* I.8.2.

made accessible largely through cultural activities, goods and services.'[549] In this area it takes a holistic approach, not trying to raise the international awareness of the necessity to protect and promote the diversity of cultural expressions by creating representative lists of single examples, but by providing for an extensive catalogue of rights and obligations of Parties[550] and emphasizing the sovereignty of Parties in the implementation process.

Taking the ICH General Assembly of the 2003 Convention[551] as a model the 2005 Convention introduces the Conference of Parties as the supreme body of the Convention. In addition to electing the members of the central body of the 2005 Convention, the Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions, and approving the operational guidelines elaborated by the Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions, it mainly functions as the supreme decision making body with the power to 'take whatever measure it may consider necessary to further the objectives of the [note: 2005] Convention.'[552]

At the heart of the institutional framework of the 2005 Convention stands the Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions (hereafter the 'Diversity Committee') with important functions in relation to the promotion of the objectives of the Convention, encouraging and monitoring its implementation[553]. For this purpose, not only the future Operational Guidelines for the Implementation and Application of the Provisions of the Convention[554], but also the competence of commenting on the periodic reports on national implementation submitted by the Parties[555] will play a decisive role. This becomes obvious when one takes into account that – although the Parties' Sovereignty in adopting necessary measures and policies to protect and promote the diversity of cultural expressions within their territories is stressed – the rights and obligations set forth by the 2005 Convention are not

[549] UNESCO, *30 Frequently Asked Questions Concerning the Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (online publication; available online at http://unesdoc.unesco.org/images/0014/001495/149502E.pdf; last visited on December 31, 2008) p. 4.

[550] Chapter IV *2005 Convention*.

[551] See *supra* I.7.3.

[552] Article 22 (4) (d) 2005 Convention.

[553] Article 23 (6) (a) 2005 Convention.

[554] Article 23 (6) (b) 2005 Convention. The Intergovernmental Committee has not completed its drafting of the Operational Guidelines. See http://portal.unesco.org/culture/en/ev.php-URL_ID=38216&URL_DO=DO_TOPIC&URL_SECTION=201.html#8 (last visited on December 31, 2008).

[555] Article 9 (a) 2005 Convention.

to be implemented in any manner the respective Party pleases[556]. The implementation of rights and obligations has to be done in accordance with the principles and goals of the convention[557]. The Diversity Committee will support and control this process.

The 2005 Convention also provides for financial aid for its implementation and protecting and promoting measures by establishing the International Fund for Cultural Diversity (hereafter the 'Cultural Diversity Fund'). Unlike the funds under the regimes of the 1972 and 2003 Conventions the Cultural Diversity Fund will only receive contribution on a voluntary basis; Parties to the 2005 Convention are not obliged to feed the fund[558]. The use of its resources will be determined by the Diversity Committee[559].

Chapter IV of the 2005 Convention contains a catalogue of rights and obligations of the Parties comprising 15 articles based on the ideas of States Parties' sovereignty and international cooperation united under the roof of the common goal of protecting and promoting the diversity of cultural expressions. The rights to be found in Article 6 of the 2005 Convention[560]

[556] See Article 5 (2) 2005 Convention: 'When a Party implements policies and takes measures to protect and promote the diversity of cultural expressions within its territory, its policies and measures shall be consistent with the provisions of this Convention.'

[557] For the relationship between Parties' Sovereignty and the role of the Intergovernmental Committee see e.g. I. Bernier and H.R. Fabri, 'Implementing the Convention', in N. Obuljen and J. Smiers, eds., *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Croatia, Institute for International Relations 2006) p. 161 at p. 166 et seq.

[558] Article 18 (3) 2005 Convention.

[559] Article 18 (4) 2005 Convention.

[560] Article 6 2005 Convention:

'1. Within the framework of its cultural policies and measures as defined in Article 4.6 and taking into account its own particular circumstances and needs, each Party may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory.

2. Such measures may include the following:

(a) regulatory measures aimed at protecting and promoting diversity of cultural expressions;

(b) measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services;

(c) measures aimed at providing domestic independent cultural industries and activities in the informal sector effective access to the means of production, dissemination and distribution of cultural activities, goods and services;

(d) measures aimed at providing public financial assistance;

(e) measures aimed at encouraging non-profit organizations, as well as public and private institutions and artists and other cultural professionals, to develop and promote the free exchange and circulation of ideas, cultural expressions and cultural activities, goods and services, and to stimulate both the creative and entrepreneurial spirit in their activities;

(f) measures aimed at establishing and supporting public institutions, as appropriate;

(g) measures aimed at nurturing and supporting artists and others involved in the creation of cultural expressions;

refer to various measures which may be taken by the Parties in order to accomplish their obligations under the regime of the 2005 Convention. In this respect the catalogue of Article 6 contains recommendations rather than pure rights, giving advice on which measures might be suitable for national adoption. Directly addressed at protection and promotion, but packed into a very 'soft' wording, the 2005 Convention prescribes a large number of obligations. A striking aspect is the use of the term shall endeavor in many core provisions[561] diluting the commitments to be made by the Parties. Nevertheless, the requirements can work as a rough guideline for the implementation process putting its emphasis on the importance of preserving the pluralism of cultural expressions as it is a vital characteristic of humankind.

The most heavily discussed issue in the drafting process was the question of how this convention deals with rights and obligations deriving from other international legal instruments in cases of interaction. Dealing with the dual nature of cultural goods and services posed a big challenge, due to the fact that under the 2005 Convention cultural and economic aspects had to be recognized[562]. The 2005 Convention tries to find a compromise, neither providing for total subordination under other international legal instruments nor for exclusive treatment under the new instrument. It introduces a quite

(h) measures aimed at enhancing diversity of the media, including through public service broadcasting.'

[561] Articles 7 (1), 7 (2), 10 (c), 12, 13 and 14 2005 Convention.

[562] The interaction and relationship between the 2005 Convention and international trade law as well as between UNESCO and WTO in this area has been a very controversial question, issue of numerous articles. It is, however, not the purpose of this report to comment on past and still ongoing discussions concerning this public international law questions, as this report primarily deals with the question of how national legislation has implemented and reacted to 'unification' law in the area of cultural heritage, showing divergence and convergence in this field. For information on the discussions refer to e.g. J. Wouters and B. De Meester, *Cultural Diversity and the WTO: David versus Goliath?* (Institute for International Law at Katholieke Universiteit Leuven, Working Paper No. 114, 2007; online publication available online at and http://ghumweb2.ghum.kuleuven.ac.be/ggs/publications/workingpapers/WP%205%20-%20J.%20Wouters%20-%20B.%20De%20Meester%201007.pdf, last visited on December 31, 2008); J. Wouters and B. De Meester, *UNESCO's Convention on Cultural Diversity and WTO Law: Complementary or Contradictory?* (Institute for International Law at Katholieke Universiteit Leuven, Working Paper No. 73, updated 2007; online publication available online at http://www.law.kuleuven.ac.be/iir/nl/wp/WP/WP73ed2e.pdf, last visited on December 31, 2008); M. Hahn, 'A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law', 9 *Journal of International Economic Law* (2006) p. 515; A. Khachaturian, 'The New Cultural Diversity Convention and Its Implications on the WTO International Trade Regime: A Critical Comparative Analysis', 42 *Texas International Law Journal* (2006) p. 191; T. Voon, 'UNESCO and WTO: A Clash of Cultures?', 55 *International and Comparative Law Quarterly* (2006) p. 635; J. Pauwelyn, *The UNESCO Convention on Cultural Diversity, and the WTO: Diversity in International Law-Making?* (American Society of International Law, 2005; online publication available online at http://www.asil.org/insights/2005/11/insights051115.html; last visited on December 31, 2008).

innovative, but still heavily discussed and unclear approach[563] based on – to use the wording of the Convention – 'mutual supportiveness, complementarity and non-subordination.'[564] While the 2005 Convention should not lead to a modification or alteration of rights and obligations under other treaties[565], Article 20 states at the same time that the Convention is not subordinated to other instruments and – included for the first time in a convention[566] – that it should be used as an interpretive means when applying other international instruments[567].

There is no provision in the 2005 Convention that denies its applicability to the cultural heritage. Thus the relationship between the 2005 Convention and other UNESCO instruments, which aim at protecting or safeguarding the cultural heritage, should be dealt with by Article 20. The partly drafted Draft Operational Guidelines do not clarify this issue yet. However Article 7, Principle 1.3 states that cultural 'policies and measures developed by Parties to promote the diversity of cultural expressions should foster the full participation and engagement … particularly persons to minorities, indigenous peoples …'[568]. This language may imply the applicability of the 2005 Convention to certain types of the cultural heritage.

CONCLUSION

We traced so far the development of international instruments in the field of cultural heritage. This development can be analyzed from various viewpoints such as the notion of cultural property/heritage, the scope of each

[563] For the discussion see e.g. Fabri, loc. cit. n. 547, p. 83 et seq.; Neuwirth, loc. cit. n. 546, p. 844 et seq.

[564] See title of Article 20 2005 Convention.

[565] Article 20 (2) 2005 Convention: 'Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.'

[566] Neil, loc. cit. n. 542, at p. 57.

[567] Article 20 (1) 2005 Convention: Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty,

(a) they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and

(b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.'

[568] See http://unesdoc.unesco.org/images/0016/001611/161119e.pdf#page=3 (last visited on December 31, 2008)

instrument, and the mechanism of each instrument, reflecting the different underlying philosophy of each instrument.

Those instruments, which were enacted prior to the establishment of UNESCO, did not know the concept of cultural heritage yet. Instead the concept of cultural property was used in the context of property rights. As a natural outcome, cultural property includes both movable and immovable objects. Articles 34 to 35 of the Lieber Code (1863), which cover churches, hospitals, establishments of education, classical works of art, and precious instruments are a good example. Such a basic standpoint was maintained also in the 1954 Hague Convention (Art. 1: movable or immovable property of great importance to the cultural heritage of every people) and its two Protocols. However the instruments enacted after the 1954 Convention target only specific types of cultural heritage, i.e. movables (the 1970 Convention), immovable (the 1972 Convention), underwater heritage (the 2001 Convention) or intangible heritage (the 2003 Convention). This trend must be closely linked to the following circumstances.

The pre-UNESCO instruments were needed to protect cultural property during war time. In war time, all properties that have artistic, academic or humanitarian value should be qualified as cultural property and protected from destructive actions. It is impossible and inappropriate to make detailed categorization of those properties in war time. However when armed conflicts in large scale were settled, other types of events than war/armed conflicts were recognized as danger for cultural property. After the international economic order was reorganized, normalized economy and various developments projects emerged as threats against cultural property. To tackle these threats, international instruments needed to focus on certain types of economic activities, i.e. either commercial transactions (the 1970 Convention and the 1995 UNIDROIT Convention) or development projects (the 1972 Convention).

Compared to the pre-UNESCO instruments, the 1954 Convention clearly states in Art. 1 “movable or immovable property of great importance to the cultural heritage of every people”. Hereby it is recognized and declared that cultural property is to be transmitted to next generations. Not only its humanitarian value, but also its significance as what embodies historic, cultural and/or ethnological identity of people/community are recognized. Also the background of the 1970 Convention shows us that cultural property is understood as something to be transmitted to next generations. Thus the loss of an artefact cannot simply be understood as the loss of economic value. It may be considered as the loss of identity.

A difference between the 1954 Convention and the 1970 Convention is what Merryman described as cultural internationalism and nationalism. The 1970 Conventions target in principle the interests of member States. The heritage in the sense of the 1954 Convention is that of the international community, while the heritage in the 1970 Convention is that of each Member State. The 1972 Convention has a dual nature in this sense, since it applies "outstanding universal value" as the key-criterion, while the key players under this Convention are States. However, after the meaning of "universal" in the criterion for the inscription into the World Heritage List was relativized under the Global Strategy, the difference between the two Conventions became less clear than before.

Also the 2001 Convention bears the nature of a peace-time law. Establishing the order of the sea became possible only after the wars in large scale were settled. The concept of underwater heritage represents the philosophy of cultural internationalism, as article 149 of the UNCLOS[569] and article 2, paragraph 3 of the 2001 Convention[570] shows. The 2001 Convention however tries to strike a balance between cultural internationalism and nationalism. We should carefully observe the practice of this Convention to see if and how this philosophy would be modified by cultural nationalism.

In contrast to the previous instruments, the 2003 Convention added a new aspect to the cultural heritage law. First, this Convention aims at safeguarding intangible cultural heritage in the context of cultural diversity. In other words, this Convention sets cultural diversity as a new objective of cultural internationalism. Second, this Convention focuses on human activities as cultural heritage and its transmissibility. Thus the key player under this Convention is not the State, but the community as the bearer of intangible cultural heritage. If the community's interest is not well represented or the state's interest is too much emphasized in its practice, it should be described as "biased cultural nationalism". The cultural-internationalism-nationalism-dichotomy, which Merryman proposed, may need theoretical modification under the regime of the 2003 and 2005 Conventions.

[569] Article 149 states 'All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.'

[570] Article 2, paragraph 3 states 'States Parties shall preserve underwater cultural heritage for the benefit of humanity in conformity with the provisions of this Convention.'

PART II – NATIONAL LEGAL FRAMEWORKS

GENERAL ISSUES

This chapter shall serve as a bridge between Part I of this report on the international framework for the protection and preservation of cultural heritage and its national counterparts outlined in the following chapters of Part II. It will focus first on explaining the fundamental national legal structure(s) in the field of cultural heritage protection and preservation, followed by basic national ideas on cultural heritage and measures for its protection and preservation.

1.1. National Legal Frameworks

Talking about national legal frameworks one has to distinguish basically between two sets: the countries' constitutions as foundation and sub-constitutional[571] legal tools as means of regulating the topic in detail. Hence, the following subchapters will explain the various concepts used by the legislators in the countries which have taken part in the underlying study to this report. Details about the respective legal mechanisms and concepts used by the national legislation can be found in the chapters discussing the material contents of the national legal frameworks.[572]

1.1.1. The National Fundament: The Constitutional Pillar – Diversity On The Constitutional Level

Basic cultural ideas can be found in the constitutions of most, but not all countries – as we can see, for example, in the United States or Japan, whose constitutions remain silent in this area[573] –, sometimes directly linked to the issue of protection and preservation of cultural heritage, sometimes indirectly by emphasizing the important role culture plays in the respective society. What most of those constitutional frameworks have in common is the fact that the detailed embodiment of the established principles is subject to – speaking in terms of legal hierarchy – weaker laws. A good example of

[571] In the context of this report, the term *sub-constitutional* refers to law which according to Kelsen's hierarchy of norms is "weaker" than constitutional law. Usually, it is based on the respective national constitutional framework, has to respect its provisions and thus must not violate them.

[572] See *infra* II.2. et seq.

[573] See Tunisian report, p. 1

an explicit mandate can be found in Article 46 of the Spanish Constitution which reads: 'Public Authorities guarantee the conservation of and will promote the enrichment of the historic, cultural and artistic heritage of the people of Spain and the assets which it includes, whatever their legal status or ownership. The Criminal Legal System will sanction attacks on this heritage.'[574] This provision also expresses the idea of not only conserving the status quo of cultural heritage, but also of promoting the important role it plays in society.

When it comes to the question of which role international legal tools can play in the context of protecting and preserving cultural heritage on a national level, it has to be noted that constitutions usually link international law to the national legal framework: Article 1 (2) of the Czech Constitution, for example, stresses compliance with obligations arising from international law, further described by Article 10 of the Czech Constitution in the way that 'the promulgated international treaties, whose ratification was approved by the Parliament, and binding on the Czech Republic shall be part of the legal order; if an international treaty lays down otherwise than a law, the international treaty shall be applied.'[575] Articles 93 and 94 of the Dutch Constitution, another instance of explaining the interrelation between national and international law, declare international treaties to become binding law once 'published'[576] and solve a possible conflict of international and (sub-constitutional) national legal norms in favor of the former. Self-executing international treaties, or at least self-executing parts of such treaties, do not need to be converted into national law. This, of course, is only possible, if – as pointed out above in Part I[577] – the respective international agreement is precise enough to be directly applied by national courts or other state authorities and the signatory states intend to be bound by it. With the exception of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects,[578] an international private uniform law, the major conventions dealing with the protection and preservation of cultural heritage as discussed in Part I of this report cannot be categorized as generally self-executing treaties, as they basically ask the States Parties to implement the often vaguely formulated provisions into national law.[579]

[574] Spanish report, p. 2.
[575] Czech report, p. 1.
[576] Dutch report, p. 27.
[577] See *supra* I.5.3.
[578] See *supra* I.5.3. for further details.
[579] See e.g. Raschèr 2000, op. cit. n. 337, at p. 70 for the 1970 Convention; see also *supra* I.5.3. for further details.

They nevertheless set the direction which should be followed by the respective national legislation.

Some constitutions stress the national character of cultural heritage. For example, according to the Croatian constitutional framework cultural heritage is a dominant factor in the legislation, as its layers are seen 'as goods representing the national spiritual values which are entitled to special protection by the State'[580]. Article 9 of the Italian Constitution sets the framework for the protection, preservation and promotion of cultural heritage also by pointing out its national character, stating that 'the Republic promotes the development of culture and scientific and technical research. It protects the landscape and the historical and artistic heritage of the Nation.'[581] Lenzerini explains that the usage of the term nation implies that Italian cultural heritage has to be protected for 'belonging primarily to the community (note: according to Lenzerini to be understood as the entire 'community of national people')'.

Other constitutions strengthen the position of groups and communities more directly. For example, Section 35 (1) of the Canadian Constitution Act 1982[582] stipulates that 'the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed', while Section 35 (2) of the Canadian Constitution Act clarifies that the term aboriginal peoples of Canada includes Indian, Inuit and Métis groups. The most important aspect of this provision is that this should guarantee that 'laws that have the effect of extinguishing the rights of aboriginals protected under the section'[583], including cultural rights, can no longer be enacted and should act as a means of balancing between the interests of aboriginal groups and states/provinces[584]. Similar constitutional guarantees can be found in the Mexican constitutional framework which – based on the recognition of the 'multi-cultural nature of Mexico'[585] – tries to protect 'all those elements that constitute [the] culture and identity'[586] of indigenous people. By doing this, the respective legislator is asked to respect and protect the interests of indigenous people when drafting laws which could interfere with them. Māori cultural heritage is protected as a constitutional principle

[580] Croatian report, p. 1.
[581] Italian report, p. 1.
[582] A full text version is online available online at http://laws.justice.gc.ca/en/const/index.html (last visited on December 31, 2008).
[583] Canadian report, p. 5.
[584] Canadian report, p. 5.
[585] Mexican report, p. 9.
[586] Mexican report, note 11.

under New Zealand law by Article II of the Treaty of Waitangi which guarantees Māori 'the unqualified exercise of their chieftainship over their lands, villages and all their treasures'[587], a provision which, according to Myburgh, is considered to be part of 'the founding document of statehood'[588] for Māori and Pakeha groups.

The recently amended Taiwanese Constitution includes quite extensive provisions on the protection of indigenous communities' culture stressing the importance of cultural pluralism and stipulating that 'the State affirms cultural pluralism and shall actively preserve and foster the development of aboriginal languages and cultures. The State shall, in accordance with the will of the ethnic groups, safeguard the status and political participation of the aborigines. The State shall also guarantee and provide assistance and encouragement for aboriginal … culture, … measures for which shall be established by law.'[589] This, as we will see later[590], led to the enactment of a progressive legal statute, strengthening the voice of the local communities. Although most European constitutions do not include provisions which are directly aimed at an extensive protection of cultural rights of indigenous groups and communities, the Preamble of the Swiss constitution emphasizes the importance of preserving the national cultural pluralism saying that 'the Swiss people and cantons are conscious of their common achievements and determined to live their diversity in unity'[591]. This principle is also reflected by the comparatively strong local activities in the safeguarding process of the local, mainly intangible cultural heritage, finding its own foundation in the constitutions of the respective cantons.[592]

Constitutional frameworks, however, not only address the protection of cultural heritage or the role of groups/communities, but also try to protect the status of private holders of cultural heritage rights. This is so even where constitutional frameworks are not directly aimed at protecting their interests. For example constitutional compensation guarantees in cases of

[587] New Zealand report, p. 4.
[588] New Zealand report, p. 4.
[589] Taiwanese report, p. 2.
[590] See *infra* II.3.2.1.
[591] Swiss report, p. 2.
[592] For details see *infra* II.3.2.2.

expropriation[593] play an important role in the context of cultural heritage, cultural property and its private ownership.[594]

Lacking a constitutional framework for the direct protection and preservation of cultural heritage, the Preamble of the French constitution chose an exclamatory approach asking for a guarantee to public cultural heritage access. Although it is said that this proclamation – due to the impossibility of filing individual claims – does not have any direct effect,[595] it can be understood as a mandate addressed at the competent authorities to install a proper legal framework capable of protecting the French cultural heritage. The very recently amended Mexican Constitution assures all citizens access rights to culture and also to the service provided by the National State. The National State is obliged to provide the means to render these rights effective and is responsible for the promotion and development of the cultural diversity in all its forms and with respect to creative freedom[596].

1.1.2. The National Legal Material Body Or How To Bring Cultural Heritage Concepts To Life: Sub-Constitutional Law – Diversity On The Instrumental Level

As explained in the preceding chapter national constitutions and international treaties can be seen as constituting the frameworks for the protection and preservation of cultural heritage. In order to work properly, those frameworks need material filling which is on a national basis provided by sub-constitutional law. In Part I of this report it was pointed out that the latest trends in the field of international cultural heritage protection go toward the safeguarding of the rich diversity of culture. The concept of diversity is, however, not only to be found in the material way of protecting, but also in relation to the question of how national laws formally approach the topic of cultural heritage protection, ranging from all-embracing legal concepts to patchwork style legislation based on a wide range of different laws. It could be referred to as diversity on the instrumental level.

[593] E.g. Croatian report, p. 10 with reference to Article 50 (1) Croatian Constitution; Danish report, p. 12 with reference to Section 73 Danish Constitution; German report, p. 6 with reference to Article 14 German Constitution.

[594] See *infra* II.2.1.2. and II.2.2.2.

[595] See French report, p. 4.

[596] See Mexican report, p.4.

In the international legal context as described in detail in Part I of this report, methods for protecting cultural heritage are usually categorised according to at least one of the following four criteria, reflected and – with reference to the respective scope of application – gradually extended by international conventions: (a) the form in which the cultural heritage presents itself (tangible or intangible; movable or immovable); (b) the geo-political circumstances surrounding it (peace or wartime); (c) the place where it is located (on land or underwater); or (d) the status of its possession (legal or illegal). In this context an aspect worth taking a look at is the question of how national sub-constitutional legal concepts deal with these categories. Do they follow the said categorizations? Do they adopt an extensive integrative approach which unites the protection and safeguarding of tangible and intangible cultural heritage as well as movable and immovable cultural heritage or do they rather favour handling tangible and intangible cultural heritage as well as movable and immovable cultural heritage separately? Not only the national perception theories of the best suitable protective mechanism for the respective category of cultural heritage, but also the evolutionary history of cultural heritage law is reflected in the national legal systems.

In the following, the legislative systems of the countries which took part in the underlying study in the area of cultural heritage protection will be grouped into four main categories. The classification will focus on the national legislative systems of cultural heritage protection and will reflect how the contributing countries basically deal with various forms of cultural heritage, be it tangible or intangible, movable or immovable. It will also discuss if – and if yes, to what extent – those cultural pillars are covered by single major national statutes. Thus, the question of comprehensiveness will be the main criterion used in the following subchapters, supplemented by the constitutionally allocated legislative competences. Although one will see smooth transitions between the categories, one will also notice that due to different reasons, including the just mentioned distribution of legal competences, the understanding of cultural concepts and the development of cultural categories used in this report, national approaches are as diverse and complex as culture itself.

1.1.2.1. The Unified Approach In Sub-Constitutional Law

If one understands the term integrative as combining the protection and preservation of tangible and pure intangible cultural heritage

comprehensively in a single legal document, then only a very few legal frameworks included in the underlying study to this report can be classified as being integrative. Among them, the Japanese Law for the Protection of Cultural Properties[597] (hereafter the 'LPCP') of 1950 is the oldest example of such a comprehensive national legislation still in use. Article 2 of the LPCP divides the protected material scope of application, 'cultural properties', into the following five groups: (1) tangible cultural property comprising both major groups movables and immovables; (2) intangible cultural property; (3) folk cultural property; (4) monuments; and (5) cultural landscapes.[598] In comparison to the international tools outlined in Part I of this report, groups (1) – movable and immovable tangible cultural property – and (2) – intangible cultural property – of Article 2 of the LPCP cannot be understood as covering exactly the same items. The five groups contained in Article 2 of the LPCP should rather be understood as overlapping to some extent. This is the case because intangible cultural heritage in terms of the pertinent UNESCO conventions dealing with intangible cultural heritage also comprises group (3), whereas (parts) of groups (3), (4) and (5) also fall within the international notion of tangible cultural heritage.

Heavily influenced by the Japanese legislation, Taiwan adopted its Cultural Heritage Preservation Act[599] (hereafter the 'TCHPA') in 1982. Although not being recognized as a politically independent country by UNESCO and UNIDROIT and thus not being a state party to any of the conventions outlined in Part I of this report,[600] Taiwan still tries to follow the latest trends in the area of cultural heritage law. Paragraph 3 of the TCHPA divides the protected cultural heritage into seven groups comprising intangibles and tangibles, movables and immovables and again there is an overlapping of categories: (1) historic sites, buildings and gathering habitations which were built for the human beings demands of daily life with historic and cultural value; (2) archaeological sites; (3) cultural vistas which includes places and coherent environments of fairy tale, legend, event, historic happenings, gathering life or ceremony; (4) traditional arts; (5) folk and related cultural artifacts; (6) antiquities; and (7) natural vistas.[601] In

[597] *文化財保護法*.

[598] See Japanese report, p. 4 et seq.

[599] *文化資產保存法* recently amended in 2005.

[600] An up-to-date list of Member States of UNESCO is available online at http://erc.unesco.org/cp/MSList_alpha.asp?lg=E (last visited on December 31, 2008); a list of Member States of UNIDROIT is available online at http://www.unidroit.org/english/members/main.htm (last visited on December 31, 2008).

[601] See Taiwanese report, p. 1

addition to the TCHPA, Taiwan is – from the mere legal perspective – also one of the most progressive countries with respect to the involvement of communities and groups, as – in addition to the TCHPA – Taiwan enacted the Protection Act of Traditional Intellectual Creation of Indigenous People[602] (hereafter the 'PATIC') in 2007, a law which is believed will lead to major changes in the national protection of indigenous groups' intangible cultural rights.[603]

The third example of a comprehensive integrative framework is set by Croatia, one of only two countries contributing to this study (with the other one being Spain) which has signed all seven major conventions (including the two protocols to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict) outlined in Part I of this report. The Croatian Cultural Heritage Act[604] (hereafter the 'CHA') of 1999 replaced two older laws[605] and introduced also the category of intangible cultural heritage to Croatian cultural heritage law.[606] Gliha and Josipovic state that the reason for including intangible cultural items into the scope of application can be found in the new awareness for culture in Croatia, as 'cultural heritage was given a significant place in the Croatian general development and economic strategies. Also the cultural heritage role and position in the field of science, education, community's civilisation level is very important as well as for the national and native awareness of individuals and nations. In realising the stated strategies, also the role of intangibles as the cultural heritage has been recognised, so they have been included in the protected cultural heritage as a separate category'.[607]

1.1.2.2. The Semi-Unified Approach In Sub-Constitutional Law

New Zealand is among those countries which – despite not including the concept of intangible cultural heritage as an independent category in the pertinent laws on the protection and preservation of cultural heritage – recognizes and protects intangible cultural heritage to some materialized extent and thus finds its place between the integrative and non-integrative approaches. The main aim of the New Zealand Historic Places Act 1993

[602] *原住民族傳統智慧創作保護條例.*
[603] For details see *infra* II.3.2.1.
[604] *Zakon o zaštiti i očuvanju kulturnih dobara*.
[605] Protection of Cultural Monuments Act of 1965 and the Basic Act on the Protection of Cultural Monuments of 1971 – see Croatian report, note 4.
[606] See Croatian report, note 15.
[607] Croatian report, note 15.

(hereafter the 'HPA') is to 'promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand'.[608] While – with regard to tangible cultural heritage – the HPA basically focuses on immovables and includes movables only to the extent that they are located on an 'identifiable place or site'[609], Māori intangible cultural heritage plays an important role in the framework of the HPA. In addition to archaeological sites, historic places and historic areas the HPA also protects wāhi tapu (defined by Myburgh as 'sites sacred to Māori'[610]) and wāhi tapu areas. The underlying rationale can be found in the intangible spiritual dimension associated with the respective site or area, as the HPA 'also protects places where no visible feature or evidence is present but where a significant event or traditional activity took place.'[611]

Italy is an example of a country which combines the protection of movable and immovable tangible cultural heritage in a single law, the Code of Cultural Properties and Landscape[612] (hereafter the 'CCPL'). This statute was amended just recently in 2008 in reaction to the Italian ratification of the 2003 Convention and the 2005 Convention in 2007. Although – in contrast to e.g. the Croatian Cultural Heritage Act – the CCPL still does not regulate the protection and preservation of intangible cultural heritage extensively, it can also be considered to take a position in the middle of two opposing concepts, the total inclusion and the exclusion of intangible cultural heritage in the main text(s) of cultural heritage protection. The newly inserted Article 7 bis of the CCPL stresses that 'the expressions of collective cultural identity contemplated by (note, according to Lenzerini: the 2003 and 2005 Conventions) are subjected to the provisions of the present code in the event that they are embodied into material manifestations and the premises and conditions for the applicability of Article 10 [of the CCPL] exist (note, according to Lenzerini: 'i.e. that these expressions may be included within the concept of cultural properties').[613] In other words, intangible cultural heritage is not per se protected under the CCPL, but only to the extent that its traces are materialized into 'a tangible expression of cultural heritage'.[614]

[608] New Zealand report, p. 5 with reference to Preamble (a) NZHPA.
[609] New Zealand report, p. 11; see also *infra* II.2.2.2.
[610] New Zealand report, p. 2.
[611] New Zealand report, p. 16 with examples of influential intangible cultural heritage.
[612] *Codice dei beni culturali e del paesaggio*.
[613] Italian report, p. 5.
[614] Italian report, p. 5.

1.1.2.3. The Semi-Diverse Approach In Sub-Constitutional Law

Many countries having participated in this study do, however, still and for various reasons to be explained later in the context of intangible cultural heritage[615], take a non-integrative approach, providing only for measures on the protection and preservation of tangible cultural heritage or regulating tangible cultural heritage and intangible cultural heritage in separate laws. Within this big group of non-community oriented legal frameworks one can further distinguish between an array of totally scattered legal concepts those which subdivide tangible cultural heritage protection into legal statutes solely dealing with immovables and others only with movables on the one hand and mere tangible/intangible separations on the other hand. Nevertheless, it has to be said that no national legal framework dealing with cultural heritage stands alone in terms that it would not refer to general legal statutes. For example, when it comes to questions of ownership of cultural property and its transfer, one can see that there exist connections between general norms and special provisions for cultural properties.

National examples of legal frameworks combining norms on immovable and movable cultural heritage in a single major law can be found e.g. in the Czech Republic, Spain, Mexico, Tunisia or France.

The Czech Republic combines concepts of immovable and movable cultural heritage in the Law on the State Care of Cultural Heritage[616] (hereafter the 'LSCCH'), being the only national law dealing comprehensively with the protection of cultural heritage in the Czech Republic.[617]

Spain chooses a similar approach with its Law on the Historical Heritage of Spain[618] (LHHS) concentrating on tangible cultural heritage. De Salas notes that Article 1 of the LHHS which deals with the material scope of application also includes objects of ethnographical interest.[619] In combination with Article 47 (3) of the LHHS which reads: 'It is considered that all knowledge and activities stemming from traditional techniques or models used by a specific community have ethnographical value and will

[615] See *infra* II.3.2.3.
[616] *Zákon č. 20//1987 Sb., o státní památkové péči*; see Czech report, note 5.
[617] See Czech report, p. 3.
[618] *Ley 16/1985, de 25 de junio, del Patrimonio Histórico Español*.
[619] See Spanish report, p. 4.

enjoy the protection of the administration. When this knowledge or these activities are in danger of disappearing, the competent Administration will adopt the necessary measures for the research and scientific documentation of these assets'[620] it could be argued that the LHHS also deals with the protection of intangible cultural heritage to some extent. However, according to de Salas, Article 47 (3) of the LHHS has so far never been of practical relevance which can lead to the assumption that Spanish (federal) legislation so far only deals with the protection and preservations of tangible cultural heritage. The classification of national Spanish legislation with respect to cultural heritage yet remains difficult, as intangible cultural heritage might not be centrally regulated on a national basis, but it may nonetheless be of interest to the local laws of the autonomous communities, as we will see later in the chapter on the protection of intangible cultural heritage.[621] In addition, tangible cultural heritage is to some extent regulated on a decentralized basis, as due to the distribution of legislative competences several areas are regulated (also) on a regional basis, leading to e.g. 18 major laws, 17 regional and one federal law, applicable to the protection of immovable cultural heritage.[622]

The Mexican 1972 Federal Law on Archaeological, Historic and Artistic Monuments and Zones (hereafter the 'LAHA') is the pertinent central legal statute covering issues related to tangible cultural heritage protection, comprising both movables as well as immovables. This law, supplemented by the Mexican General National Ownership Act (hereafter the 'MGNOA') again, however, only focuses on tangible cultural heritage, while intangible cultural heritage is currently not regulated by federal laws in Mexico. Nevertheless, related issues can be found on a decentralized basis, regulated by several provincial state laws.[623]

Tunisia also combines the protection of movable and immovable tangible cultural heritage in the law of May 19, 1988 on cultural goods[624], completed and partly revised by the Code of Archaeological and Historical Heritage and Traditional Arts[625] (hereafter the 'CAHH') in 1994 and the Law of February 22, 1989 on Maritime Wrecks, applicable to underwater cultural

[620] Spanish report, p. 18.
[621] *Infra* II.3.2.2.; see also Spanish report, p. 18 et seq.
[622] See e.g. *infra* II.2.1.2.
[623] See *infra* II.3.2.2.
[624] *Loi n° 88-44 du 19 mai 1988 relative aux biens culturels*.
[625] *Loi n° 94-35 du 24 février 1994 relative au code du patrimoine archéologique, historique. et des arts traditionnels*.

heritage[626]. Unlike the two before-mentioned Czech and Spanish national legal frameworks, Tunisia regulates intangible cultural heritage protection on a centralized basis in the Law on Literary and Artistic Heritage (hereafter the 'LLAH')[627] enacted at the same time as the CAHH.

In 2004, the French legal framework in the area of cultural heritage protection shifted from a totally scattered system towards a more integrative one when the Cultural Heritage Code[628] (hereafter the 'CHC') was adopted. It unifies and regroups several older laws dealing with tangible cultural heritage in both forms, movable and immovable, and divides them into the following six books: general provisions on cultural heritage (Book I), archives (Book II), libraries (Book III), "Musées de France" (Book IV - label granted under specific conditions), archaeology (Book V) and historic monuments/buildings and sites (Book VI).[629] The provisions on movable tangible heritage must – as far as movable tangible cultural heritage belonging to the public domain is concerned – however be read in connection with Article L. 2112-1 of the General Code Regarding the Property of Public Persons[630] (hereafter the 'GCPPP') which was inserted in 2006 and which contemplates the regulations concerning the legal status of movable cultural property belonging to the public domain.[631] Although France ratified both the 2003 Convention as well as the 2005 Convention, the protection and preservation of intangible cultural heritage still plays a minor role in the French legislation.[632]

1.1.2.4. The Diverse Approach In Sub-Constitutional Law

Another big group of legal frameworks in the field of national cultural heritage protection and preservation is formed by Denmark, the Netherlands, Switzerland, Canada and the United States. These provide examples of scattered legislation in the area of tangible, and as it is the case in Switzerland, also intangible cultural heritage protection and preservation.

The Danish legal Framework in the area of cultural heritage protection and preservation focuses solely on tangible forms of cultural heritage. In

[626] See *infra* II.3.2.1.
[627] *Loi n° 94-36 du 24 février 1994 relative à la propriété littéraire et artistique*.
[628] *Code du patrimoine*; see French report, p. 5.
[629] See French report, p. 4.
[630] *Code général de la propriété des personnes publiques*; see French report, p. 32.
[631] See *infra* II.2.2.2. for details.
[632] See *infra* II.3.2.3. for details.

addition, Danish law also distinguishes between the two material forms of tangible cultural heritage: movables and immovables. With respect to immovable tangible cultural heritage the main law is the Consolidated Act No. 1088 of August 29, 2007 on Listed Buildings and Preservation of Buildings and Urban Environments[633] (hereafter the 'LBA'), with additional special regulations in various sets of special regulations of law, such as the Consolidated Act No. 1505 of December 14, 2006 on Museum[634] (hereafter the 'DaMuA') regulating – among other matters – the 'safeguarding of walls of stone and earth'[635] in the form of ancient monuments and numerous executive orders[636]. Movable tangible cultural heritage, on the other hand, is mainly regulated first by the Act on the Protection of Cultural Assets in Denmark 1987[637] (hereafter the 'CAA') and its supporting executive order No. 404 of June, 11 1987 on Protection of Cultural Assets in Denmark, both of which primarily aimed at export controls over 'rare works of art, objects of importance to cultural history, books, manuscripts, documents and the like.' In addition and secondly, the DaMuA provides for important regulations, mainly in relation to safeguarding issues.[638]

The Netherlands take a similar approach and distinguishes strictly between tangible and intangible forms of cultural heritage. While the first group is regulated by various legal statutes, Lubina stresses that 'the protection of intangible cultural heritage is not law-based'[639]. Dutch law also distinguishes between movable and immovable forms of tangible cultural heritage when it comes to the regulation by legal statutes. The regime of immovable tangible cultural heritage is regulated by the Monuments Act[640] (hereafter the 'DuMoA') of 1988. Its counterpart for the protection and preservation of movable tangible cultural heritage – with the exception of underwater movables, which also fall under the legal regime of the DuMoA[641] – is the Cultural Heritage Preservation Act[642] (hereafter the 'CHPA') of 1984 with the major contemplating Act on the Return of

[633] *Lov om bygningsfredning og bevaring af bygninger og bymiljøer*; see Danish report, p. 8.
[634] *Museumslov*; see Danish report, p. 15.
[635] Danish report, p. 15.
[636] See Danish report, p. 7.
[637] *Lov nr. 332 af 4. juni 1986 om sikring af kulturværdier i Danmark*.
[638] See Danish report, p. 17 et seq. See also *infra* II.2.2.2.
[639] Dutch report, p. 8; for details see *infra* II.3.2.3.
[640] *Monumentenwet*, latest amendment in 2008; see Dutch report, p. 9.
[641] See Dutch report, p. 6 et seq., p. 53. and *infra* II.2.4.2.1.
[642] *Wet tot behoud van cultuurbezit*; see Dutch report, p. 9.

Cultural Objects Removed From Occupied Territories[643] of 2007 and the Sanction Order Iraq[644] of 2004, both aimed at regulating repatriation issues of movable tangible cultural objects.

Switzerland also distinguishes between tangible and intangible cultural heritage protection and further divides the first group into movable and immovable objects. This is further complicated due to the strong positions of the cantons.[645] On a centralized federal level movable cultural heritage is mainly protected by the Act on the International Transfer of Cultural Property[646] (hereafter the 'CPTA') of 2003 which implemented the 1970 Convention, regulating the 'import of cultural property into Switzerland, its transit and export and repatriation from Switzerland'.[647] Immovable cultural heritage protection is mainly a cantonal matter[648] and therefore regulated only in a limited way on a federal basis. While the Federal Nature and Cultural Heritage Protection Act[649] (hereafter the 'NCHPA') of 1966 sets the framework for the protection of Swiss national immovable cultural heritage, cantonal law provides for further regulations on the protection of immovable tangible cultural heritage on a regional level. Although cantonal law primarily aims at the protection of immovables, the latest trend goes into a more extensive direction, also including movable tangible cultural heritage in cantonal legislation. Intangible cultural heritage – although the term is not commonly used in Swiss legislation – finds its expression also in federal and cantonal laws providing for a wide diversity of regulations, as will be shown later in this report.[650]

Canada also has a quite complicated, and above all, scattered legal framework for the protection of cultural heritage. This might be due to the fact that Canada, according to Patterson 'has never accorded cultural heritage its own separate legal category, except for the purposes of specific statutes and the implementation of international agreements into domestic law (also by statute). This is largely because, as a mostly common law jurisdiction, Canada has no basis in its legal history for the separate

[643] *Wet van 8 maart 2007, houdende regels over inbewaringneming en instelling van een vordering tot teruggave van cultuurgoederen afkomstig uit een tijdens een gewapend conflict bezet gebied (Wet tot teruggave cultuurgoederen afkomstig uit bezet gebied)*; see Dutch report, p. 8

[644] *Sanctieregeling Irak 2004 II*; see Dutch report, p. 8.

[645] See Swiss report, p. 2 et seq. and *infra* II.2.1.2., II.2.2.2. and II.3.2.2. for details.

[646] *Bundesgesetz vom 20. Juni 2003 über den internationalen Kulturgütertransfer (KGTG) (SR 444.1)*.

[647] Swiss report, p. 4.

[648] See Swiss report, p. 12 with reference to J.-F. Aubert and P. Mahon, *Petit Commentaire de la Constitution fédérale de la Confédération suisse*, (Zurich, Schulthess 2003) Art. 78, para. 3.

[649] *Bundesgesetzes vom 1. Juli 1966 uber den Natur- und Heimatschutz (NHG) (SR 451)*.

[650] See *infra* II.3.2.2.

recognition of a cultural heritage category.'[651] The legal competences are divided between the central parliament and the provinces. While the first one has e.g. the legislative competence in the area of international trade and for that reason implemented the 1970 Convention in Section 37 of the Canadian Cultural Property Export and Import Act of 1977, the regulation of ownership falls under the competences of the provinces, causing complications as both civil law (note: in Quebec) and common law systems (note: in the other provinces) are represented in Canada.[652] The protection and preservation of immovable cultural heritage is subject to parallel legislation, as legal statutes can be found on provincial levels, such as the British Columbian Heritage Conservation Act, as well as on a federal centralized basis, expressed mainly in the Historic Sites and Monuments Act and the Canada National Park Act which both were enacted to implement the 1972 Convention. It should further be added that Canada also belongs to the group of countries which have not enacted any legal statutes dealing extensively and expressively with the protection and preservation of intangible cultural heritage.[653]

In the United States, although Nafziger notes that '[f]ederal measures to protect immovables, as discussed above, normally apply as well to movables and their transferability,'[654] core regulations on the protection of immovable and movable tangible cultural heritage can be found in a patchwork of statutes of special regulations of law, while the category of intangible cultural heritage falls basically under the regime of Intellectual Property law.[655] In addition, several national laws also provide indigenous groups, mainly American Indian and Native Hawaiian groups, with comparatively extensive rights, leading the way in respecting and incorporating the interests of groups and communities.[656] Modern legal protection of cultural heritage in the United States dates back to the beginning of the 20th century and since then has been steadily evolving in most of cultural categories, movables and immovables as on land and underwater cultural heritage. General core laws in the area of immovable cultural heritage protection are the National Historic Preservation Act of 1966 (hereafter the 'NHPA') and the Archaeological Resources Protection Act of 1979 (hereafter the

[651] Canadian report, p. 1.
[652] See Canadian report, p. 1 et seq.
[653] For details see *infra* II.3.2.3.
[654] United States report, p. 7.
[655] See United States report, p. 11 and *infra* II.3.2.3.
[656] See *infra* II.2.1.2. and II.3.2.3.

'ARPA'), the latter dealing with 'archaeological resources'[657] in general, combining the regimes of immovables and movables. The National Stolen Property Act (hereafter the 'NSPA') and the Cultural Property Implementation Act (hereafter the 'CPIA'), which implements the 1970 Convention, are the general main laws in the area of movable tangible cultural heritage protection. In addition, tools of special regulations of law have been enacted in relation to underwater cultural heritage[658] and the role of groups and communities. With regard to the latter one 'the world's most comprehensive and effective national law to protect indigenous cultural material'[659], the Native American Graves Protection and Repatriation Act (hereafter the 'NAGPRA') has to be mentioned.[660]

1.1.2.5. Germany As An Example Of A Mixed-Diverse Approach In Sub-Constitutional Law

Germany falls under neither of the two categories mentioned in chapters II.1.1.2.3 and II.1.1.2.4. Due to its complex system of competence distribution between federal and (note: local) state authorities, the systems of combining movable and immovable cultural heritage issues in single laws and using separate laws can both be found.

The declaration of (note: tangible) objects to form part of the national cultural heritage falls within the competence of the German states, as does the protection of immovable tangible cultural heritage. Each German state has its own act on the preservation of monuments, comprising immovables as well as movables.[661] In addition, however, one can find centralized federal legal statutes dealing with questions of movable tangible cultural heritage protection focusing on the prohibition of illegal export of cultural property and measures to prevent illegal import and regulate repatriation. In this regard two just recently enacted laws should be mentioned: the Law on the Return of Cultural Goods[662] (hereafter the 'LRCG') implementing the 1970 Convention and the European Council Directive 93/7/EEC of March 15, 1993 and the Act implementing the Hague Convention of 1954 on the

[657] United States report, p. 3.
[658] See *infra* II.2.4.2.1.
[659] United States report, p. 4.
[660] For details see *infra* II.1.2.2., II.2.1.2. and II.2.2.2.
[661] *Gesetz zum Denkmalschutz*; see German report, p. 4.
[662] *Kulturgüterrückgabegesetz*; see German report p. 4.

Protection of Cultural Property in the Event of Armed Conflict[663] (hereafter the 'AHC'), both enacted in 2007.

1.2. Basic National Concepts Of Cultural Heritage – The Underlying Rationale Of Its Protection And Preservation

1.2.1. Basic Points Of Interest

The terms cultural heritage and cultural property, the latter placing a greater emphasis on the ownership aspects of culture, are rather vague expressions and subject to different, more or less comprehensive definitions to be found in national legislation. This phenomenon is influenced by various factors, leading to a broad array of national concepts of cultural heritage.

Major points of interest in this regard are possible impacts on those national concepts and the question of how they are expressed in the respective legal systems. The following will take a brief look at different national approaches and by doing this will shortly touch upon the influences made by the following wide range of factors: historic origins of cultural heritage protection, the relationship between culture and private property, the role of communities and groups including the Christian church and the link between past and future.

1.2.2. National Approaches

The Oxford English Dictionary defines the term heritage – inter alia – as '[t]hat which has been or may be inherited.'[664] Other dictionaries use definitions such as 'anything transmitted from ancestors or past ages'[665] or 'anything that has been transmitted from the past'.[666] The Oxford Dictionary of Phrase and Fable links heritage to the term culture by defining it as

[663] *Gesetz zur Ausführung der Konvention vom 14. Mai 1954 zum Schutz von Kulturgut bei bewaffneten Konflikten*; see German report p. 4.

[664] J.A. Simpson and E.S.C. Weiner, eds., *The Oxford English Dictionary*, Vol. 7, 2nd edn. (Oxford, Oxford University Press 1989).

[665] C. Schwartz et al., eds., *The Chambers English Dictionary*, 7th edn. (Cambridge, W & R Chambers Ltd and Cambridge University Press 1988).

[666] P. Hanks et al., eds., *Collins Dictionary of the English Language* (Glasgow, Williams Collins Sons & Co. Ltd. 1979); connatural definitions can be found in many other dictionaries as well, including *The American Heritage Dictionary of the English Language*, 4th edn. (Boston, Houghton Mifflin Company 2000) or P.B. Gove et al., eds., *Webster's Third New International Dictionary of the English Language* (Springfield, G. & C. Merriam Company 1976).

'valued objects and qualities such as historic buildings, unspoilt countryside, and cultural traditions that have been passed down from previous generations'[667], stressing again the aspect of transfer from generation to generation and implicating the necessity to protect and preserve it for the sake of enjoyment by the respectively following generation. This idea is more or less directly reflected in a number of national legal frameworks.

For example, Lenzerini notes that the Italian regime is 'founded on – and permeated by – the philosophical rationale according to which it represents heritage belonging primarily to the community. Therefore, the first purpose of the relevant legislation consists in making fruition of cultural heritage available for the entire community'[668] and explains with reference to Bottari and Pizzicanella that the term heritage finds its Italian expression in the Italian equivalent patrimonio, deriving 'from the Latin term patrimonium, indicating the inheritance left by the father (pater) to his descendants, inheritance that they must preserve, valorize and transmit in their turn to future generations'[669]. As pointed out above[670] in the context of the constitutional frameworks, the Italian Constitution in its Article 9 tries to anchor this idea by saying that 'the Republic promotes the development of culture and scientific and technical research. It protects the landscape and the historical and artistic heritage of the Nation,'[671] with the term nation to be understood as 'the community of national people,[672] including all regional and local communities.'[673] Italy plays an active role in the area of cultural heritage protection and possesses the highest number of entries in the World Heritage List under the regime of the 1972 Convention with 42 inscribed cultural objects (as of December 31, 2008)[674]. Italy might also be the country with the highest percentage of church owned cultural property.

[667] E. Knowles, ed., *The Oxford Dictionary of Phrase and Fable* (Oxford, Oxford University Press 2000).

[668] Italian report, p. 1.

[669] Italian report p. 1 with reference to F. Bottari and F. Pizzicanella, *I beni culturali e il paesaggio* [Cultural goods and the landscape] (Bologna, Zanichelli 2007), p. 3.

[670] See *supra* II.1.1.1.

[671] Italian report, p. 1.

[672] Italian report, p. 1 with reference to N. Assini and G. Cordini, *I beni culturali e paesaggistici. Diritto interno, comunitario, comparato e internazionale* [Cultural and Landscape Properties. Domestic, European Community, Comparative and International Law] (Padova, Cedam 2006), p. 22.

[673] Italian report, p. 1 with reference to V. Piergigli, 'I "beni culturali": interpretazione evolutiva di una nozione giuridica consolidata' ["Cultural Properties": Evolutionary Interpretation of a Consolidated Legal Notion], in V. Piergigli and A.L. Maccari, eds., *Il Codice dei beni culturali e del paesaggio tra teoria e prassi* [Code of Cultural Properties and Landscape between Theory and Practice] (Milano, Giuffrè 2006) p. 17 at p. 37.

[674] A complete list of inscribed Italian cultural properties is available online at http://whc.unesco.org/en/statesparties/it (last visited on December 31, 2008).

In 2006 Assini and Cordini estimated that roughly 70% of Italian cultural heritage as defined under its legal framework belongs to the Catholic Church.[675] The strong position of the church in Italy is reflected by Article 9 (1) of the CCPL, pursuant to which in Lenzerini's words 'modalities of their preservation and fruition are established by means of an agreement between the Ministry (or the regions to the extent that they are competent in the instant case, if at all) and the relevant religious institution(s). The purpose of these agreements is to conciliate the different demands attached to religious heritage, so as to make possible both their use for the spiritual needs to which they are devoted and, at the same time, their public fruition as cultural heritage.'[676] Lenzerini also expresses that the main principle in the area of general cultural heritage protection is based on the 'recognition of the supremacy of the public interest over any kind of property rights over the properties concerned. These rights – when incompatible with the primary purpose of the national action concerning cultural heritage, i.e. ensuring its proper preservation, valorization and adequate fruition by the community – are destined to surrender to the supreme requirement to properly realize the interests of the collectivity.'[677]

Denmark is another country which enshrines the principle of generation transfer in its legal framework. According to Tamm and Østrup Section 23 (1) of the Danish Museum Act[678] (hereafter the 'DaMuA') the Danish 'Minister of Culture and the state-owned and state-subsidised museums are to co-operate with the local authorities in order to ensure that significant cultural heritage is safeguarded for posterity.'[679] Furthermore, as is the case in Italy, the church, in the case of Denmark the Danish National Evangelical Lutheran Church, also plays an important role with regard to cultural heritage protection in Denmark. Again, Danish law tries to strike a balance between the protection and preservation of cultural heritage and the needs of the church. In order to accomplish this, matters related to church buildings and church areas are exempted from the scope of application of the Danish Listed Buildings Act and regulated by a separate law, the Act No. 7 of January 3, 2007 on Church Buildings and Church Yards Belonging to the Danish National Evangelical Lutheran Church[680]. It should, however, also be noted that the Danish legislation with its long tradition of cultural

[675] See Italian report, p. 9 with reference to Assini and Cordini, op. cit. n. 672, at p. 79.
[676] Italian report, p. 9.
[677] Italian report, p. 20.
[678] *Museumslov, Lov nr. 473 af 7. juni 2001.*
[679] Danish report, p. 29.
[680] *Lov om folkekirkens kirkebygninger og kirkegårde*; fort details see Danish report, p. 13.

heritage protection in its provinces reaching back to the 13th century[681] is to some extent rather conservative, as it neither provides for the granting of (note: direct) rights over cultural property to groups and communities nor for the protection of intangible cultural heritage by the means of legal statutes[682].

When it comes to the protection of cultural heritage rights and interests of groups and communities, one cannot see a general trend in the national legal frameworks towards the strengthening of the position of groups and communities. Although for example the language of minorities, understood as part of intangible cultural heritage[683], is protected in the legal systems of most countries, this might not be the case in relation to cultural heritage rights of groups and communities in general, especially not in relation to tangible cultural heritage. The main obstacles to granting (ownership) rights and protective means to communities can primarily be explained with the basic principle of private law applicable in various national legislations: generally speaking, (property) rights might only be granted to individuals or to groups if they are considered to be legal entities. A community per se, however is usually not classified as a legal entity and thus cannot be capable of holding (ownership) rights. Nevertheless, there exist several national legal concepts which – in one form or another – respect community or group rights.

In this context the Native American Graves Protection and Repatriation Act (NAGPRA) has to be pointed out as it grants comprehensive rights to indigenous groups and communities in the area of cultural heritage, its protection and preservation. Comprising both basic forms of intangible cultural heritage immovables as well as movables the NAGPRA 'grants autonomy to recognized Native American and Native Hawaiian groups in the use and disposition of stipulated cultural material on their lands or otherwise within their authority.'[684] In contrast to many other, especially European, countries indigenous groups and communities are actively involved in the national cultural heritage regime based on the ideas of repatriation, mediation, community ownership, balancing of community and state interests and special jurisdiction. With regard to the latter one, the Review Committee established under the NAGPRA should be mentioned.

[681] See Danish report, p. 3 referring to the Law of Jutland [*Jyske Lov*] of 1241.
[682] For details on the Danish position towards the protection of intangible cultural heritage see *infra* II.3.2.3.
[683] See Article 2 (2) (a) 2003 Convention and *supra* I.7.2.
[684] United States report, p. 4.

When it comes to issues related to the interests of indigenous groups and communities this institution functions as an alternative jurisdictional authority in addition to the general Federal Court jurisdiction. Composed of seven members, it 'meets twice a year to mediate disputes and to make policy recommendations to the Secretary of the Interior'[685] being 'far more active and effective in resolving disputes than the federal courts.'[686]

Canadian law does not generally define the terms cultural heritage or cultural property and, so Patterson 'does not generally recognize cultural heritage as a separate legal category'[687] 'except for the purposes of specific statutes (note: dealing only with limited questions of cultural heritage protection) and the implementation of international agreements into domestic law'[688]. Canadian law does however strengthen the position of indigenous groups – also referred to as aboriginals, Native people or First Nations[689] – in the field of cultural heritage rights. Section 35 (1) of the Canadian Constitution Act 1982[690], stipulates that 'the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed', while Section 35 (2) of the Canadian Constitution Act 1982 clarifies that the term aboriginal peoples of Canada includes Indian, Inuit and Métis groups. Although no federal sub-constitutional law relating to indigenous group (immovable) cultural heritage rights has been enacted so far, this constitutional provision plays an important role as a balancing mechanism with regard to provincial law in Canada, trying to protect the interests of indigenous groups. What started in the area of immovable cultural heritage rights on a provincial basis, extended to touch indigenous group rights in relation to movable cultural heritage also on a federal basis. The – so far only – federal law addressing this issue is the Indian Act (hereafter the 'IA') of 1876[691]. Section 91 IA reads:

(1) Certain property on reserve may not be acquired – No person may, without the written consent of the Minister, acquire title to any of the following property situated on a reserve, namely,

an Indian grave house;

---

[685] United States report, p. 10.
[686] United States report, p. 10.
[687] Canadian report, p. 2.
[688] Canadian repot, p. 1.
[689] See e.g. Canadian report, p. 2.
[690] The text of the Canadian Constitution Act is available online at e.g. http://laws.justice.gc.ca/en/const/index.html (last visited on December 31, 2008).
[691] As Patterson notes the term *Indians* is 'a now dated term for *Aboriginal* or *First Nations people*' – see Canadian report, p. 6.

a carved grave pole;

a totem pole;

a carved house post; or

a rock embellished with paintings or carvings.

(2) Saving – Subsection (1) does not apply to chattels referred to therein that are manufactured for sale by Indians.

(3) Removal, destruction, etc. – No person shall remove, take away, mutilate, disfigure, deface or destroy any chattel referred to in subsection (1) without the written consent of the Minister.

On a provincial basis, the Alberta First Nations Sacred Ceremonial Objects Repatriation Act of 2000 should be mentioned. This is – so far – the only provincial law dealing with the question of repatriation of movable cultural property to indigenous groups, making it 'the only one of its kind in Canada and the only Canadian law resembling the [United States] Native American Graves Protection and Repatriation Act.'[692] Despite the lack of a comprehensive centralized legislation in this field, indigenous groups' cultural heritage rights are nevertheless respected: Canadian museums often respond positively to requests for the return of cultural objects to indigenous communities.

New Zealand is another example for the involvement of indigenous group rights and their cultural interests in national legislation. Myburgh with reference to Quince, Ruru and Stephenson explains that wāhi tapu[693] and wāhi tapu areas are expressly recognized and protected under the Historic Places Act 1993, and the kaitiakitanga (the ethic of stewardship) of Māori hapu or iwi (note: defined by Myburgh as 'Māori subtribes and tribes'[694]) of such places or areas is recognised under the Resource Management Act 1991.[695] With regard to the question of ownership of Māori land, it should be stressed that it 'is owned communally by hapu and iwi in any event, so all cultural heritage sites are owned communally by definition'[696]. Also movable tangible cultural heritage can be owned by such groups, which –

[692] Canadian report, p. 8.
[693] For a definition see *supra* II.1.1.2.2.
[694] New Zealand report, p. 2.
[695] See New Zealand report, p. 4 with reference to K. Quince, *When Uncle Ron and the Monster Took On The Crown*, Working draft of paper presented to the Federalism and Indigenous Peoples Conference at the University of Hawaii Law School, 7 January 2007 (forthcoming 2008) and J. Ruru and J. Stephenson, 'Wāhi Tapu and the Law' [2004] *New Zealand Law Journal* 57.
[696] New Zealand report, p. 12.

with regard to found Māori artifacts – finds its reflection in the fact that 'found Māori artefacts are prima facie owned by the Crown until ownership is determined, in which case the artefact passes into the communal ownership (or more correctly kaitiakitanga[697]) of the relevant hapu or iwi'[698]. In addition, materialized Māori intangible cultural heritage is of legal significance as well, as it forms one part of the extensive Māori taonga (to be understood as 'treasure') joining tangible cultural heritage as the second pillar. Over the last decades Māori intangible cultural heritage has been the subject of various court cases, with the result of strengthening the position of indigenous groups in this respect.[699] As already explained[700] the strong position of Māori in the field of cultural heritage protection and preservation is also expressed on a constitutional basis as Article II Treaty of Waitangi aims at safeguarding 'the unqualified exercise of their chieftainship over their lands, villages and all their treasures'.

Taiwanese cultural heritage law is comparatively modern in its underlying principles. Firstly, deriving from Japanese cultural heritage models, the cultural heritage concept in Taiwan is based on integrative ideas, protecting various forms of culture be it tangible or intangible and thus taking a holistic view. Secondly, the Taiwanese position with respect to cultural heritage rights of indigenous people recently changed to strengthen their role. Based on a constitutional amendment in 2005 which stressed the importance of cultural pluralism and the safeguarding of the participation of ethnic people[701], Taiwan enacted the new Protection Act of Traditional Intellectual Creation of Indigenous People (PATIC) in 2007. Pursuant to the PATIC and in difference to the older, but nevertheless still parallel applicable Cultural Heritage Preservation Act (TCHPA) not only individuals, but also indigenous groups and communities can be hold rights to intangible cultural heritage, empowering tribes to have their traditional intellectual creation registered and protected.[702]

Tunisia is another example of a country which tries to protect cultural heritage expressed materially and/or immaterially. The legal framework in

[697] Myburgh explains that 'Kaitiakitanga is defined in s. 2 of the Resource Management Act 1991 as: 'the exercise of guardianship by the tangata whenua [people of the land] of an area in accordance with tikanga Māori [Māori custom] in relation to natural and physical resources; and includes the ethic of stewardship'.' – see New Zealand report, note 17.

[698] New Zealand report, p. 14.

[699] See *infra* II.3.2.4.and New Zealand report, p. 19 et seq.

[700] See *supra* II.1.1.1.

[701] See *supra* II.1.1.1. for details.

[702] See *infra* II.3.2.1.; the relationship of the PATIC and the TCHPA is still not clear – see Taiwanese report, p. 2.

Tunisia with regard to cultural heritage protected was just created in the late 1980s based on a mere tangible cultural heritage concept, but was soon adapted in the mid-1990s, complemented by specific regulations on the protection of intangible cultural heritage leading to a comprehensive safeguarding system for various forms of cultural heritage. Although Tunisia seems to have an all-embracing legislative foundation, the cultural heritage debate has been relatively modest, as – according to Ben Jemia – there has not been a single lawsuit with respect to cultural heritage in Tunisia so far. Also the position of communities is not yet clear, as e.g. the role of indigenous people with respect to intangible cultural heritage is to turn it (note: intangible cultural heritage) 'into practical use' without further definitions by legal statutes.[703]

Contrary to the Taiwanese and Tunisian legal frameworks the protection of cultural heritage has a long legal history in Japan. The latest comprehensive Japanese law, the Japanese Law for the Protection of Cultural Properties (LPCP) was enacted in 1950 and includes several provisions deriving from older laws on the protection and preservation of cultural heritage. The Japanese legal system is also based on an extensive cultural heritage concept integrating tangible and intangible forms in its legislative regime. It also plays an important role on an international level, for having influenced foreign national legislations, as the Taiwanese system shows. Like in the two before-mentioned systems, the Taiwanese and the Tunisian, group ("ownership") rights are, however, limited to forms of intangible cultural heritage, defining those groups and communities as holders of intangible cultural heritage.[704]

The position of most European countries in relation to granting cultural heritage rights to communities and groups is more reserved. Although national cultural heritage concepts are often based on the idea of ancestry and passing on culture from generation to generation, it is usually not a defined group or community which possesses (ownership) rights. Also the position towards regulating the protection of intangible cultural heritage by statutes containing special regulations of law is not a welcoming one in many parts of Europe.

Croatia might be the most progressive European country having contributed to this study in relation to an integrative cultural heritage concept. The rather new core legal statute aimed at the protection and preservation of cultural

[703] See Tunisian report, p. 5.
[704] See also *infra* II.4.

heritage dates from 1999 and embraces tangible as well as intangible forms of cultural heritage. Also the fact that Croatia is very active in the field of international cultural heritage protection, having signed all major treaties in this area[705] indicates that Croatia is proud of its national cultural heritage which dates back to the 7th century[706] and is willing to protect it nationally as well as on an international level. Although community rights are again very limited, some influences can be found in relation to intangible cultural heritage, as, according to Gliha and Josipovic, 'the respective community is also involved in the proceedings to establish the cultural heritage status since it has to give its approval and is involved in all the stages of drafting a proposal – from identification, definition, documentation to its submission.'

Germany is a good example of a country which generally neither grants extensive cultural heritage rights to communities and groups nor protects mere intangible cultural heritage by the means of special cultural heritage laws. Siehr explains the reluctance towards community rights with the fact that 'There are hardly any ethnic, tribal or minority groups in Germany to which cultural objects are assigned as "their" cultural assets.'[707] The only major, though regional legislation which has a link to the preservation of a community's intangible culture is to be found in the states of Brandenburg and Saxony with legal statues aimed at 'guaranteeing the "national identity" of the Sorbs'[708] including their language, traditions and costumes. Nevertheless, the position of communities and groups is quite weak with practically no influence in the field of tangible cultural heritage, its protection and preservation. In general, the German legal framework focuses on tangible forms of cultural heritage and protects intangible cultural heritage not in a special way, but only by intellectual property laws, if the expressions fulfill the necessary criteria determined by those rules.

The Czech Republic takes a similar approach as Germany. In its concept of cultural heritage protection, neither groups/communities nor intangible forms of cultural heritage play a decisive factor. The Czech Republic has neither ratified the 2003 Convention nor the 2005 Convention and generally speaking, according to Šturma, 'does not know the concept of intangible cultural heritage'.[709] It also does not grant any cultural heritage rights to communities or groups, unless a group is classified as a legal entity – a basic

[705] See *infra* table.
[706] See Croatian report, p. 18.
[707] German report, p. 8.
[708] German report, p. 8 with further details.
[709] Czech report, p. 10.

rule which is applicable at least with regard to tangible cultural heritage throughout most European countries. In addition, the idea of cultural heritage and its protection finds only limited reflectance in the national constitutional system, as the pertinent provision, Article 7 of the Czech Constitution protects only natural resources and natural heritage and also Articles 11 and 34 of the Czech Charter of Fundamental Rights and Freedoms, which is of constitutional character, only indirectly address the protection and preservation of cultural heritage as on the one hand it is stipulated that the right to property can be subject to certain exceptions and limitations and on the other hand everyone should have 'the right of access to cultural heritage under (note: the) conditions set up by law'.[710] The position of private owner of cultural properties is also quite strong as the Czech legal framework seeks a balance of individual interests and the protection of cultural heritage, making a designation of cultural property only possible if the rights and interests of the individual are sufficiently respected.[711]

Like its Czech counterpart and as already outlined above[712] the French constitution does not directly refer to the protection of cultural heritage. Also community and group cultural heritage rights cannot be found in the French legislation. Extensive regulations on the protection of intangible cultural heritage are also absent. Especially the latter might come as a surprise, as France is among those countries which have ratified the 2003 Convention. Under the current framework of special regulations of law for the protection of cultural heritage, intangible cultural heritage per se is not reflected. It can, however, be of interest if it is materialized in a tangible form, leading to an indirect protection.[713] The concept of tangible cultural heritage protection is, according to Cornu, 'flexible and synthetic'[714], as pursuant to Article L.1. of the Cultural Heritage Code a cultural object, in order to be protected under that law, 'must represent public interest from the point of view of art, history, archaeology, science or technology'[715], with a shift from protecting 'remarkable movables and immovables'[716] towards encompassing 'new forms of heritage, for example ethnological heritage'[717].

[710] Czech report, p. 2.
[711] See Czech report, p. 7.
[712] See *supra* II.1.1.1.
[713] See French report, p. 13.
[714] French report, p. 14.
[715] French report, p. 14.
[716] French report, p. 14.
[717] French report, p. 14.

The Dutch legal framework for the protection and preservation of cultural heritage is one of the youngest European systems. The first ever national legal statute dates to the 1960s and only focused on immovable tangibles cultural heritage. The protection of movable tangible cultural heritage was not regulated before 1984 by the Dutch Cultural Heritage Preservation Act (CHPA). Pure intangible cultural heritage is still not subject to a legislative regime, neither on a national nor on an international basis, as the Netherlands has neither signed the 2003 nor the 2005 Convention. Lubina stresses that the Dutch concept of cultural heritage is based on the principle of property rights[718], which leads to the result that – e.g. in contrast to the Italian understanding – 'tangible cultural heritage is primarily considered someone's property and only considered cultural heritage secondarily.'[719] The importance of property rights is also expressed by the fact that communities or groups can only play an active role in the protection of cultural heritage, if they are classified as legal entities. The idea of being a holder of cultural rights is not transferred into national law.

The constitutional expression of the Swiss concept of cultural heritage can be found in its constitutional Preamble reading: 'Swiss people and cantons are conscious of their common achievements and determined to live their diversity in unity.'[720] Beside various federal and cantonal legal statutes on the protection of tangible cultural heritage, one can find also special regulations on the protection of intangible cultural heritage including respective rights of groups and communities who are considered to be 'one of the main holders of intangible cultural heritage.'[721] On a cantonal basis one can often find state support for groups and communities for the protection, preservation and promotion of local intangible cultural heritage.[722] It should however be stressed that the important role of communities and groups is limited to intangible forms of cultural heritage.

Cultural heritage protection in Spain is based on the concept of representing history rather than being an expression of culture, as reflected by the first core legal statute, the federal Law on the Historical Heritage of Spain (LHHS).[723] With respect to community or group rights and intangible cultural heritage, both originally played a minor role. Just recently and only on the level of regional legislation by the Autonomous Communities the

[718] See Dutch report, p. 12.
[719] Dutch report, p. 12.
[720] Swiss report, p. 2.
[721] Swiss report, p. 21.
[722] For details see *infra* II.3.2.2.
[723] See Spanish report, p. 10.

concept of cultural heritage and its protection has been gradually expanded, in some areas of Spain also including intangible cultural heritage[724] and the emphasis on the 'fundamental role'[725] of communities and groups with regard to its protection.

TANGIBLE CULTURAL HERITAGE

2.1. Immovable Tangible Cultural Heritage

2.1.1. General Issues

With currently 186 States Parties (as of December 31, 2008)[726] the 1972 Convention is the most highly accepted and comprehensive among the international tools outlined in Part I of this report dealing with the protection of cultural heritage. While the 1954 Convention and the 2001 Convention also cover forms of movable cultural heritage, but both immovables and movables only to a certain extent – either in the context of armed conflicts or located underwater –, the 1972 Convention is solely applicable to immovable cultural heritage, but at the same time covers a large area neither distinguishing between states of armed conflicts and freedom nor practically affecting mainly coastal states, but also land-locked countries.

As pointed out above the application of the 1972 Convention has developed over the past decades, introducing new forms, such as the concept of cultural landscapes and combining the decisive two sets of criteria applicable to cultural and natural heritage into a single set supplemented by further factors: authenticity and integrity. Discussions on an international level were also led with regard to the concept of outstanding universal value and the balancing of represented objects on the World Heritage List. Also, while the 1972 Convention can primarily provide for financial assistance, it still depends on the collaboration of its States Parties in order to guarantee a well-functioning system for the practical protection of the World Heritage.

When it comes to the national frameworks of immovable cultural heritage protection, the just mentioned points are surely of interest, as one might detect differences among the national concepts in relation to e.g. the scopes

[724] See Spanish report, p. 18.
[725] Spanish report, p. 20.
[726] See *supra* I.4.1.

of application or decisive criteria for the designation of immovable cultural heritage. However, from a legal perspective national legal systems also show additional interesting features. This begins with the question of how national legislation deals with the subject of immovable cultural heritage protection, an issue which is closely linked to the question of distribution of legal competences. This also touches on issues related to the involvement of and respect for indigenous groups and communities and leads to the interesting question of how private property rights with regard to protected objects are possibly limited, be it already in the process of designating a potential immovable cultural heritage object, as a consequence of its designation or in terms of possible selling restrictions. The following subchapter will focus on the national answers to those questions and give a general idea of how several countries incorporate their respective perceptions in relation to immovable cultural heritage protection and preservation in national frameworks, striking balances between the above-mentioned, sometimes opposing interests.

2.1.2. General National Legal System With Regard To The Protection And Preservation Of Immovable Tangible Cultural Heritage

Croatia belongs to those countries which combine core regulations on the protection and preservation of immovable and movable tangible cultural heritage in one fundamental legal statute, the Cultural Heritage Act (CHA) of 1999 which replaced older national laws in this field[727] and also implemented the 1972 Convention. When it comes to the protection of immovable cultural heritage one has also to mention a set of special regulations of law, the Restoration of the Threatened Monument Entirety of Dubrovnik Act,[728] which provides for special protective measures for the City of Dubrovnik, an object on the World Heritage List which was also inscribed on the Endangered World Heritage List from 1991 to 1998[729]. The CHA is applicable in relation to a large number of various immovables on a federal level reaching from single buildings – sometimes including their surroundings – and sites containing buildings to whole villages, towns and also comprising archeological sites, zones, as well as gardens, parks and culturally significant technical facilities regarded as immovable[730]. The Ministry of Culture as the competent authority with regard to immovable

[727] For details see Croatian report, note 5.
[728] *Zakon o obnovi ugrožene spomeničke cjeline Dubrovnika*, OG 21/86, 26/93, 33/89, and 128/99.
[729] See *supra* I.4.3. and http://whc.unesco.org/en/news/147 (last visited on December 31, 2008).
[730] For a list of protected immovables see e.g. Croatian report, p. 5 or Article 7 CHA.

cultural heritage on a federal level determines and grants the status of cultural heritage to objects falling under one of those categories by the means of an assessment based on a materially rather undefined set of criteria. In order to be declared to be part of the nation's cultural heritage an object must be of 'artistic, historical, palaeontological, archaeological, anthropological or scientific importance'[731] or – in the case of archaeological sites and zones – must show 'man's presence in the area and have artistic, historical and anthropological value'[732]. This basic concept comprises some kind of ranking system with a special category of 'national importance'[733] applied to objects if a specially designed evaluation committee comes to the conclusion that an object is 'of highest national importance', which can lead to stricter preservation measures. All objects forming the immovable cultural heritage of Croatia on a federal basis are inscribed on the Register of the Cultural Heritage of the Republic of Croatia[734]. The set of criteria for the determination of whether or not a potential object can be granted the status of immovable cultural heritage is not more precisely defined, facilitating flexible decisions on a case-by-case basis. In addition to the before-mentioned federal immovable cultural heritage and if not categorized as such, it is also possible to have objects declared as unregistered local immovable cultural heritage, which is decided on a local level in cooperation with either the Conservation Department of the Ministry of Culture on whose territory the object is situated or the City Bureau for the Protection of Cultural and Natural Monuments of the City of Zagreb in case the location is Zagreb[735]. Croatian tangible cultural heritage in general can be either public or privately owned. In the latter case the owner does not have to give his consent to the minister's decision, but has the right to appeal against a decision on the designation of his object to form part of Croatia's cultural heritage. Once granted the status of immovable tangible cultural property the owner is not deprived of his ownership rights per se. However, classification leads to a couple of restrictions of his property rights. Beside national duties and rights with respect to the protection and preservation of immovable cultural heritage, especially comprising means of documenting and monitoring the status or condition of the respective object, it is primarily the owner who has to care for the protection of cultural property owned by him, providing him however with

[731] Article 2 (2) lit. 1 CHA.
[732] Article 2 (2) lit. 2 CHA.
[733] Article 13 (1) CHA.
[734] *Registar kulturnih dobara Republike Hrvatske*.
[735] Article 17 (3) CHA.

several financial and practical benefits, including tax exemptions or experts' help. He also is restricted in several ways directly linked to the issue of ownership, e.g. with regard to planned modifications of his property or cases of sale of his property, enabling the authorities to safeguard the national interest of protecting cultural heritage by issuing permits or exercising pre-emption and expropriation rights, the latter subject to compensation and only possible if it is in the national interest of Croatia, which is in detail defined by Article 41 (1) of the CHA, as well as carrying out protective measures at the owner's expense if he does not comply with his duties[736]. Under the Croatian legal framework the role of communities and groups with regard to the protection and preservation of immovable cultural heritage is limited, as they are not considered as potential owners due to the fact that they are usually not legal entities[737]. As they are neither 'owners [n]or [other] right-holders of the immovable, [they also] do not have [a] party status in the administrative proceedings for declaring the cultural heritage status'.[738] The role of e.g. non-governmental organizations is restricted to the possibility 'to report to the competent body any immovable which they suppose might belong to the cultural heritage.'[739]

The Czech Republic takes a similar approach to Croatia with regard to the protection and preservation of tangible cultural heritage, as its core law, the Law on the State Care of Cultural Heritage (LSCCH) of 1987 covers both immovable and movable tangible cultural heritage. Immovable cultural heritage, which comprises also archaeological sites[740] and which can be subdivided into the main categories of cultural monuments (being either of "normal" or national significance), reservations[741] and zones[742], is

[736] For details with regard to the owner's restrictions see Croatian report, p. 11 et seq.; Pursuant to Article 41 (1) CHA national interest is defined as cases of (1) danger of damage or destruction of the immovable cultural heritage, when its owner is not able to or interested in implementing all the necessary measures of protection and preservation, (2) if this is the only way to ensure archaeological research and excavation or the implementation of measures for the technical protection of the culturally significant immovable; or (3) if this is the only way to ensure public access to the immovable heritage. Gliha and Josipovic add that pursuant to Article 42 (2) CHA 'the Croatian Government may exceptionally pass a decision on the interest of the Republic of Croatia in the expropriation of a heritage immovable in some other case as well.'

[737] Under Croatian law only individuals or legal persons/entities can be owners of privately owned cultural property.

[738] Croatian report, p. 12.

[739] Croatian report, p. 12. and Art. 4 (3) CHA.

[740] See Czech report, p. 5.

[741] Šturma defines the term *reservation* as 'group(s) (collection) of immovable cultural objects or archeological sites' – see Czech report, p. 5.

[742] Šturma defines term *zone* as 'a territory or a part of habitation which include(s) a lesser share of cultural monuments, a historical environment or a part of landscape which present significant cultural values' – see Czech report, p. 5.

designated as such by the Ministry of Culture, which usually consults various regional authorities as well as private owners, whose consent however is not necessary for the final designation. The set of criteria used for the determination seems to be well defined as it consists of the following two groups: '(a) objects which show significant evidences of historical development, style of life and environment of the society from the early times to the present, being expressions of creativity and work in various branches of human activities because of their revolutionary, historical, artistic, scientific and technical values, or (b) objects which have a direct relation to important personalities and historical events. Groups (collections) of objects may be declared as cultural heritage even if some objects therein do not belong to cultural heritage.'[743] Like Croatia the Czech legal framework distinguishes between "normal" cultural immovables and national cultural immovables, the latter one being 'most important'[744] examples of the national cultural heritage and designated by the Czech Government, not the Ministry of Culture. The two-class categorization has various practical consequences, including a stricter protective regime for the national cultural heritage as well as the impossibility to remove objects belonging to that group from the national register, on which all immovable tangible cultural heritage protected under the LSCCH are enlisted. This national register, the Centralized List of Cultural Heritage of the Czech Republic, is maintained and regularly updated by a special national administrative body, the National Institute of Cultural Heritage [745]. Also under the Czech legal framework, the respective owner of the cultural object, be it public or privately owned, is the main addressee for carrying out protective and preserving measures at his or her own expense. Like in most countries, private owners do however get financial benefits in the form of tax remunerations/exemptions in return and are under certain circumstances entitled to public funding if the preservation costs are extraordinarily high. Private owners are also restricted when it comes to intended modifications or a sale of the object. In the first case the respective owner needs a permission of the competent authority; in the second case the public authority might exercise pre-emption rights[746]. Failures in fulfilling protective and preserving tasks can lead to the imposition of safeguarding means on the costs of the private owner and can eventually lead to compensated expropriation. The public authorities may also react in cases of imminent

[743] Czech report, p. 4.
[744] Czech report, p. 5.
[745] *Národní památkový ústav*.
[746] See Czech report, p. 6 for details on exercising the pre-emptive right.

danger and may order the necessary steps directly, if privately initiated protective attempts would be too late.

Although French law recently transferred some competences in the field of immovable tangible cultural heritage protection to local authorities, it nevertheless is characterized by a strong centralized system. One can basically distinguish between two different concepts of protection forming some kind of ranking system: the stronger protective regime in relation to classified monuments (monuments classés au titre des monuments historiques) and the more owner friendly regime of registered monuments (monuments inscrits au titre des monuments historiques), both regulated by the Cultural Heritage Code (CHC). Originating from the protection of monuments of mere historic value, the concepts were widened to also include other cultural aspects. The scope of application with regard to the first group, the group of classified monuments, is however still comparatively narrow, as pursuant to Article L. 621-1 of the CHC classified monuments are defined as 'immovables whose preservation is, regarding history or art, of public interest, … [to be] classified as historic monuments as a whole or in part by the administrative authority.'[747] The Minister of Culture as competent authority for the designation of respective objects can list an object showing one of the two alternative criteria – public interest with regard to history or art – in a national register for classified and registered monuments. The decision is made in consultation with the National Commission of Historic Monuments and either with the consent of the owner, be it a public or private one, or against his will, in the second case subject to compensation payments.[748] According to Cornu the set of criteria is very demanding leading to the fact that 'only the most significant and rare elements are protected,'[749] reflected by 'a reluctance in classifying the heritage of the twentieth century.'[750] The second group of protected immovable cultural heritage comprises registered monuments, a group which does not limit the owner's rights as much as the regime of classified monuments does. Article L. 621-25 of the CHC defines registered monuments as 'buildings or parts of buildings, public or private, which, without justifying an immediate classification as a historic monument, demonstrate a sufficient interest in art or history as to make their preservation desirable [which] may, at any time, be registered by decision of

[747] French report, p. 20.
[748] For details see French report, p. 21 and p. 30 et seq.
[749] French report, p. 20.
[750] French report, p. 20.

the administrative authority, as a historic monument.'[751] In contrast to classified monuments, the owner of a registered monument does only have to inform the Ministry of Culture of planned changes, such as modifications or renovations, of his property. No permission for such an undertaking is needed. The authority can only react by classifying an already registered monument if the set of criteria for the group of classified monuments is fulfilled. Also, no obligation of conservation is imposed on the private owner, a further easement in contrast to classified monuments in relation to which the respective owner is responsible for their preservation. With regard to the protection and conservation of privately owned immovable cultural heritage, the owner has the right to tax exemption as well as to further financial aid and assistance by public authorities. Also under French law, the authorities' position in the protective regime is quite strong, as the state is entitled to expropriate from the owner if it 'is necessary for a cause of public utility'[752], including historical or artistic interest. This for example might be the case if the owner does not want to or cannot fulfill his obligations to protect and preserve classified monuments. The State has also certain pre-emptive rights which are in detail described by special statutes.[753] In addition to classified and registered monuments, which are both protected by the core text in the field of immovable cultural heritage, the CHC, other – more or less typical – forms of cultural heritage are protected under supplementary legal statutes, covering culturally significant natural monuments/sites, landscapes, coastal sites/zones, parks, urban ensembles and surrounding zones, some of them being of rather new date and standing for a more decentralized system.[754]

Throughout the Canadian system with its competences in the field of immovable cultural heritage protection divided between sometimes overlapping provincial and federal legislation indigenous groups play an important role. Provincial legislation covers various buildings and sites being of cultural significance. For example, culturally significant sites to be registered as cultural heritage under the British Columbia Heritage Conservation Act have to be of importance for the province of 'British Columbia, a particular community or Aboriginal People.'[755] Designations of cultural heritage objects can usually also be done on a municipal level, as is the case for British Columbia under its Local Government Act. One of the

[751] French report, p. 22.
[752] French report, p. 29.
[753] See French report, p. 29.
[754] For details see French report, p. 24 et seq.
[755] See Canadian report, p. 3.

main consequences for the public or private owner is the necessity to ask for permission if he or she intends to conduct changes of the object or if excavations should be carried out. The federal legislation in response to the 1972 Convention is based on the Canada National Parks Act covering federal Crown land and national historic parks as well as on the Historic Sites and Monuments Act aiming at the designation and protection of nationally significant historic sites. Patterson points out that '[o]nce designated as an historic site, however, the place receives no other special protection… and its owner cannot be prosecuted for destroying it,'[756] revealing a lack of penal provisions, which however can be usually found on a provincial level. Another difference between federal and provincial legislation can be found in relation to archaeological cultural heritage which is only protected by provincial laws, as heavy opposition from aboriginal groups concerning ownership issues and jurisdiction over Aboriginal archaeological resources is said to be the main reason for this development.[757] Means of further strengthening the position of indigenous groups can be linked to the constitutional amendment of 1982, which – expressed in Section 35 (1) of the Canadian Constitution Act 1982 – affirmed the recognition of 'existing aboriginal and treaty rights'. This has led to various claims by aboriginal groups with respect to provincial legislation on immovable cultural heritage and might possibly contribute to a well-balanced system of protection and preservation in this field.

The United States is another country with an important legislative framework on the involvement of indigenous groups and communities. The pertinent law, the Native American Graves Protection and Repatriation Act (NAGPRA) strengthens the position of indigenous groups and communities, who can also be owners of immovable cultural heritage, by granting 'autonomy to recognized Native American and Native Hawaiian groups in the use and disposition of stipulated cultural material on their lands or otherwise within their authority.'[758] The rules of the NAGPRA are to some extent supplemented by the practically rather weak American Indian Religious Freedom Act of 1978 (hereafter the 'AIRFA') which aims at inter alia protecting sites sacred to indigenous groups and communities.[759] Generally, two of the most important national legal statutes are the National Historic Preservation Act (NHPA) and the Archaeological Resources Protection Act (ARPA). The first one introduces a well-known system

[756] Canadian report, p. 3.
[757] See Canadian report, p. 4.
[758] United States report, p. 4.
[759] For details on the AIRFA see United States Report, p. 4 et seq.

including features such a national list of immovable cultural heritage, the National Register of Historic Places and financial aid in the form of tax benefits in order to partly recompense the private owner of immovable cultural heritage. The ARPA on the other hand can be considered as a practical advancement of the 1906 Antiquities Act, the oldest national legal statute regulating cultural heritage in the United States. It deals with the issue of archaeological resources and archeological excavations and thus combines the regimes of immovables and movables. The ARPA also introduces a special set of criteria for determining whether or not an object falls within its scope of application as it defines the term archaeological resources as 'any material remains of past human life or activities which are of archaeological interest and are at least one-hundred years old.'[760]

The protection and preservation of immovable cultural heritage in Denmark is subject to a patchwork of legal statutes, which comprises national as well as local legislation. One of the pertinent main acts, the Act on Listed Buildings and Preservation of Buildings and Urban Environments[761] (LBA) was enforced in 1979 and recently amended in 2007. The material scope of its application is relatively narrow as it only covers the protection and preservation of 'buildings, building structures, parts of buildings and similar', as well as 'the immediate surroundings of buildings'[762] under the basic idea that the buildings are 'of special architectural, cultural heritage or environmental value'[763], including 'buildings which illustrate housing, working, and production conditions and other significant characteristics of social development'[764]. The decision whether or not an object falls under the application of the LBA is made by the Danish Heritage Agency based on a delegation order by the Minister of Culture. The owner of a respective object may comment on the intended declaration; the decision, however, does not need the owner's consent and is made by the Heritage Agency in consultation with the Historic Building Council based on a set of precise, but still flexible, criteria which takes into account the age of the respective object as well as its importance for the Danish community. It distinguishes between three major groups: (1) automatic listing of buildings erected before 1536[765]; (2) optional listing of buildings which are more than 50 years old and which are of special architectural, cultural heritage or environmental

[760] United States report, p. 3.
[761] *Lov om bygningsfredning og bevaring af bygninger og bymiljøer*.
[762] Sections 2 and 3 (2) LBA; see also Danish report, p. 9.
[763] Section 1 (1) LBA; see also Danish report, p. 9.
[764] Section 1 (1) LBA; see also Danish report, p. 9.
[765] Section 4 (1) LBA.

value[766]; and (3) optional listing of buildings irrespective of their age on grounds of their outstanding value or other special circumstances[767]. The criteria used in the second and third categories are not defined in detail, but open to a case-by-case decision process which may also take into account questions of authenticity and integrity known under the 1972 Convention regime. Classification under one of the three categories leads to an entry in a national register and causes various consequences for the owner, be it a public or private owner. The most drastic ones include the obligations to maintain the object in good condition and to ask for permissions in case he wants to modify or demolish the building. In exchange for the maintenance work, the owner has the right to tax exceptions. In order to guarantee the good maintenance the Heritage Agency might in extreme cases and subject to compensation payments expropriate the building from the owner. Danish legislation is however at the same time relatively owner-friendly, as, according to Tamm and Østrup, it does not include pre-emptive rights of the State if the owner wants to sell his property. In addition to the group of listed buildings which represent 'the best or most characteristic of their type and period'[768] being 'of national, or in some cases international, significance'[769] culturally interesting buildings might also just be declared as worth being preserved either on a municipal or – since 2001 – also on a national level. The category of preservation-worthy, not listed objects can also include cultural/urban environments of buildings which individually may not qualify for being listed, but 'as a whole possess … architectural quality.'[770] Both groups, listed and not listed, yet preservation-worthy cultural objects, are subject to a protection and preservation regime which is stricter with regard to the first group due to the fact that it includes 'the best or most characteristic of their type and period.'[771] Churches – if still in use – are exempted from the scope of the LBA and are regulated by a set of special regulations of law, the Act on Church Buildings which asks for a strong involvement of the Church, via its Board of the Diocese in issues of protection and preservation of immovable cultural (Church) heritage and which can be seen as traces of granting rights to communities. Except for this, communities do not possess rights with respect to immovable cultural heritage. The scattered legal framework is further enriched by the Danish

[766] Section 3 (1) LBA; Tamm and Østrup explain that until the amendment of 1997 'only buildings older than 100 years could be listed.' – see Danish report, note 34.
[767] Section 3 (1) LBA.
[768] Danish report, p. 7.
[769] Danish report, p. 7.
[770] Danish report, p. 14.
[771] Danish report, p. 7.

Museum Act (DaMuA). A part of Danish immovable (archaeological) cultural heritage is formed by walls of stone and earth being the 'witnesses of earlier time's use of land, propriety rights and administrative structures'[772] which may be protected as ancient monuments under the DaMuA and in this case be subject to a protective regime including permissions for changes. Immovable archaeological items in general are protected and preserved by the DaMuA and supplemented by the Act on Protection of the Natural Environment, covering also the surroundings of archaeologically significant objects. Protected monuments and archaeological sites under the DaMuA are registered in the Register of Archaeological Heritage maintained by the Heritage Agency. The DaMuA covers various kinds of archaeological heritage including 'traces of human activity, which has been left in older times, i.e., structures, constructions, groups of buildings, developed sites, moveable objects, monuments as well as their context.'[773] Tamm and Østrup with reference to Christiansen and Koester stress that 'it follows from tradition and practice that a site or monument must be at least 100 years old to be protected.'[774] The main rationale of the protection is 'to ensure that significant cultural heritage is safeguarded for posterity.'[775] Finally, the Spatial Planning Act accomplishes the legal framework of immovable cultural heritage protection in Denmark, as it shows the importance of cultural heritage in relation to construction works, ranging from road planning to the creation of houses and other buildings. 'Valuable buildings, urban environments and landscapes'[776] must be taken into account when such a construction is planned, in order not to interfere with the protective and preserving tasks in relation to cultural heritage.

The core of the modern Italian legislative framework for the protection of immovable cultural heritage, which dates back to 1861,[777] is the Italian Code of Cultural Properties and Landscape (CCPL) which takes a similar integrative approach to the 1972 Convention. With regard to immovable cultural objects the CCPL does not only cover mere cultural objects, but also landscape-related properties of cultural significance, something which,

[772] Danish report, p. 15.

[773] Section 27 DMA; for further groups see Danish report, p. 30 et seq.

[774] Danish report, p. 30 with reference to O. Christiansen and V. Koester, 'Beskyttelse af kulturmiljøet' [Safeguarding of the Cultural Environment], in E.M. Basse, ed., *Miljøretten. Bind 2 – Arealanvendelse, natur- og kulturbeskyttelse* [Environmental Law. *Volume 2* – Land Use and the Safeguarding of Nature and Culture], 2nd edn. (Copenhagen, Jurist- og Økonomforbundet 2006), pp. 463 et seq., at p.518.

[775] Danish report, p. 29.

[776] Sections 1 (2) and 1 (4) Danish Spatial Planning Act.

[777] See Italian report, note 6.

according to Lenzerini, resembles to some extent the cultural landscapes under the 1972 Convention. Although immovable cultural heritage can be basically also owned by private parties, some categories ('public goods'[778]) including inter alia 'immovables and areas of archaeological interest'[779] or 'immovables declared as national monuments'[780] are only subject to state ownership, making it part of the cultural domain and making them res extra commercium.[781] While those public goods are considered as immovable cultural heritage ex lege privately owned objects need to be designated by the Ministry for Cultural Goods and Cultural Activities on the initiative of the local Soprintendente ('Superintendent'). Authenticity and integrity as known from the 1972 Convention may – and usually do – play an important role in the designation process, but are not absolutely necessary factors.[782] In case a private property is classified as immovable cultural heritage, the owner's rights are drastically cut and the owner's role changes to the role of a 'custodian,'[783] being responsible for the protection of his property – supported by a well-structured system of 'cultural sponsorship'[784], with further common limitations including authorization of changes, pre-emptive rights of the state as well as the state's power to expropriate the property from the owner if this is 'the only reliable measure for ensuring proper safeguarding and public fruition of the relevant heritage'.[785] Like in Denmark, the Church has a special status with regard to its cultural property. Its special rights are directly regulated within the framework of the CCPL which asks for conciliation agreements with respect to religious cultural heritage.[786] The term immovable itself is not defined by the CCPL, but the general definition used in the Italian Civil Code is applied.[787] The set of criteria used for the determination of an object's cultural character is comparatively extensive, ensuring that a large number of possible objects can find protection under the CCPL.[788] Italian law does not only distinguish between public goods and privately owned immovable cultural heritage and declare the first category to be 'res extra commercium', but it also

[778] Italian report, p. 5.
[779] Italian report, p. 6.
[780] Italian report, p. 6.
[781] For details see Italian report, p. 5 et seq. or Article 54 CCPL.
[782] See Italian report, p. 8.
[783] Italian report, p. 8.
[784] Italian report, p. 13.
[785] Italian report, p. 8 with reference to Assini and Cordini, op. cit. n. 672, at p. 125 et seq.
[786] For details see Italian report, p. 9.
[787] According to Article 812 Italian Civil Code 'the soil, springs, watercourses, trees, edifices and other buildings, even if linked to the soil on a transitory basis, as well as any other thing which – naturally or artificially – is anchored to the soil are immovable goods' – see Italian report, p. 13.
[788] For a listing of the criteria see Article 10 CCPL or Italian report, p. 13 et seq.

expressively further declares the objects enlisted on the World Heritage List are in a special category of privileged protection.[789]

Due to its complicated distribution of competences the protection and preservation of immovable cultural heritage in Germany is regulated by decentralized legal statutes in the German states. In contrast to the other countries which have taken part in this study there is no federal authority with competences in relation to national immovable cultural heritage protection.[790] Although the German states regulate this matter independently, one can see certain trends. Generally speaking one can distinguish between three big groups of immovables: (1) buildings, (2) (archaeological) sites, and (3) landscapes (including cultural landscapes, but also including traces of natural heritage, thus taking an integrative approach as known from the 1972 Convention). The set of criteria used for the designation of prospective sites differs from state to state. Principles of uniqueness or authenticity are however to be found in several state statutes.[791] With the exception of its patchwork of state legislation Germany's legal framework does not depart from the ordinary legal protection system used in many other countries. The respective objects can be privately owned and are subject to various types of permission in cases of changes, to a notification and pre-emption system in cases of intended sale or expropriation rights subject to compensation payments. The owner, who is responsible for the protection of the immovable cultural property owned by him, has also the right to tax exemptions. As it is the normal case in European countries, there are no collective group rights or rights of communities with respect to immovable cultural heritage. It is however worth mentioning that Germany has a strong system consisting of three public and regional non-governmental protective institutions, which is reflected e.g. in the German state of Schleswig-Holstein with 61 private bodies (as of December 31, 2008) engaging and assisting in the process of immovable cultural heritage protection[792]. Another interesting aspect, according to Siehr, is the fact that despite being a State Party to the 1972

[789] See Italian report, p. 13 and note 25 with reference to Article 1 Law 20 February 2006, No. 77 (*Legge 20 febbraio 2006, n. 77 - 'Misure speciali di tutela e fruizione dei siti italiani di interesse culturale, paesaggistico e ambientale, inseriti nella "lista del patrimonio mondiale", posti sotto la tutela dell'UNESCO*; Special Measures of Protection and Fruition of Italian Sites of Cultural, Landscape-Related and Environmental Interest, Inscribed on the "World Heritage List", Placed under UNESCO Protection)

[790] See German report, p. 8.

[791] Siehr refers to the state legislation of Sachsen-Anhalt to explain that e.g. the category of buildings is made up by buildings 'if they qualify as unique, of artistic or craftsmanship quality, as exemplary, original, or as to be integrally preserved' – see German report, p. 9.

[792] For details see German report, p. 7.

Convention, Germany has not (yet) implemented that convention comprehensively, leading to various problems, especially with regard to Germany's obligation to prevent German objects enlisted on the World Heritage List from threats to their protection[793].

Like in Germany the protection and preservation of immovable cultural heritage is basically a decentralized matter in Switzerland and falls under the legal competences of the Swiss cantons. In contrast to Germany, Switzerland also has a (limited) legal framework on a federal basis, built on the 1966 Federal Nature and Cultural Heritage Protection Act (NCHPA) and supplemented by the Swiss Zoning Act and the Swiss Federal Act on Expropriation.[794] The NCHPA, which was enacted six years before the 1972 Convention, shows a similarity to that convention as it includes both natural and cultural heritage, the latter one comprising monuments, heritage sites and archaeological sites. The NCHPA itself does not clearly define the term cultural heritage and does not provide for a general set of criteria applicable to the designation of immovable cultural heritage, which can be either publicly or privately owned. It also does only cover the protection and preservation of a limited amount of immovable cultural heritage, as it regulates only objects of national importance to be registered in a Federal Inventory, whereas regionally or locally significant immovable cultural heritage is subject to cantonal legislation which provides for the registration on a cantonal basis. Although the term national importance is not explicitly defined by the NCHPA, Belser, Rüegg and Molinari with reference to Keller explain that a basic definition can be found in the explanatory report to the Swiss Inventory for Landscape and Natural Monuments of National Importance. According to that report a prospective object has to be 'unique for Switzerland or typical for a part of the country.'[795] The owner of a designated object has to care for its preservation, but is assisted by the competent authority and has the right to subsidies, as Articles 13 et seq. of the NCHPA stress the supportive federal role in relation to the protection and preservation of Swiss heritage. Immovable cultural heritage is comprehensively protected on a cantonal level and cantonal laws stipulate various limitations on property rights. Cantonal laws as well as the Federal

[793] For details and the example of the Waldschlösschen-Brücke and the Elbe Valley in Dresden see German report, p. 7 and note 27.

[794] See Swiss report, p. 12 et seq.; *Bundesgesetz vom 22. Juni 1979 über die Raumplanung (Raumplanungsgesetz, RPG) (SR 700)* and *Bundesgesetz vom 20. Juni 1930 über die Enteignung (EntG) (SR 711)*.

[795] Swiss report, p. 13 with reference to Keller, et al., *Kommentar NHG* [Commentary on the Federal Act on Protection of Nature and Cultural Heritage], (Zurich, Schulthess 1997) at p. 194, para. 2.

Act on Expropriation include the possibility to expropriate property from private owners with full compensation in cases 'where the protection of immovable cultural heritage and the objectives of the respective act cannot be achieved by any other means.'[796] Private owners' property rights are however not as restricted as under many other national frameworks, as neither the NCHPA nor the majority of cantonal laws know pre-emptive rights with regard to immovable cultural heritage. Rights and obligations connected to a designated immovable cultural object pass on to the purchaser of the object. Swiss law also tries to protect immovable cultural heritage by the means of spatial restrictions, as within the framework of the Swiss Zoning Act special protective zones may be designated around a protected object. It provides for various measures such as building bans and restrictions and allows cantons to introduce further protective regulations.[797]

The Spanish regime of immovable cultural heritage protection is even more complex. Due to a complicated distribution of competences between federal and provincial legislation and supported by a decision of the Spanish Constitutional Court dating from 1991[798] the protection of immovable cultural heritage is regulated by not less than 18 major laws, 17 regional legal statutes and one state law, the Spanish Law on the Historical Heritage of Spain (LHHS).[799] Although regulating the issue independently on a local level, the Spanish provinces, according to de Salas, are heavily influenced by the LHHS and do no not include 'real innovations.'[800] With regard to immovables, a group which is subdivided by the LHHS into the five categories of (1) monuments, (2) historic gardens, (3) historic agglomerations, (4) historic sites and (5) archaeological zones,[801] the designation and registration in the General Register of Assets of Cultural Interest are usually carried out by a royal decree following recommendations of various advisory bodies[802] and only in some minor cases allocated by law ('ministerio legis'[803]). This system is however complicated by the fact that with the 1991 Spanish Constitutional Court decision[804] the designation competences for a large number of (especially privately owned) immovable cultural heritage were practically transferred to the provinces which each

[796] Swiss report, p. 18; see also Swiss report, p. 13 for the Federal Act on Expropriation.
[797] See Swiss report, p. 16 et seq.
[798] See Spanish report, p. 4.
[799] See Spanish report, p. 4.
[800] Spanish report, p. 4.
[801] Article 15 LHHS.
[802] See Spanish report, p. 9.
[803] Spanish report, p. 5.
[804] See *supra* note 798.

apply individual sets of criteria in regard to both the subcategory of the prospective object as well as the pertinent provincial law itself.[805] The LHHS as well as the provincial laws stipulate extensive obligations of the owner and limitations on his property rights once it is declared to be an immovable cultural object. The obligation to preserve the object (note: with the support of public financial aid) can also be found in the Spanish legal framework on a national and provincial basis as well as limitations by obligatory modification permits and pre-emptive rights of the state.[806] It should also be noted that the LHHS provides the competent administrative body with expropriation rights applicable in cases where the private owner does not fulfill his maintenance tasks if expropriation is necessary due to social interest.[807] Further expropriation options can be found in special regulations of the 1954 Law about Compulsory Expropriation (hereafter the 'SLCE').[808]

As mentioned before, Japan takes a integrative approach by combining the protection of various forms of cultural heritage, immovables and movables, tangibles and intangibles in a single legal statute, the Japanese Law for the Protection of Cultural Properties of 1950 (LPCP).[809] Immovable cultural heritage is regulated extensively in that law, comprising the major classifications later used in the 1972 Convention,[810] also – and already in 1950 – including the integrative group of cultural landscapes and giving rich examples for each of the groups.[811] Within the various groups one can basically find two special levels of value, important (with the further subcategory of national treasures) and registered[812] tangible cultural properties, granting prime protection to the first one. While pursuant to Article 37 of the LPCP the competent authority, the Commissioner of the Agency for Cultural Affairs, can for example issue a repair order addressed at the private owner of cultural objects belonging to the subgroup of national treasures, owners of other cultural objects are – at most – only potential addressees of mere recommendations. With regard to the 1972 Convention it should be stressed that in order to find its way to the tentative list and

[805] For the example of special provisions of law and their sets of criteria for the designation of immovable cultural heritage in the Spanish province Aragon see Spanish report, p. 8 et seq.
[806] See Spanish report, p. 13.
[807] See Article 36 (4) LHHS and Spanish report, p. 11.
[808] Articles 76 to 84 SLCE – see Spanish report, p. 11.
[809] See *supra* II.1.1.2.1.
[810] See *supra* I.4.2.
[811] See Article 2 LPCP and Japanese report, p. 4 et seq.
[812] See e.g. Chapter III of the English translation of the LPCP available online at http://www.wipo.int/tk/en//laws/pdf/japan_cultural.pdf (last visited on December 31, 2008).

subsequently to the World Heritage List, the respective object also needs to be designated as immovable cultural heritage on a national level.[813] Like in most other countries the Minster of Culture, who – in the case of Japan – is also responsible for matters related to education, sports, science and technology, is the competent authority for declaring that an object, be it public or privately owned, forms part of the national immovable cultural heritage. He is also assisted by a consultation body, the Council for Cultural Affairs, whose recommendations – though not binding – form the basis for the Minister's decision.[814] As a particularity of the Japanese designation process the owner's consent to a prospective designation is – though not mandatory by law – always obtained by the decision-making authority. The set of criteria used for the designation differs from category to category, is usually broad and includes several aspects of value related to e.g. history, art, technology or representation of characteristic importance.[815] The consequences of designation for the owner include several property rights restrictions, such as various preservation obligations as well as limitations due to the need to ask for permissions of intended modifications of privately-owned cultural property or pre-emptive rights regarding important cultural objects. The LPCP itself does not provide for protective zones around designated objects which could be compared to the buffer zones under the 1972 Convention. Such protective zones can nevertheless be found in the Japanese framework, regulated by various other laws.[816] It should also be noted that – although no extensive rights in relation to immovable cultural heritage are granted to communities or groups under Japanese law – protective rights and obligations can be granted to 'associations' [817] if the 'owner (note: of the respective object) is unknown' [818]

Like the Japanese framework the Taiwanese legal system chose an integrative approach, regulating various forms of cultural heritage in one major legal statute, the Cultural Heritage Preservation Act of 1982 (TCHPA). Three of seven groups of cultural heritage listed in Paragraph 3 of the TCHPA fall under the category of immovable cultural heritage: (1) historic sites, building and gathering habitations which were built for the human beings demand of daily life with historic and cultural value; (2) archaeological sites which contain historic objects, sites and places of the

[813] See Japanese report, p. 8.
[814] See Japanese report, p. 7.
[815] For details on the various sets of criteria see Japanese report, p. 8 et seq.
[816] See Japanese report, p. 11.
[817] Japanese report, p. 7.
[818] Japanese report, p. 7.

human beings former life with historic and cultural significance; and (3) cultural vistas with places and coherent environments of fairy tale, legend, event, historic happenings, gathering life or ceremony.[819] Designation of a prospective object, be it publicly or privately owned, falls under the competences of the Council for Cultural Affairs, which makes its decision – not necessarily with the consent of the object's owner – based on a comprehensive set of criteria set forth by Article 2 of the Rule for Designation of Cultural Heritage and Abolishment of Review, supplementary to the TCHPA and – though not binding – practically functioning as a guideline in the designation process. Unlike some European systems outlined above it does not stipulate a certain time limit, but encompasses various alternative aspects such as historic or artistic values, rarity, technology or significance.[820] In addition to this centralized process, local and municipal governments can also declare objects to be immovable cultural heritage, under condition of its local or municipal importance.[821] Once designated, immovable cultural heritage is registered and subject to extensive protection means outlined by Paragraph 20 of the TCHPA. The owner of the respective immovable cultural object, who is basically responsible for its protection and preservation, can get financial support and tax benefits. Costs for the protection and preservation can however also be imposed on him if he is not willing to care for the immovable cultural property owned by him. The owner is further restricted in his property rights as he cannot freely sell a designated object, but has to inform the competent authority in case of an intended sale providing for a pre-emptive right of the authority.[822]

The Mexican legal framework for the protection and preservation of immovable cultural heritage is based on its core law, the 1972 Federal Law on Archaeological, Historic and Artistic Monuments and Zones (LAHA), supplemented by the General National Ownership Act (MGNOA) providing for provisions on state owned objects, including cultural heritage objects. It should be pointed out that the LAHA only regulates the protection and preservation of national cultural heritage, with local forms of cultural heritage protected by decentralized legal statutes on a state level.[823] The LAHA distinguishes between three groups of cultural heritage, all of them including immovables as well as movables: (1) archaeological monuments

[819] For the complete list of protected objects see Taiwanese report, p. 1.
[820] For the complete set of criteria see Taiwanese report, p. 4.
[821] See Taiwanese report, p. 4.
[822] See Article 28 TCHPA.
[823] See e.g. Mexican report, p. 19 and p. 21mentioning *national (cultural) heritage*.

and zones, (2) historic monuments and zones, and (3) artistic monuments and zones, and provides for examples which also function as applicable criteria for the determination of cultural heritage[824]. The date of the establishment of Hispanic culture in Mexico is not only important for the differentiation between archaeological and historic monuments and zones with objects created before the establishment of the Hispanic culture in Mexico falling under the first category of archaeological monuments and zones and post-establishment objects belonging to the second category,[825] but also for the question of who might possibly be the owner of a respective immovable cultural object. Archaeological monuments and zones, according to Sánchez Cordero, 'are considered to be under national ownership and this situation can not be challenged in court,'[826] whereas e.g. historic monuments and zones are state owned if decided by the LAHA, but in other cases also subject to possible private ownership.[827] Depending on the classification of the respective immovable cultural object it is either recognized as being part of the Mexican cultural heritage ex lege, as it is the case with archaeological monuments or some certain historic monuments[828], or designated by the either the Mexican President, in cases of public, not ex lege recognized objects, or the Ministry of Public Education, in cases of private artistic or historic, not ex lege recognized objects. The competent authority is supported by one of its two assisting special institutions, the National Institute of Anthropology and History (hereafter the 'INAH'), which makes proposals for the declaration of archaeological zones and historic monuments or zones, and the National Institute of Fine Arts (hereafter the 'INBA'), which is responsible for artistic monuments and zones. Once designated as immovable cultural heritage or recognized ex lege by the LAHA, immovable cultural heritage objects are usually enlisted on (at least) one of three registers: the Public Federal Register under the regime of the MGNOA, the Public Register of Archeological and Historical Monuments and Zones or the Public Register of Artistic Monuments and Zones, both under the regime of the LAHA. Although the Mexican legislation imposes various restrictions and obligations on the owner of an immovable cultural

[824] The concepts of *authenticity* and *integrity* as known from the framework of the 1972 Convention (still) do not play a role in the national designation process – see Mexican report, p. 30.

[825] See also Mexican report, p. 44, where Sánchez Cordero indirectly stresses the importance of pre- and-post Columbian establishment periods for the classification of cultural heritage.

[826] Mexican report, p. 27.

[827] See Mexican report, p. 27.

[828] See Article 36 LAHA, pursuant to which historic monuments created after the 16th up to the 19th century are *ex lege* recognized as immovable cultural heritage if they are dedicated to religious, educational, military, civil or governmental activities.

object, especially with regard to the protection and preservation of an object such as the obligation to obtain a permit for modifications of the object, the LAHA provides for neither (direct) expropriation[829] nor pre-emptive rights.

No special features can be found in the Tunisian legal framework with relation to the protection and preservation of immovable cultural heritage except for the fact that some categories of immovable cultural heritage need a consensus of two different ministries for the designation. The categories of cultural sites – which also include archaeological sites – and traditional historic ensembles – also comprising whole towns and villages – are designated by the Ministry of Culture and Safeguarding of Heritage and the Ministry of Urbanization in a joint decision if the respective object is of either national or universal value, assessed by the alternative criteria of history, aesthetics, art and tradition.[830] The third category of immovable cultural heritage covered by the 1994 Code of Archaeological and Historical Heritage and Traditional Arts (CAHH), the group of historical monuments, is designated only by the Ministry of Culture and Safeguarding of Heritage based on the same set of criteria. Once designated the public or private owner of the object faces severe limitations, similar to those already mentioned in the context of other national frameworks: in addition to financially subsidized protective obligations he needs authorization for modifications of his immovable cultural property. Also the sale of such a property is restricted as the state may make use of its pre-emptive rights. Groups and communities are principally not granted direct property rights in relation to an immovable cultural object, but may 'contribute to its safeguarding'.[831]

In comparison to many of the national legal frameworks in the field of immovable cultural heritage protection discussed above the Dutch system shows a couple of differences with regard to the position of the owner of an immovable cultural object which can be explained by the underlying rationale of the cultural heritage concept in the Netherlands[832]. The minister of Education, Culture and Science as competent authority designates prospective immovable objects as forming part of the Dutch cultural heritage based on the regulations of the core law, the Dutch Monuments Act of 1988 (DuMoA). Protected immovables are subdivided into various groups: monuments, sites holding archaeological monuments and city and village

[829] See Mexican report, p. 27 et seq.
[830] See Tunisian report, p. 2.
[831] Tunisian report, p. 3.
[832] For details on this system see *supra* II.1.2.2 and Dutch report, p. 12.

views, each of them containing one level of value, not distinguishing between "important" and "very important", a concept which is used by many other countries. The second group, archaeological monuments, also comprises movables as long as they are 'in the ground'.[833] Unlike under the 1972 Convention the DuMoA does not know the concept of cultural landscapes, but takes a rather non-integrative approach. Lubina, however, – with reference to the Dutch National Service for Archaeology, Cultural Landscape and Built Heritage (RACM), an authority to which the competent Minister mandated various tasks in relation to the protection of immovable cultural heritage – points out that the 'protection of cultural landscapes is in development.'[834] Designated objects are enlisted on the Dutch Monumentsregister[835] and the owner's consent is as usual not necessary for the decision. He has however the right to appeal against the designation of his property. Each of the three categories of immovable cultural heritage is subject to a different set of criteria. The basic set of criteria with reference to the predominant group, the category of monuments, is outlined in Article 1 (b) sub 1 of the DuMoA: Monuments are 'objects that have been created at least fifty years ago and that are of public interest due to their beauty, their scientific/academic relevance or to their cultural-historical value'. In contrast to Denmark the Netherlands follows a strict age limit which is, however, half of its Danish pendant with 50 compared to 100 years. The vague qualitative factors are further defined on a case law level which has led to a large number of individual characteristics.[836] The designation process is to some extent influenced by the framework of the 1972 Convention, as the criterion of authenticity – in contrast to integrity – has gained importance on a case law level. Sites holding archaeological monuments as well as city and village views are subject to the application of different sets of criteria[837], but both have in common the fact that 'they are granted protection by virtue of containing at least one monument'.[838] While city and village views must contain at least one protected monument, sites holding archaeological monuments must potentially contain a respective monument, which has yet to be excavated. When it comes to the rights and obligations of private owners of immovable cultural property one can see various particularities. What the Dutch system has in common with the majority of other national systems is the fact that the owner basically needs permission for

[833] Dutch report, p. 11.
[834] Dutch report, p. 13.
[835] See Dutch report, p. 14.
[836] See Dutch report, p. 16.
[837] See Dutch report, p. 17 et seq.
[838] Dutch report, p. 17.

modifications of his privately owned immovable cultural property. The Dutch System does not, however, provide the state with any pre-emptive or expropriation rights nor does it stipulate a 'positive duty on the owner to maintain a designated monument.'[839] Those differences may be explained with the fact that ownership is declared by Article 5:1 of the Dutch Civil Code to be the 'most comprehensive right which a person can have in a thing', and that its limitations are subject to a strict system of balancing private and public interests and demonstrating high respect for private ownership. The strong position is further reflected in the fact that the owner is entitled to compensation payments if his application request for demolishing a declared monument owned by him is denied. If the owner is willing to maintain the status quo of a designated monument owned by him he has the right to financial support. With respect to group and community rights one can say that the Netherlands follows the trend to be found also throughout other European national systems not to grant extensive rights to communities and groups. Only groups which are legal entities have rights to some extent, as they may appeal against a designation decision if they either have a right in rem or due to a possible 'general and collective interests which they particularly represent in accordance with their objects and as evidenced by their actual activities.'[840]

New Zealand is another example of a country which in comparison with most of the above-discussed countries shows some special features in the field of immovable cultural heritage protection. The core main law, the Historic Places Act 1993 (hereafter the 'HPA') which is supplemented by the Resource Management Act 1991 regulating 'the use of land, air and water resources'[841] and including 'explicit protection for historic heritage'[842], divides immovable cultural heritage into the groups of archaeological sites, historic places (note: also covering single monuments), historic areas, wāhi tapu[843] and wāhi tapu areas. Whereas the first three categories are to be found in most other national systems as well, the last two categories were specifically created under New Zealand law to protect sites sacred to Māori. By doing this the New Zealand legal framework not only respects the rights of Māori as Māori land is 'owned communally by definition'[844], but it also chooses a very integrative approach as the

[839] Dutch report, p. 19.
[840] Dutch report, p. 25.
[841] New Zealand report, p. 5.
[842] New Zealand report, p. 5.
[843] For a definition see *supra* II.1.1.2.2.
[844] New Zealand report, p. 12.

intangible spiritual dimension plays a decisive role in the designation of Māori owned objects as protected immovable cultural property under the HPA.[845] New Zealand law knows different forms of protecting objects as immovable cultural heritage. It can be done automatically by the means of registration in the Rarangi Taonga, a register maintained by the Historic Places Trust, the competent authority in the area of immovable cultural heritage protection and preservation. It can also be done by the imposition of heritage orders or by heritage covenants negotiated by the Historic Places Trust and the owner of the respective object. In general the designation system and the following protective regime are quite diverse depending on the category under which a prospective object falls. With respect to archaeological sites an age limit is applied as additional requirement to criteria related to expressions of human activity or history, whereas the other categories are subject to a large number of alternative criteria also including various ranks and expressions of intangible factors.[846] Yet, according to Myburgh, including factors of authenticity and integrity do not play a decisive role in the designation process.[847] The owner of an immovable cultural property, be it a public, private or community-based owner, is basically responsible for the protection of the object. He gets financial and practical support by e.g. Lotteries Board funding and Historic Places Trust experts.[848] Depending on the classification of the object used modifications of the object can, but do not necessarily have to be, subject to the obtaining of permission.[849] New Zealand law also prescribes for the possibility of expropriation under the conditions of a set of special regulations of law, the Public Works Act 1981.[850] At the same time New Zealand law also protects the interests of private owners as immovable cultural heritage – if not prohibited by heritage orders or heritage covenants – may be freely sold. The new owner is, however, bound by the same restrictions and conditions as the former owner. It should also be noted that New Zealand adopted a ranking system dividing registered immovable cultural heritage into two categories. However, categorization does not cause any special obligations, but only leads to higher penal fines under the HPA.

[845] For details see *supra* II.1.2.2. or New Zealand report, p. 18.
[846] See New Zealand report, p. 7 et seq.
[847] See New Zealand report, p. 8.
[848] See New Zealand report, p. 11.
[849] For details see New Zealand report, p. 10.
[850] For details see New Zealand report, p. 8.

CONCLUSION

As of December 31, 2008 roughly 900 immovable properties, including approximately 700 cultural and 25 properties of mixed cultural and natural character are inscribed on the World Heritage List under the 1972 Convention.[851] The total number of immovable cultural heritage on a national basis (including regional and local forms) surely reaches many times that number. While the States Parties to the 1972 Convention are obliged to report on their respective implementation steps with regard to the 1972 Convention on a periodic basis,[852] it is also interesting to see how various countries regulate the protection of immovable cultural heritage located on their territory on a more comprehensive level, including not only objects on the World Heritage List, but also other forms of immovable cultural heritage. Parallels and reciprocal influences between national legislations and the 1972 Convention can be found.

As far as the practical implementation of the 1972 Convention is concerned, Francioni points out that the combined system of national and international legal tools must strike a balance as the 1972 Convention 'restates full respect for state sovereignty and for private property rights provided by national legislation over the sites and objects to be protected under the [1972] Convention. This is understandable, since the commitment to a system of cooperation to safeguard heritage of international significance does not detract from the fact that such heritage consists normally of immovable objects placed under the sovereignty of the territorial state and under the ownership title of a private or public person.'[853] Striking balances between various, sometimes opposing, interests and legal competences is however not only of importance for the protection of cultural heritage on an international basis, but also in cases without international points of contact, be it with regard to the relationship between centralized and local legislation, the relationship between the state and the private owner or the issue of involving groups and communities in the concept of cultural heritage

[851] For the exact numbers and the complete list see http://whc.unesco.org/en/list/ (last visited on December 31, 2008); for details on the 1972 Convention see *supra* I.4 or F. Francioni and F. Lenzerini, eds., *The 1972 World Heritage Convention – A Commentary* (Oxford, Oxford University Press 2008).

[852] See Article 29 1972 Convention and Paragraphs 199 to 210 WHC Operational Guidelines; the reports can be found online at http://whc.unesco.org/en/periodicreporting/ (last visited on December 31, 2008).

[853] Francioni 2008 'Preamble', loc. cit. n. 213, at p. 5.

protection. Conclusions of how national systems solve those issues, sometimes influenced by international tools, sometimes as result of an internal evolution, can be drawn from the outline given above as well as from the respective national reports.

Like under the 1972 Convention with its World Heritage List, immovable cultural objects are usually also inscribed on national, regional or local lists. Entries on the latter lists depend on the one hand on the distribution of competences in the field of immovable cultural heritage protection,[854] and on the other hand (also) on the importance of the respective object for the whole nation or just a part of it.[855] With the exception of a few countries, such as the Netherlands[856], those internal lists form the basis for the national selection of cultural objects to be put on the national tentative lists and to be recommended for inclusion on the Word Heritage List. Many countries with a strong position of the central state legislation, such as e.g. Croatia, France or the Czech Republic, distinguish between various, usually two, levels of protected immovable cultural objects, allowing for privileged, stricter protective means of the higher ranked objects. Within the groups of nationally listed objects some countries also explicitly focus on the protection of immovable cultural objects also inscribed on the World Heritage List. Italy, for example, based on Article 2 Law No. 77 of 20 February 2006[857] recognizes that any project which has the purpose of protecting and restoring the national properties inscribed on the World Heritage List will be considered as more important than any other similar project concerning other cultural or natural heritage and thus enjoy prime treatment.[858] This national regulation is an example of a national implementation step, as Article 4 of the 1972 Convention, which stipulates that a state has an obligation to provide for the safeguarding of protected objects, had not been comprehensively implemented before.[859]

[854] See e.g. the German system with its lists primarily on a decentralized state level due to the state competences in this area – *supra* II.2.1.2. and German report, p. 6.

[855] See e.g. the Swiss system which distinguishes between national importance and local/cantonal importance – *supra* II.2.1.2. and Swiss report, p. 15.

[856] See Dutch periodic report of 2005 on the implementation status of the 1972 Convention submitted to the World Heritage Center (summary), p. 1 – available online at http://whc.unesco.org/archive/periodicreporting/EUR/cycle01/section1/nl-summary-en.pdf (last visited on December 31, 2008).

[857] See *supra* note 789.

[858] F. Lenzerini, Law No. 77 of 20 February 2006 (GU No. 58 of 10 March 2006). Special measures for the protection and fruition of Italian sites of cultural, landscape-related and natural interest, inscribed in the World Heritage List, placed under UNESCO's protection', 16 *Italian Yearbook of International Law* (2006) p. 395 at p. 395.

[859] See Lenzerini 2006, loc. cit. n. 858, at p. 396.

The integrative approach of the 1972 Convention, which combines cultural and natural aspects in the concept of cultural landscapes representing the 'combined works of nature and man,'[860] has, since 1992, been followed by several countries. These include, for example, the recent amendment in 2005 of the Japanese Law for the Protection of Cultural Properties of 1950. The concepts introduced by the Swiss Federal Nature and Cultural Heritage Protection Act of 1966, such as natural sceneries (heimatliches Landschaftsbild) or heritage sites (heimatliche Ortsbilder) seem to be similar to this new concept.

Immovable cultural heritage can be usually subdivided into various categories. The three big groups of the 1972 Convention: monuments, groups of buildings and sites, are however the least common denominator and can be found in most countries. Prospective immovable cultural objects, which can principally, but not under every national legislation to the full extent,[861] also be privately owned, are usually subject to a designation process carried out by the responsible authority, be it a centralized or local one, with the assistance of one or more advisory bodies. The sets of criteria used by the respective authority differ from country to country, but include in principle as a minimum the factors of history and art[862] with other national sets of criteria being more progressive and including other factors as well, such as e.g. scientific value[863] or intangible and/or community related issues.[864]

As far as the designation itself is concerned, the private owner of an object has only limited rights, usually the right to appeal against the decision of the authority.[865] With the exception of Japan, which in practice requires the consent of the private owner, national designations can be done against the owner's will.

Striking a balance between the owner's interest and the interest of the state and/or the public is a delicate issue in all national systems. Some national concepts strongly favor the interests of latter while others try to leave the private owner's position as untouched as possible. The basic model to be found in the majority of the countries which took part in the underlying

[860] Paragraph 47 WHC Operational Guidelines and *supra* I.4.2.

[861] See e.g. Mexican report, p. 27, referring to archaeological monuments under the 1972 Federal Law on Archaeological, Historic and Artistic Monuments and Zones (LAHA).

[862] See e.g. French report, p. 20 with reference to Article L. 621-1 CHC ; see also *supra* II.2.1.2.

[863] See e.g. Article 2 (2) lit 1 CHA or Article 1 (b) sub 1 DMoA and *supra* II.2.1.2.

[864] See e.g. the New Zealand concept with its protection of wāhi tapu and wāhi tapu areas and the respect of Māori related issues – see e.g. *supra* II.2.1.2.

[865] See e.g. Danish report, p. 10 or Croatian report, p. 6.

study imposes far reaching restrictions on the owner's property rights, including the obligation to maintain the status quo of the owner's property and to ask for permission in case of planned modifications. The supervising state position is further usually guaranteed by pre-emption and expropriation rights. Both of these give the state the chance to ensure the protected status quo by acquiring an immovable cultural object, either due to national/regional interest or – with regard to expropriation rights – if it is the only way to guarantee its protection. While expropriation rights are common in most jurisdiction, some major cultural heritage jurisdictions, such as Switzerland, New Zealand or Denmark, oppose the idea of installing pre-emption rights and instead stipulate that the rights and obligations pass on to the new owner.[866] On the other hand, the Netherlands installed a much more owner-friendly system. Neither does it provide the state with pre-emption or expropriation rights nor does it mandate the private owner to actively protect the immovable cultural object owned by him.[867] It does however – and this can be found elsewhere in most other national legislations, too – financially support the private owner in case he carries out protective tasks. Financial support on a national basis can take various forms, usually as a right to tax exemption, but in various cases also in a more active way by state funding.[868]

Not only the rights of the immediate owner, but also the rights of (potential) owners in the neighborhood can be affected by the designation of an immovable cultural object due to possible building restriction. It should however be noted that buffer zones in terms of Paragraphs 103 and 104 of the WHC Operational Guidelines[869] are not a common concept within the framework of several national cultural heritage laws. In various countries, such as Japan, Denmark or Germany comparable effects are caused by construction laws. Although Article 45 of the CCPL 'does not constitute a measure of implementation [of the buffer zone]'[870], Lenzerini points out that its concept, 'prescriptions of indirect protection'[871], 'may be compared to the 'buffer zones' as known in the practice of the 1972 World Heritage,'[872] installing a flexible system, allowing for the imposition of building restrictions on a case-by-case basis.

[866] See *supra* II.2.1.2.
[867] See *supra* II.2.1.2.
[868] E.g. in the Czech Republic or in Canada – see *supra* II.2.1.2.
[869] For details see *supra* I.4.3.
[870] Italian report, p. 11.
[871] Italian report, p. 11 with reference to Article 45 CCPL.
[872] Italian report, p. 11.

Public awareness-raising according to Article 27 (1) of the 1972 Convention[873] can also take various forms. Japan is an example of a very active country, having launched various campaigns, including television documentary programs, publications of annual information by national UNESCO groups or the printing of various postage stamps.[874] Italy, again in its Law No. 77 of 20 February 2006, this time however in Article 4, implements the state duty by for example providing for governmental support for visiting trips of school classes to cultural properties and cultural activities in schools.[875]

When it comes to the question of group and/or community involvement in the field of immovable tangible heritage it must be noted that in most countries the position of (indigenous) groups and communities are very limited, as due to their lack of legal capacity in relation to property rights they are not actively involved, neither as holders of property rights nor as addressee of protective measures. Exceptions can be found e.g. in New Zealand, where two important groups of protected immovable heritage can also be community owned: wāhi tapu and wāhi tapu areas, thus leading to a community-integrative approach even in relation to tangible cultural heritage.[876] Also the United States provides for a comprehensive integration of indigenous groups and communities in the area of immovable cultural heritage protection, as the core law, the Native American Graves Protection and Repatriation Act grants extensive and exclusive rights to native groups, including communal property and administrative rights.[877]

MOVABLE TANGIBLE CULTURAL HERITAGE

2.2.1. General Issues

With the exception of underwater cultural heritage protected by the 2001 Convention and tangible cultural heritage protected by the 1954 Convention

[873] Article 27 (1) 1972 Convention: 'The States Parties to this Convention shall endeavour by all appropriate means, and in particular by educational and information programmes, to strengthen appreciation and respect by their peoples of the cultural and natural heritage defined in Article 1 and 2 of the Convention'.

[874] See Japanese periodic report of 2005 on the implementation status of the 1972 Convention submitted to the World Heritage Center (summary), p. 2 – available online at http://whc.unesco.org/archive/periodicreporting/APA/cycle01/section1/jp.pdf (last visited on December 31, 2008).

[875] See Lenzerini 2006, loc. cit. n. 858, at p. 396.

[876] See *supra* II.2.1.2. for details; for the relation to intangible cultural heritage see *infra* II.3.2.4.

[877] See *supra* II.2.1.2. and United States report, p. 4 et seq.

and its Second Protocol the international legal framework for the protection of movable tangible cultural heritage differs considerably from the international regime for immovable cultural heritage built upon the 1972 Convention. As far as movable tangible cultural heritage is concerned, one will look for an international list of World Heritage comparable the 1972 World Heritage List in vain. The main international interest in protecting movable forms is not put on the safeguarding of exceptional items of outstanding universal value, but rather on the fight against illicit import, export and transfer of ownership of cultural property as one 'of the main causes of the impoverishment of the cultural heritage of the countries of origin'[878] including questions related to its return,[879] supplemented by a framework for the 'restitution of stolen cultural objects.'[880] These issues, or at least some of their aspects are covered by various international legal tools outlined in Part I of this report: the First Protocol to the 1954 Convention[881], the 1970 Convention[882] and the 1995 UNIDROIT Convention[883].

National legislative frameworks for the protection of movable tangible cultural heritage do also address the just mentioned issues, sometimes in conformity and with rather close links to the international specifications, in other cases independently. It has to be noted that in this context the issue of private property rights plays an important role, as the national systems have to give their preferences to either strict protective regimes in accordance with the international agreements or to refraining from limiting private property rights too much. Different approaches taken by the countries outlined in the following subchapter will explain this interrelationship.

On the other hand, national legal concepts go beyond the international framework and in various cases also deal with other important questions, including the issues of general protection of movable tangible cultural heritage, rules also applicable to national cases of transfer of ownership without international points of contact, the law of finds or the role of groups and communities. The following will shortly reflect the national concepts.

[878] Article 2 (1) 1970 Convention.
[879] See Article 7 (b) (ii) 1970 Convention and Article 1 (b) 1995 UNIDORIT Convention.
[880] Article 1 (a) 1995 UNIDROIT Convention.
[881] For details see *supra* I.2.2.
[882] For details see *supra* I.3.
[883] For details see *supra* I.5.

2.2.2. General National Legal System With Regard To The Protection And Preservation Of Movable Tangible Cultural Heritage

The protection and preservation of movable tangible cultural heritage under Croatian law is basically regulated by one of the most comprehensive national legal statutes in the field of cultural heritage[884], the 1999 Croatian Cultural Heritage Act (CHA). Article 8 of the CHA defines the term movable tangible cultural heritage by giving various examples of respective objects ranging inter alia from museum collections to church objects, from archaeological finds to pieces of art.[885] The designation process of movable tangible cultural heritage leading to its registration in the Register of the Cultural Heritage of the Republic of Croatia[886] is the same as with regard to immovable cultural heritage and is also based on the same set of criteria.[887] A statute of special regulations of law dealing with one category of movable tangible cultural heritage is the Croatian Museum Act of 1998[888] regulating 'museum activities and keeping museum material.'[889] In this context it should also be noted that, according to Gliha and Josipovic, Croatian museums also apply the ICOM Code of Ethics.[890] Special norms are to be found in the Croatian Ownership Act with regard to treasure troves. Found treasure must be handed over to the Republic of Croatia which becomes the owner of such an object, but in return has to pay an award up to 10% of the market value to the finder as well as to the owner of the land where the object is found. The finder and the land owner can however – subject to a state option – become co-owners instead of the Croatian Republic. With regard to privately owned movable tangible cultural heritage restrictions go beyond the also applicable restrictions immovable cultural heritage and include the obligation to make the object available for exhibiting purposes or limitations of export. Basically, movable tangible cultural heritage cannot be exported. There are only exceptions for temporary exports in certain cases, such as exhibitions, but then again only with the prior approval of the state, [891] while permanent exports are basically prohibited. The purchase of stolen movable tangible cultural objects is – under the general regime of the Croatian Ownership Act applicable to movables – not possible, if the

[884] See *supra* II.1.1.2.1.
[885] For the complete list see either Article 8 CHA or Croatian report, p. 13 et seq.
[886] See Croatian report, p. 4.
[887] For details see *supra* II.2.1.2. or Croatian report, p. 14.
[888] *Zakon o muzejima*
[889] For details see Croatian report, p. 17.
[890] See Croatian report, note 57.
[891] For details see Articles 67 et seq. CHA and Croatian report, p. 15.

claimant can prove both that the object was stolen and that the purchaser was not bona fide, meaning that the purchaser knew or could have known that he/she was acquiring possession of a (stolen) movable from a person who was not its owner. The filing of claims is facilitated due to the fact that they are not subject to time limitations.[892] In addition to the direct applicability of the 1995 UNIDROIT Convention and the possibility to conclude further bi- or multilateral agreements, other legal regulations can be found which are aimed at the return of stolen or illegally imported/exported movable tangible cultural objects. These include Articles 70a et seq. of the CHA transforming the European Council Directive 93/7/EEC into national law, applicable in relation to other EU Member States or states belonging to the European Economic Area.[893]

Parallel regulations to the Croatian legal system on movable tangible cultural heritage can be found in the Czech Republic which also combines regulations on immovable and movable tangible cultural heritage in a single major law, the Law on the State Care of Cultural Heritage (LSCCH) of 1987. The designation process and listing of movable tangible cultural heritage in the Centralized List of Cultural Heritage of the Czech Republic is the same as in the case of immovable cultural heritage, also using the same set of criteria. Resemblance can also – to some extent – be found with regard to the law of finds of archaeological movable cultural heritage, whose regulations are however included in the LSCCH itself. The finder does not become owner, but has the right to an award up to 10% of the market value. In contrast to Croatia, the region in which the object was found, not the state, acquires automatic ownership. However, the Ministry of Culture may intervene and declare the object as being part of the national cultural heritage, transferring the ownership rights to the state.[894] In addition to the LSCCH, the Czech system complements its protection and preservation regime by various special regulations of law. For example, the Law on the Protection of Museum Collections stipulates further rules and introduces a list of museum collections, the Central List of Collections (Centrální evidence sbírek), maintained centrally by the Ministry of Culture.[895] Further restrictions of privately owned movable tangible cultural property can be found in the LSCCH, e.g. the obligation 'to lend it temporarily to a specialized organization for the purpose of research or exhibition'[896] or

[892] See Croatian report, p. 16 and Articles 118 et seq. COA.
[893] See Croatian report, p. 16.
[894] For details see Czech report, p. 9.
[895] See Czech report, p. 9.
[896] Czech report, p. 8.

limitations with regard to the – limited – export which requires the prior approval by the Ministry of Culture pursuant to Section 20 of the LSCCH.[897] For the export of objects on the list of museum collections (note: which is only possible on a temporary basis under the pertinent set of special regulations of law), the Law on the Protection of Museum Collections stipulates the requirement of an export license (note: again to be published by the Ministry of Culture) which is only granted if 'there are sufficient legal guarantees of its return to the Czech Republic'.[898] Like Croatia the Czech Republic as member of the EU implemented the European Council Directive 93/7/EEC by its Law on the Sale and Export of Objects of Cultural Value (hereafter the 'LSEOCV'), which also contains special rules applicable in relation to non-EU Member States. As the Czech Republic is not (yet) a Member State to the 1995 UNIDROIT Convention, the LSEOCV is of high importance in the field of restitution.

Like Croatia and the Czech Republic Italy combines both main forms of tangible cultural heritage, movables and immovables, in a single law, the Code of Cultural Properties and Landscape (CCPL). Being a Member State to most of the pertinent Conventions outlined in Part I of this report [899] the CCPL provides for a quite comprehensive and strict – but as we will see later, in relation to the 1970 Convention not perfect – protection and preservation regime also with regard to movable cultural heritage. The basic system of cultural heritage already touched upon in the context of immovable cultural heritage[900] with its division into public and privately owned heritage and the declaration system with regard to the latter one is also applicable to movable tangible cultural heritage. In addition to that one can find several special rules applicable to movables, including rules on matters of export, bona fide purchase and restitution. The strict approach taken by Italy, also comprising pre-emption and expropriation rights, reflects, according to Lenzerini, 'the will of preserving the integrity and cohesion of national heritage, as its loss is considered as a harmful impoverishment of the national identity.'[901] Definitive export of public movable cultural heritage or privately owned declared[902] movable cultural properties is absolutely forbidden pursuant to Article 65 of the CCPL. Other categories of movable tangible cultural heritage need authorization by the

[897] See also Czech report, p. 9.
[898] Czech report, p. 9.
[899] See *infra* table for details.
[900] See *supra* II.2.1.2. and Italian report, p. 5 et seq. and p. 14 et seq.
[901] Italian report, p. 14.
[902] For a definition see Italian report, p. 15.

competent authority, the export offices under the authority of the Ministry for Cultural Goods and Cultural Activities, in order to be exported from Italy. Pursuant to Article 66 of the CCPL authorization is also needed for the temporary export of objects listed under Article 65 of the CCPL. Various cases of absolute export prohibition are also stipulated.[903] The issue of restitution is closely linked to the question of bona fide purchase and under Italian law subject to a diverse system of legislation that is also comprised of international self-executing tools. As a basic principle and with regard to restitution the implementation of 1995 UNIDROIT Convention and the European Council Directive 93/7/EEC, the first one applicable to non-EU Member States or states not a member of the European Economic Area which are members of the 1995 UNIDROIT Convention, the latter one in relation to EU Member States and Member States of the European Economic Area irrespective of their membership to the 1995 UNIDROIT Convention, the position of the original owner of the illegally transferred movable cultural property is safeguarded. The respective provisions found in Article 87 of the CCPL and Articles 75 et seq. of the CCPL, however, give a bona fide purchaser the right to compensation if he can prove that he used 'the necessary diligence as required by the specific circumstances of the case'[904] at the time of purchase. While these two international instruments seem to be implemented sufficiently, the success of the implementation of the 1970 Convention can be questioned. Lenzerini explains that although the just recently inserted Article 64 bis of the CCPL, which states that 'control over international circulation of cultural property is to be exercised consistently with international obligations in force for Italy'[905] and Article 87 bis of the CCPL which states that 'the properties included within the scope of application of the 1970 UNESCO Convention are regulated pursuant to the provisions of such a Convention'[906] refer more or less directly to the 1970 Convention, the material contents of the 1970 Convention have not yet been implemented by national legislation. This makes application difficult 'as its [note: the 1970 Convention's] self-executing nature is certainly debatable.'[907]

Japan is another example of a country which basically takes an integrative approach as it combines the protection and preservation of both movable and immovable cultural heritage in a single law, the 1950 Law for the Protection

[903] See Italian report, p. 15.
[904] Italian report, p. 16.
[905] Italian report, p. 18.
[906] Italian report, p. 18.
[907] Italian report, p. 18, where further details can be found.

of Cultural Properties (LPCP). This law is, however, complemented by the Act on Controls on the Illicit Export and Import and Other Matters of Cultural Property (ACIEI) of 2002[908] in order to implement the 1970 Convention, which was ratified by Japan also in 2002. The designation process of movable cultural heritage, which can be divided into the two subcategories of important movable tangible cultural property and important movable tangible folk cultural property[909], follows the general rules already outlined in the context of immovable cultural heritage protection.[910] The regime of important movable tangible cultural heritage also grants the same pre-emptive rights to the state as the counterpart for immovables does.[911] When it comes to the question of exporting designated movable cultural objects, Japan also tries to control the export through a system of mandatory export permission requests. Permission is only granted in limited cases, mainly in cases of temporary museum exhibitions abroad. Found un-owned objects have to be reported to the police. This gives the competent authority the opportunity to designate the respective object as a cultural object and to grant ownership rights of designated cultural objects to the municipality or (alternatively) to leave it to the general regime of the law of finds under the Japanese Civil Code. The 1970 Convention was implemented on a national level by the ACIEI which provides for a detailed restitution system. An important feature of that law is that it extends the time limitation of claims against bona fide purchasers from the normal two years under the Japanese Civil Code to ten years. By doing this Japan struck a balance between the limitation system of the Japanese Civil Code and Article 7 (b) (ii) of the 1970 Convention which does not stipulate a time limit.[912] It should also be noted that the bona fide purchaser carries the burden of proof with regard to the question of whether he was acting in good faith at the time of the purchase.

Also Taiwan incorporates the protection and preservation of immovable and movable tangible cultural heritage in a major single statute, the Cultural Heritage Preservation Act of 1982 (TCHPA). The TCHPA distinguishes between three different protective levels 'in accordance with the value of rarity'[913]: national treasures, significant antiquities and general antiquities. This categorization is especially important in relation to various kinds of

[908] *文化財の不法な輸出入等の規制等に関する法律.*
[909] See Japanese report, p. 13.
[910] See *supra* II.2.1.2.
[911] Article 56-14 LPCP with reference to Article 46 LPCP.
[912] See *supra* I.3.3. for details.
[913] Taiwanese report, p. 6.

property restrictions of privately owned movable cultural heritage. The set of criteria applicable for the designation of a prospective object is set forth by a supplementary legal tool, the Rule for Designation of Cultural Heritage and Abolishment of Review, which also includes criteria applicable to immovables. Although the two sets are quite similar, the material form, movable or immovable, is taken into account.[914] The Taiwanese collaborative framework of various competent authorities[915] is responsible for various tasks in relation to maintenance work and also supports private owners of movable tangible cultural heritage, which can include all three before-mentioned categories. However, only with regard to the two higher groups of national treasures and significant antiquities can one find a detailed system of safeguarding the movable tangible cultural heritage. The TCHPA installs a comprehensive regime of ownership and export control applicable to those two groups. In addition to a notification obligation in the case of a planned transfer of ownership, the state also possesses a pre-emptive right in order to purchase the respective cultural object. Both groups are also subject to the need to obtain export permission, which is only granted if strict requirements are met.[916] Although the TCHPA includes special provisions on the transfer and export of cultural property per se, there are no special rules limiting bona fide purchase, which in fact strengthens the position of a good faith acquirer, as return claims of stolen objects are subject to a two-year-time limitation and are in several cases also complicated due to the original owner's obligation to compensate the bona fide purchaser.[917]

Unlike under e.g. the Croatian or Czech legal frameworks movable tangible cultural heritage in Denmark is not comprehensively protected by a single core legal statute. Instead, two legal statutes, the Danish Museum Act (DaMuA) and the Act on the Protection of Cultural Assets in Denmark (CAA) are applicable for certain limited aspects related to the protection and preservation of movable tangible cultural heritage. Pursuant to Section 1 of the CAA the scope of the CAA is the protection of 'Danish cultural heritage through preservation of cultural assets in Denmark.'[918] It does this by stipulating export permissions for the export of movable cultural property,

[914] The set for movables comprises the following six categories: (1) historic significance or presentation of tradition, groups and local cultural characteristics; (2) historic origin; (3) certain characteristics, technology and groups of epoch; (4) artistic or scientific success; (5) valuable and rare characteristics; or (6) historic, cultural, artistic or scientific value; see Taiwanese report, p. 6.

[915] For details see Taiwanese report, p. 6.

[916] See Taiwanese report, p. 7.

[917] For details see Taiwanese report, p. 7.

[918] Danish report, p. 19.

be it a temporary or permanent export, as defined in Section 2 of the CAA.[919] The two major factors for the decision of the competent authority, the Commission on Export of Cultural Assets (hereafter the 'CECA'), as to whether an object to be exported belongs to the Danish movable tangible cultural heritage are its age and its financial value, a concept which however is not exclusive as it is subject to certain exceptions.[920] The underlying principle is that both temporary and permanent exports – the latter one in e.g. in the case of transfer of ownership – is only possible with the approval of the CECA, which is given if the export does not impair the unique value[921] the object has for the Danish cultural heritage. In order to accomplish a safeguarding system, the CECA concluded agreements with several auction houses, which have to pass on information about planned auctions.[922] It should also be noted that pursuant to Section 11 (1) of the CAA a refusal to issue an export license leads to the state's obligation to purchase the object at market price.[923] While international sale and national sale with subsequent export are subject to the before-mentioned license restrictions, national sale (of privately owned objects) is basically not restricted in Denmark. Tamm and Østrup explain that (also on a national level), pursuant to Section 11 (2) of the DaMuA, state-owned or state-subsidized museums in general however 'may not part with moveable cultural property from the museum collections without approval from the Ministry of Culture.'[924] Another important aspect, the regime of return of illegally removed and illicitly exported or imported movable cultural heritage, is regulated by a scattered legal framework comprising the DaMuA and various special regulations of law, including the Act on Unlawfully Removed Cultural Objects as an implementation tool of the European Council Directive 93/7/EEC. The DaMuA was amended in 2001 in order to provide for an implementation of the 1970 Convention and the 1995 UNIDROIT Convention, of which only the first one has been ratified by Denmark so far – in 2003, two years after the preparatory amendment of the DaMuA. Especially the new Section 33 (1) of the DaMuA is of relevance, according to which 'no museum may acquire a cultural object if the object has been exported from another country contrary to the legislation of that country and the matter is subject to an international agreement which has

[919] See also Danish report, p. 21 for details on the European Council Regulation 3911/92/EEC applicable to the export of cultural goods to countries which are not members of the EU.
[920] For details on the set of criteria see Danish report, p. 19 et seq. or Section 2 CAA.
[921] See Danish report, p. 19.
[922] See Danish report, p. 20 et seq.
[923] For details see Danish report, p. 21.
[924] Danish report, p. 18.

been signed by the country in question and Denmark. Further, subsection (2) of this provision sets out that, if an acquisition has been made contrary to subsection (1), the object shall be returned in accordance with the international agreement in question.'[925] It should be stressed that this is only applicable in relation to state-owned and state-subsidized museums, whereas private museums are only bound by the ICOM Code of Ethics and only if they are members of the Danish National Committee of ICOM.[926] The DaMuA also regulates the area of treasure and fossil trove. In any case, treasures or fossils as defined under the DaMuA [927] fall under the state's ownership. Finders of such objects can only be granted a 'discretionary award'.[928]

As mentioned earlier[929], the German legal system in the field of cultural heritage protection and preservation consists of a patchwork of legal statutes, which is the case especially in the area of movable tangible cultural objects. On a federal basis one can find several important statutes, some of them explicitly implementing the regulations of international treaties and legal statutes: the 2007 Law on the Return of Cultural Goods (LRCG) implements the provisions of the 1970 Convention and the European Council Directive 93/7/EEC, the Act implementing the Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict the 1954 Convention. In addition, the 1955 Act on the Protection of German Cultural Property Against Expatriation[930] sets an important framework for the regulation of the export of 'German national treasures' to be enlisted by the German states in the Central Register of Nationally Valuable Cultural Property.[931] Complementing the federal rules the state laws on the protection of monuments also cover the regime of movable tangible cultural property using various definitions of that term and applying independent sets of criteria for the determination of movable tangible cultural property, which – as a general rule – can also be privately owned. Common criteria used for the determination comprise public importance in relation to history, art, science and ethnology.[932] The basic German concept is to protect movable tangible cultural heritage by limiting its export, more precisely the export of

[925] Danish report, p. 23; see also Danish report, p. 22 et seq. for details on the regulatory framework and its practical meaning.
[926] See Danish report, p. 28.
[927] Sections 30 et seq. DaMuA.
[928] Danish report, p. 31.
[929] See *supra* II.1.1.2.5.
[930] *Gesetz vom 6. August 1955/8. Juli 1999 zum Schutz deutschen Kulturguts gegen Abwanderung.*
[931] *Gesamtverzeichnis national wertvollen Kulturgutes.*
[932] See German report, p. 11.

movable cultural objects enlisted on the Register of Nationally Valuable Cultural Property.[933] They may only be exported with governmental permission expressed by an export license. With respect to property right related aspects it can be noted that the German system basically does not provide for extensive special regulations in relation to movable cultural heritage. The German Civil Code, for example, does not differentiate between "normal" and "cultural" property when it comes to the question of bona fide purchase, which with regard to stolen objects is only possible in very limited cases.[934] Only due to the strict German jurisdiction bona fide purchase of movable cultural properties is more difficult because the concept of good faith is interpreted restrictively. The law of finds and treasure trove regulates the ownership of found objects like in most other countries, as not the finder, but the state acquires ownership automatically. One more aspect worth mentioning is that Germany is quite active in the return of cultural objects illegally taken during the Nazi-era, expressed by various soft law instruments, having led to various cases of restitution even if respective claims would have already been time-barred.[935]

France adopted a comparatively detailed and comprehensive legal framework for the protection and preservation of movable tangible cultural heritage based on its 2004 Cultural Heritage Code (CHC) and the 2006 General Code Regarding the Property of Public Persons[936] (hereafter, GCPPP) dividing the movable tangible cultural heritage into various classes and providing for several differences compared to the groups of immovable cultural heritage. Firstly and based on the assumption that 'the public owner is in France considered as the best guardian for cultural heritage'[937], Article L. 2112-1 of the GCPPP declares several movable cultural objects as public property saying that they 'are part of the movable public domain of the public entity owning property with a public interest from the perspective of history, art, archaeology, science or technology'.[938] The main consequence of this classification is the fact that those objects are 'inalienable, imprescriptible, and cannot be seized.'[939] With regard to privately owned movable cultural property the state has the opportunity to enrich the French public-owned movable heritage by several means including a pre-emption

[933] See German report, p. 11.
[934] See German report, p. 5 and p. 11 et seq.
[935] For details see German report, p. 12.
[936] *Code général de la propriété des personnes publiques*.
[937] French report, p. 33.
[938] For the list of those movable see Article L. 2112-1 GCPPP or French report, p. 34 et seq.
[939] French report, p. 34.

right which, however, is relatively narrow in its application as it is limited to certain objects at public auctions.[940] Designation of movable tangible cultural heritage under the CHC basically follows the system already outlined in the context of immovable cultural heritage above[941] including its differentiation between classified and registered properties and also imposing special rules and widening the concept by the category of Musées de France collections. Lists exist both for the categories of classified and registered objects as well as for museum collections. Although there are several restrictions and obligations imposed on the private owner of movable tangible cultural heritage, they are less drastic than the respective restrictions and obligations with regard to immovable cultural heritage, which according to Cornu is explained by the argument that 'the public interest is less significant as regards to movables'.[942] While expropriation of immovables is possible if 'their preservation is comprised'[943], a similar rule is missing in relation to movables. Automatic state intervention in cases of urgent protection measures is also limited to the category of classified movables, whereas there is no such possibility with regard to registered movable tangible cultural heritage. Among other particularities it might also be noted that the registration of privately owned movable cultural heritage is in practice subject to the owner's consent, a further ownership friendly difference to immovable cultural heritage.[944] In addition to the categories of classified and registered movable cultural objects, the CHC regulates a further category, the category of Musées de France collections, defined by Article L.410-1 of the CHC as 'any permanent collection[s] … of property [whose] preservation and presentation are of public interest and [which are] organized for the knowledge, education and delectation of the public'.[945] Musées de France collections and parts of it are considered to be national treasures and thus subject to a special regime of protection, which for example only allows the export in special cases and only on a temporary basis and also exempts return claims from any time limitation – differences which apply to every category of national treasures which include classified movable objects, classified archives, public collections and Musées de

[940] For details see French report, p. 36 et seq.; see also French report, p. 35 et seq. for other forms of national enrichment including the interesting category of voluntary enrichment.

[941] See *supra* II.2.1.2.

[942] French report, p. 41.

[943] French report, p. 41.

[944] See French report, p. 41 et seq. for further details and differences between the protection and preservation of immovable and movable tangible cultural heritage under the French national system and French report, p. 49 et seq. for an analysis of the balancing of private and public interests in relation to movable tangible cultural heritage.

[945] See French report, p. 43 for details and examples of such objects.

France collections. Particularities can also be found in relation to treasure trove and the law of finds. The state does not become owner of excavated objects automatically, but 'may in the sole interest of public collections, claim the ownership of the resources excavated or fortuitously discovered with compensation paid to the owner of the object. Takings are allowed in the sole interest of public collections.'[946] Also the legal regime for fortuitous finds is regulated differently in comparison to most other national regimes discussed in this report, as the ownership is basically decided by the general Civil Law rules, leading to a shared ownership between the finder an the landowner.[947] A diverse system with regard to transaction and ownership questions is based on general civil rules and on special regulations, mainly focusing on national treasures and objects falling under the scope of the GCPPP.[948] While – as a general rule – the position of a bone fide purchaser is relatively strong, putting the burden of proof for having been of bad faith (note: in the meaning of 'should have doubted' the legal correctness of his acquisition[949]) on the claimant and restricting a potential claim by a basic three-year-time limitation, extensive exceptions are made for national treasures under the regime of the CHC and objects under the GCPPP. For those movable cultural properties, there basically exists no time limitation for respective claims. Also regarding the export of movable cultural heritage, the division into various categories is important. These are briefly summarized by Cornu as: (1) national treasures subject to strict export prohibitions making exceptions only for special temporary exports under the control of the Ministry of Culture; (2) other movable cultural properties subject to various licenses with different system for exports to EU Member States and non-EU Member States; and (3) movable cultural objects, which due to their minor value may be exported freely.[950] One more interesting aspect worth mentioning is the fact that under French law there does not exist an extensive obligation of Museums to return movable cultural property as the ratification of the 1970 Convention did not lead to the modification of French law[951]. Yet it should be noted that French public museums are obliged to due diligence in acquiring objects, as they are bound by the principles of the ICOM Code of Ethics.[952]

[946] French report, p. 36.
[947] See French report, p. 45 et seq. for details.
[948] For a detailed analysis see French report, p. 51 et seq.
[949] See French report, p. 51.
[950] See French report, p. 58 et seq. for details.
[951] See French report, p. 60 et seq., 2.2.4.5.
[952] See French report, p. 63.

The Mexican legal framework for the protection and preservation of tangible cultural heritage basically does not differentiate between movables and immovables, as it regulates both forms in the same law, the 1972 Federal Law on Archaeological, Historic and Artistic Monuments and Zones (LAHA), using the same designation process, the same set of criteria for both categories and dividing them into the same three groups: archaeological, historic and artistic cultural heritage.[953] Mexico tries to protect its national movable tangible heritage primarily through a complex system of regulations and restrictions on transfer of property and export of movable cultural heritage. One has to distinguish between firstly domestic and international transfer of property and secondly between the three before-mentioned categories of national cultural heritage. As far as the transfer of property within Mexico is concerned, privately owned movable cultural properties can be traded freely.[954] International transfer of privately owned movable cultural properties is only allowed subject to special permission, as is also the case for temporary exports, which is under certain circumstances possible for exhibitions. International sale of privately owned archaeological movable cultural heritage is basically prohibited. The only cases of export of such property are to be found with regard to temporary exports subject to special permission. In this context it should be stressed that private ownership of archaeological heritage is only possible in very limited cases, namely only in relation to archaeological heritage privately owned prior to 1972, as under the non-retroactive LAHA archaeological movables are declared to be owned by the Mexican nation. For the further protection of movable archaeological cultural heritage the LAHA also strictly prohibits archaeological excavations without the permission of the competent authority, the National Institute of Anthropology and History (INAH). This prohibition is subject to severe penal sanctions. In any case, discovered or found archaeological objects have to be reported to the INAH within 24 hours, leading to state ownership.[955] Another feature of the inalienability of archaeological cultural heritage is that possible claims for its restitution (to the state as owner of the property) are not subject to any time limitations, which can be seen as an additional means to protect (at least a part) of the Mexican national cultural heritage.

New Zealand is an interesting example of a country with recent changes in the field of national movable tangible cultural heritage protection and

[953] See *supra* II.2.1.2. and also Mexican report, p. 3.
[954] See Mexican report, p. 28 et seq.
[955] See Mexican report, p. 39.

preservation. As Myburgh points out it is the second Common Law jurisdiction after Nigeria which ratified both the 1970 Convention and the 1995 UNIDROIT Convention 'and the first Common Law jurisdiction to give domestic effect to both conventions in a single domestic statute.'[956] The Protected Objects Act 1975 (hereafter the 'POA'), which was – despite its title – enacted in 2006, is the core law for the protection and preservation of movable tangible cultural heritage in New Zealand, implementing the two international treaties. The Historic Places Act 1993 (HPA)[957] by comparison concentrates rather on the protection of immovables and covers movables only if they are still on a protected site or place.[958] The POA provides for an extensive definition of the term movable tangible cultural heritage, following the basic definitions of the 1970 Convention and the 1995 UNIDROIT Convention. The Ministry of Culture and Heritage as the competent authority designates prospective objects if they meet one of the extensive criteria and fall within one of the detailed categories of the POA.[959] It should be noted that the POA also recognizes the role of Māori, as one of the categories comprises ngā taonga tūturu, 'objects more than 50 years old that relate to Māori culture, history and society and that were, or appear to have been, imported into New Zealand by Māori, manufactured or modified in New Zealand by Māori, or used by Māori'.[960] Unlike most other national legislation the New Zealand legal framework grants direct (property) rights to indigenous people, which is for example reflected in the regulations on treasure trove and the law of finds: although found Māori objects are initially under national ownership, ownership is transferred to Māori themselves once 'ownership is determined.'[961] Once designated as a movable cultural object under the POA the respective property can only on application of its owner or due to the refusal of export permission enlist the respective object in the Nationally Significant Objects Register (NSO Register).[962] The registration in the NSO Register has some practical consequences, as it leads to automatic export restrictions. While national transfer of ownership is basically unrestricted, registered movable cultural objects as defined by the POA are subject to export permissions to be issued

[956] New Zealand report, p. 5 with reference to the detailed analysis in P. Davies and P. Myburgh, 'The Protected Objects Act in New Zealand: Too Little, Too Late?', 15 *International Journal of Cultural Property* (2008) pp. 321-345.
[957] See *supra* II.2.1.2.
[958] See New Zealand report, p. 13.
[959] For a listing of both see e.g. New Zealand report, p. 13.
[960] New Zealand report, p. 13.
[961] New Zealand report, p. 13.
[962] See New Zealand report, p. 14.

by the Ministry of Culture and Heritage. It should be noted that the permanent export of enlisted objects is automatically prohibited. In comparison to its predecessor, the Antiquities Act 1975, the new POA introduces several new regulations, which are, due to the lack of retroactivity, only applicable to movable cultural properties stolen or illegally imported/exported after May 1, 2007.[963] Although the new regulations are expected to bring the national New Zealand legislation in conformity with the 1970 Convention and the 1995 UNIDROIT Convention, some points, including the determination of the burden of proof, still remain unclear, as there has not been any 'detailed guidance' [964] issued yet.[965] Not only the state itself but also New Zealand museums try to cooperate with Māori and help preserving their cultural heritage. There is also a willingness of New Zealand museums to restitute and return cultural objects to the Māori as the original owners, a trend which however is not reflected in relation to indigenous groups outside New Zealand.[966]

Unlike some other above-mentioned countries, the Netherlands adopted a non-integrative approach in relation to the protection and preservation of tangible cultural heritage, as it deals with its movable forms in a separate law, the 1984 Cultural Heritage Preservation Act (CHPA)[967]. Pursuant to Article 7 of the CHPA its 'main goal … is to prevent the loss of objects that are significant to Dutch cultural history in the sense of loosing access to the objects through export.'[968] One of the particularities of the listing system under the CHPA is the relatively small number of enlisted objects on the Cultural Heritage Protection List (hereafter the 'CHPL'), not differentiating between various levels of protection, designated by the Minister of Culture with the assistance of the Council for Culture, its advisory body.[969] The reason therefore is the fact that only privately owned objects are enlisted on the CHPL, whereas public owned movable cultural objects cannot be found in the CHPL, but in special 'inventories of the respective institutions. State owned collections are supervised by the State Inspectorate for Cultural Heritage. The foundation for Ecclesiastical cultural objects has made an

[963] See New Zealand report, p. 15.
[964] See New Zealand report, p. 16.
[965] See New Zealand report, p. 16.
[966] See New Zealand report, p. 16 et seq. for details.
[967] For the relation to the framework on immovables, especially for the question why the regime of movables had not been dealt until the 1980s see Dutch report, p. 31.
[968] See also Dutch report, p. 32.
[969] As of December 31, 2008 the CHPL contains only roughly 300 objects and collections, while '[t]he Dutch State Inspectorate for Cultural Heritage estimates that the total number of single objects plus objects from the designated collections amounts to 60.000-70.000 objects' – see Dutch report, p. 32.

inventory of ecclesiastical objects in the Netherlands.'[970] For the determination of a movable cultural object, the Minster of Culture assesses the status based on a two-tiered system built on the factors of irreplaceability and indispensability for the Dutch cultural heritage.[971] Movable cultural property protected under the CHPA is subject to a notification and permission system with respect to transfer of ownership and/or export. Every change of ownership, even within the boundaries of the Netherlands, must be reported to the Minister of Culture as the competent authority. If the respective object is to be sold internationally or exported even on a temporary basis, the owner also needs permission issued by the Minister of Culture. The CHPA declares the minister's refusal to grant permission for an international sale as an automatic state offer to purchase the cultural object, with the price to be negotiated by the owner and the state or determined by a court decision.[972] The public interest in safeguarding the movable cultural heritage listed on the CHPL is also expressed in the public funding an owner can get for the restoration of the protected object. However, under the CHPA restoration is to be done on a voluntary basis, as there does not exist any legal obligation to preserve the object.[973] The rather strong position of the private owner is also reflected in the application of property law. While the sale and export of movable cultural objects are subject to special norms under the CHPA, general property law rules of the Dutch Civil Code are applicable in other areas, such as treasure trove and the law of finds. With the exception of finds in an area protected as immovable cultural heritage under the DuMoA, the ownership of found treasure is shared by the finder and the landowner; the state does not receive special rights. The application of Dutch Civil Code is currently – until the implementation of the 1970 Convention which is now on its way[974] – of further importance for the return of stolen objects, in relation to which the national provisions enacted to implement European Council Directive 93/7/EEC are not applicable. Thus, according to Lubina, the general regime of the Dutch Civil Code 'applies to stolen cultural objects from private Dutch collections (not listed under the CHPA), as well as to objects stolen in foreign countries which are not EU Member States [or do not belong to the European Economic Area]).'[975] Pursuant to the general system, which does not distinguish between "normal" movables and movables belonging to the Dutch cultural heritage,

[970] Dutch report, p. 32.
[971] For a definition of the two terms see Dutch report, p. 33.
[972] See Dutch report, p. 36.
[973] See Dutch report, p. 36.
[974] For details see Dutch report, p. 47 et seq.
[975] Dutch report, p. 39.

stolen objects can be acquired lawfully by a bona fide purchaser in several cases outlined in Article 3:86 (3) of the Dutch Civil Code.[976] The original owner's only chance is to prove the purchaser's bad faith, which is only possible within 20 years after the purchaser's acquisition of the object. This strong position of bona fide purchase is only broken in relation to cultural objects as defined by European Council Directive 93/7/EEC and only in relation to other EU Member States or parties to the European Economic Area. In this context, recent amendments of the Dutch Civil Code implemented the before-mentioned European Council Directive and strengthened the position of the original owner.[977] The return of movable cultural objects is also an issue touching on the status of movable cultural heritage exhibited in museums and galleries. Like in many other countries, a search for binding legal statutes in the Netherlands will also be in vain. The applicable ICOM Code of Ethics is the only written tool which could have an impact, as it can put 'moral pressure'[978] on the said institutions. Although not having had extensive practical impacts yet, it can be expected to open new ways to restitution of (foreign) cultural heritage.[979]

Due to its complex competence system, Switzerland, which ratified the 1970 Convention in 2003, but still has not ratified the 1995 UNIDROIT Convention, regulates the protection and preservation of movable tangible cultural heritage on a mixed basis of federal and local cantonal law. On a federal basis the main law is the Act on the International Transfer of Cultural Property (CPTA) which entered into force in 2005 and 'regulates the import of cultural property into Switzerland, its transit and (note: as far as objects of national interest are concerned, also the) export and repatriation from Switzerland.'[980] The CPTA is a good example of a national legal statute which was enacted to implement a major international treaty in the field of cultural heritage protection: the 1970 Convention. This fact is reflected throughout the CPTA and starts already with the definition used for describing the material scope of application. The term cultural property comprises objects which due to religious or universal reasons are valuable expressions of archaeology, prehistory, history, literature, arts or sciences falling under one of the categories of Article 1 of the

[976] See Dutch report, p. 41 et seq. for details.
[977] For details on the European Council Directive 93/7/EEC and the Dutch implementation see the in-depth analysis in the Dutch report, p. 42 et seq.
[978] Dutch report, p. 49.
[979] See Dutch report, p. 49 et seq. for details.
[980] Swiss report, p. 4.

1970 Convention.[981] The CPTA introduces an extensive protective regime for movables of national interest and even goes further than the 1970 Convention as Articles 10 et seq. of the CPTA provide for a 'return guarantee' for exhibited foreign movables in Switzerland, protecting exhibited objects from being subject to return claims during the time of exhibition and at the same time guaranteeing that those objects will be returned once the exhibition is finished.[982] The Swiss legal framework differentiates between various forms of movable tangible cultural heritage, both in relation to the form of ownership – private or public – and the "area" – federal or cantonal. Only publicly owned federal movables – meaning that they are 'of significant importance for the cultural heritage of Switzerland'[983] – can be enlisted by the Fachstelle[984] in the future[985] Swiss Federal Register of Cultural Heritage.[986] Registration has the effect that the listed objects become res extra commercium, having inter alia the effect that potential return claims are not subject to time limitations. Non-registered cultural objects are not extra commercium and can be acquired in good faith or by adverse possession. The time limitation was however extended to thirty years from five[987]. For application on an international level the CPTA introduces several regulations in relation to the import of foreign cultural movables and the export of federally listed Swiss movable cultural heritage, which is only possible on a temporary basis and under the condition of receiving special permission. It also asks for the due diligence of federal institutions when acquiring cultural movable property, an obligation which is also expressed by the national ICOM Code of Ethics, applicable also in relation to 'individual' members.[988] With regard to import and connected repatriation provisions it should be noted that the CPTA asks for the conclusion of (bilateral) treaties which guarantee the reciprocity of repatriation norms, following the US-model for implementation.[989] Conclusion of the respective treaties leads to the applicability of the pertinent regulations of the treaty and the CPTA. In other cases – cases in

[981] Article 2 (1) SCPTA; Article 2 (2) SCPTA goes on and defines *cultural heritage* with a reference to Article 4 1970 Convention.

[982] For details see also Swiss report, p. 4 et seq.

[983] Swiss report, p. 5.

[984] To be translated as 'Specialized Body' – see Swiss report, p. 5.

[985] At the time of writing this report, the Swiss Federal Register of Cultural Heritage was not created yet.

[986] Article 3 SCPTA.

[987] Swiss report, p.6.

[988] Swiss report, p. 10.

[989] For details see Article 7 SCPTA and Swiss report, p. 6 noting that (as of December 31, 2008) Switzerland has concluded three such treaties with Italy, Peru and Greece of which only the first one has entered into force.

which no agreements exist – claims are subject to "normal" private international law. As already mentioned, movable tangible cultural heritage can also be privately owned if the owner is a natural person or a legal entity. Those objects are however not listed on the Swiss Federal Register of Cultural Heritage, which means that the special provisions of the CPTA are not applicable. Privately owned movables, however, can be – and in reality often are – regulated by cantonal laws, which sometimes put strict restrictions to the respective private property rights, as the legislation of most Cantons provide for cantonal pre-emptive and expropriation rights in relation to movable cultural properties.[990] The positions of the cantons are usually quite strong, making them also automatically the owner of discovered archaeological objects.[991] It should also, however, be pointed out that the cantonal legal statutes and legal practice in the field of movable tangible cultural heritage shows some shortcomings, which is for example reflected by the fact that although cantons installed inventories for cantonal cultural heritage, privately owned objects are usually not listed[992] and are not subject to cantonal export restrictions. On the other hand, cantonal and federal assistance and financial support foster the protection, preservation and promotion of movable cultural heritage, including that which is privately owned.

The Canadian legal system on the protection and preservation of movable tangible cultural heritage also differs very much from the Croatian and Czech legal frameworks mentioned at the beginning of this chapter, as there does not exist any comprehensive federal law in this area. Thus, movable tangible cultural heritage is not generally defined and neither is there a basic set of criteria or a centralized list of movable tangible cultural objects in Canada. Canada does however – and this is another interesting difference to most other, especially European countries – provide for some sets of special regulations of law and practice regulating and dealing with the rights of indigenous groups in relation to (also) movable tangible cultural heritage. As Patterson points out the 'only federal law specifically addressing Aboriginal cultural property in the form of … movables ... is section 91 … Indian Act'[993] exempting various objects on reserve from being acquired, guaranteeing the property rights of the respective aboriginal people.[994] In addition, while many provincial laws provide for the transfer of aboriginal

[990] See Swiss report, p.10, p. 18 et seq.
[991] See Swiss report, p. 19.
[992] See Swiss report, p. 17.
[993] Canadian report, p. 6.
[994] For details see Canadian report, p. 6.

cultural objects to the government, respective objects are, based on unwritten law, handed over or returned to aboriginal people. Repatriation might also be of importance with regard to museum-located indigenous movable cultural objects. Only one Canadian province, the province of Alberta, covers that issue in its First Nations Sacred Ceremonial Objects Repatriation Act which generally deals with the 'return of sacred ceremonial objects whose return is requested by an Alberta First Nation from the Alberta government (including the two major provincial museum collections),'[995] while there is no comparable law to be found on a federal basis or in the other Canadian provinces. Nevertheless repatriation of indigenous movable cultural heritage to aboriginal people is not seldom carried out on a voluntary basis, also leading to further cooperation between museum and indigenous groups in the field of movable cultural heritage protection and preservation.[996] The role of museums in relation to movable tangible cultural heritage protection in general is regulated by a legal patchwork of federal and provincial laws. Canadian museum collections are nevertheless documented and inventoried centrally in a national inventory of Canadian museum collections, the Canadian Heritage Information Network (hereafter the 'CHIN'). With regard to (temporarily) imported cultural objects exhibited at Canadian museums, several provincial laws try to prohibit possible court cases concerning property rights for the time of the exhibition, such as the British Columbian Law and Equity Act.[997] On a federal basis one can however find a comprehensive legal statute regulating questions related to import and export of movable cultural objects as well as their return: the Cultural Property Export and Import Act which was enacted as implementation tool of the 1970 Convention. In comparison to the United States, Canadian law allows for the recognition and enforcement of the cultural property export controls of all 1970 Convention parties[998]. The issue of bona fide purchase is not regulated on a federal, but only provincial basis by the provincial Civil Codes which can lead to some divergences and complications as Quebec adopted a civil law concept, whereas all other Canadian provinces follow common law approaches which do not provide for a special system of bona fide purchase. Thus, in the common law provinces, the bona fide purchaser per se is not protected. Possible claims are however subject to time limitations. In contrast to this, under the provincial law of Quebec a bona fide purchaser can under certain conditions

[995] Canadian report, p. 8.
[996] For details see Canadian report, p. 8.
[997] See Canadian report, p. 7.
[998] See Canadian report, p. 7.

become the owner even if the respective object was stolen. It has to be noted that neither of the two Canadian concepts distinguishes between movable objects and movable cultural objects.

Unlike Canada the United States has introduced a comprehensive federal legal statute granting rights to indigenous groups and communities: the Native American Graves Protection and Repatriation Act (NAGPRA).[999] The NAGPRA strengthens the role of indigenous groups and communities, who can also be owners of movable tangible cultural property, as it provides for 'a scheme for repatriation of Native American human remains and other cultural items from museums, very broadly defined, and federal agencies,'[1000] both of them 'required to compile inventories or provide summaries of Native American remains and cultural items in their possession.'[1001] In various cases repatriation issues are very delicate and difficult to be solved. The earlier mentioned Review Committee[1002] tries to handle arising disputes by applying and assessing 'four statutory qualifications on the requirement of expeditious return of material.'[1003] The qualification system is quite complex and tries to take into account several aspects related to ownership questions and the cultural character of the respective object, including a determining set of criteria comprising 'geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical or other relevant information or expert opinion'[1004] and basic rules for the legal argumentation.[1005] The general protective regime of movable tangible cultural heritage is based on a legal framework formed primarily by the Cultural Property Implementation Act (CPIA), implementing the 1970 Convention on a national level, the National Stolen Property Act (hereafter, NSPA), which however is applicable to any object with a value of at least US$ 5,000 - regardless of its possible qualification as cultural object - and the earlier mentioned Archaeological Resources Protection Act (ARPA)[1006]. Both the CPIA and the NSPA were enacted to fight illegal transfers of ownership, with the NSPA also applicable on a national, interstate level.[1007] Having been, according to Nafziger, 'the first "art market" state to ratify the [1970]

[999] See United States report, p. 4 and p. 9.
[1000] United States report, p. 9.
[1001] United States report, p. 9.
[1002] See *supra* II.1.2.2..
[1003] United States report, p. 9.
[1004] United States report, p. 9.
[1005] For details see United States report, p. 9 et seq.
[1006] See *supra* II.2.1.2.
[1007] See United States report, p. 8.

Convention'[1008] the United State takes a relatively active approach by having concluded several bilateral treaties in accordance with Article 9 of the 1970 Convention[1009] in order to facilitate international cooperation and the return of illegally imported/exported movable cultural objects. A Cultural Property Advisory Committee in the Cultural Heritage Center within the Bureau of Educational and Cultural Affairs of the Department of State plays an important role through its activities. These activities include advising the US President to conclude executive agreements to restrict importation from countries where pillage is a threat. The conclusion of bilateral treaties is especially of importance as the United States at the time of ratification of the 1970 Convention declared a reservation according to which 'United States reserves the right to determine whether or not to impose export controls over cultural property.'[1010] With regard to excavations and archaeological objects, the ARPA provides for a comprehensive legal regime stipulating a control system including mandatory excavation permits, strict penalties and the possibility of 'seizure and forfeiture of illegally obtained material, including material imported from foreign sites.'[1011]

On a federal legal level, regulations on the protection and preservation of Spanish movable cultural heritage can be found in the Law on the Historical Heritage of Spain (LHHS), which also covers immovable cultural heritage. The Spanish system is quite interesting as it restricts the owner's property rights comparatively severely. The classification of movable objects resembles the designation process for immovables.[1012] However, Article 26 of the LHHS introduces a further level of protection for movables, movable tangible cultural heritage which are 'given a lower level of protection [and which] are those [that are] included in the General Inventory of Objects … [due to their] notable historic, archaeological, scientific, artistic, technical or cultural value and which have not been declared as being of cultural interest

[1008] United States report, p. 8.

[1009] Article 9 1970 Convention: 'Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the **specific** materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State'; see also United States report, p. 8 et seq. for details on the CPIA and the bilateral treaties.

[1010] See e.g. http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited on December 31, 2008).

[1011] United States report, p. 3.

[1012] See *supra* II.2.1.2.

(Article 26 of the LHHS).'[1013] Such objects are enlisted on a different register, the General Inventory of Movable Assets (hereafter the 'GIMA').[1014] Under the strict Spanish concept the sale of movable cultural objects enlisted in the General Register of Assets of Cultural Interest (hereafter the 'ACI Register'), representing objects of highest value, is generally prohibited, both nationally and internationally, which thus includes the prohibition of permanent export. Temporary export is only allowed if authorized by the competent authority.[1015] The ownership of objects recorded in the GIMA is less limited, as permanent export is also possible though it is subject to previous authorization. The competent authority can refuse the issuing of a permit and can also exercise a pre-emption-right within a period of six months.[1016] The strong position of the state is also expressed in the provisions on treasure trove and the law of finds of movable tangible cultural heritage, as those objects which are covered by the LHHS fall under the public domain, making them state owned property.[1017]

The Tunisian concept of movable tangible cultural heritage protection and preservation is another example of a comparatively strict regime. The term movable tangible cultural heritage is defined by the Code of Archaeological and Historical Heritage and Traditional Arts (CAHH) and its predecessor, the law of May 19, 1988 on cultural goods extensively by giving several examples.[1018] The Ministry of Culture as the competent authority designates respective objects by using the same set of criteria as for the designation of immovable cultural heritage, the four alternative factors of history, aesthetics, art or tradition. Although the consent of a private owner is basically required for declaring an object owned by him as movable cultural property, the Minister with the help of a court's decision can substitute the owner's consent. Once an object is granted the status of a protected movable object under the CAHH, numerous restrictions limit the owner's property rights. Any kind of intended transfer of ownership has to be approved by the authorities, providing the state with a pre-emptive right. In addition, while temporary export is under certain circumstances possible subject to prior approval, permanent export of designated movable cultural property is 'strictly prohibited.'[1019] There also exist difficulties for the owner to regain

[1013] Spanish report, p. 6.
[1014] For the main obligations with regard to the objects registered in the GIMA see Spanish report, p. 14 et seq.
[1015] See Spanish report, p. 15.
[1016] See Spanish report, p. 16.
[1017] See Spanish report, p. 16.
[1018] See Tunisian report, p. 3 et seq. for details.
[1019] Tunisian report, p. 4.

his property, as according to the generally applicable norms of the Tunisian Code of Real Rights[1020] he carries the burden of proof that an acquirer was not bona fide at the time of taking possession over the respective object, meaning that he 'knew or should have known … that the one from whom he received the good had no right to dispose of it.'[1021] The claim is subject to a three-year-time limit and the successful claimant does under certain circumstances have to reimburse the bona fide purchaser for the paid price, but even if the purchaser was mala fide at least reimburse the purchaser for a considerable increase of value.[1022] As far as discovered movable cultural objects are concerned, the finder has the obligation to inform the authorities within five days of the discovery.[1023]

CONCLUSION

If one understands protecting movable tangible cultural heritage in terms of the 1970 Convention and the 1995 UNIDROIT Convention, mainly as the fight against the illegal transfer of movable cultural property from one country to another, one can see that most countries set up a framework of export – and to some extent also import – controls, restitution and return issues and rules concerning bona fide acquisition. In these areas national regulations however differ due to various reasons, including the status of ratification of the pertinent international tools, as e.g. the 1995 UNIDROIT Convention is basically directly applicable The willingness to implement the non-self-executing specifications of the 1970 Convention and the balancing of the interests of the state and the private owner are also influential in the context of national legislation and are further reflected by national perceptions of the role which movable cultural heritage plays in the respective country.

In addition to this narrow understanding, general issues related to the safeguarding of movable tangible heritage, including questions of ownership, designation, registration, obligations and rights of the private owner and possible national means of control have also to be included in national legislation, although international frameworks cover these areas

[1020] For details see Tunisian report, p. 4 et seq.
[1021] Tunisian report, p. 4.
[1022] See Tunisian report, p. 4 et seq.
[1023] See Tunisian report, p. 4.

only rudimentarily and indirectly.[1024] In this context, national concepts are quite diverse, as the pertinent international tools in the area of movable cultural heritage protection leave the regulation of these aspects to the discretion of the national legislators. Also the issue of group and community rights, especially in rem rights, in relation to movable tangible cultural heritage is of interest, as one can see regional differences when it comes to their national regulation.

In some countries, such as Croatia, the Czech Republic, Japan or Mexico, the designation of movable tangible cultural heritage shows similarities to the concept used for the designation of immovable cultural heritage when it comes to the criteria used, the competent authorities or the registration. While it might be logical that also in these countries special rules – most commonly in the form of special supplementary legal statutes[1025] – are needed for areas solely to be found in relation to movable tangible cultural heritage, such as questions linked to the return of illegally imported or stolen objects or to the law of finds, there are however a couple of countries which generally regulate movables separately from immovable forms. Denmark, for example, uses different criteria for the designation of movable tangible cultural objects. In addition to an age factor, also to be found in relation to immovables, financial value plays an important role when it comes to the designation of movables.[1026] Several newer national special regulations of law link their concepts more directly to the pertinent international tools, such as the Swiss Act on the International Transfer of Cultural Property (CPTA) of 2005, defining the material scope in accordance with the 1970 Convention[1027] or the New Zealand definition of the term protected foreign object under Section 2 (1) of the POA, which uses exactly the same terminology as Article 1 of the 1970 Convention[1028]. In various cases one can also find differences between movables and immovables in relation to their national registration. In contrast to immovable cultural heritage, registration of movables in accordance with Article 5 (b) of the 1970 Convention, sometimes causes "incomplete" registration. In the Netherlands only privately owned movables can be registered under its core law, the

[1024] See e.g. the definition of the term *cultural property* by Article 1 1970 Convention or the indirectly declared possibility of private ownership of cultural property by Article 3 1995 UNIDROIT Convention which does not distinguish between privately and public owned objects.

[1025] See *supra* II.2.2.2

[1026] See Danish report, p. 19.

[1027] See *supra* II.2.2.2. and *supra* note 981.

[1028] For a detailed analysis of the New Zealand implementation of the 1970 Convention and the 1995 UNIDROIT Convention in the New Zealand Protected Objects Act see Davies and Myburgh, loc. cit. n. 956.

Cultural Heritage Preservation Act,[1029] whereas it is the opposite way on a federal level in Switzerland, where only public owned movables can be listed on the Swiss Federal Register of Cultural Heritage and in some, yet not all, cantons with their the cantonal registers.[1030] In addition, many countries also installed lists for movable tangible cultural heritage held by museums in accordance with Article 7 (b) (i) of the 1970 Convention. This is, however, mostly done on a centralized basis, such as the Czech Republic with its Czech Central List of Collections or Canada with its Canadian Heritage Information Network.

As it is the case in relation to immovable cultural heritage, the national and/or local interests in containing and preserving the movable tangible cultural heritage is oftentimes also guaranteed by national and/or regional pre-emptive and expropriation rights. Some countries however differentiate between movable and immovable forms. Some have introduced stricter while others more owner-friendly concepts applicable to movable cultural heritage. While only a very few Swiss cantons include pre-emptive and expropriation rights in relation to immovable cultural heritage, both are more common with regard to movables.[1031] France on the other hand provides the state with expropriation rights applicable to immovables, whereas this option basically cannot be found in relation to movable cultural heritage.[1032]

As far as the issue of controlling the export of movable tangible cultural heritage in conformity with Article 5 of the 1970 Convention is concerned, the vast majority of countries adopted a relatively strict system, installing a licence system applicable to temporary – and in cases where permanent exports are possible – also to permanent exports. One can distinguish between three major concepts. The first is a mixture of control and prohibition while the second is a more owner-friendly group that basically allows both temporary and permanent export. Both of these are subject only to state permission. The third concept is a combination of the first two systems. The first group comprises countries such as e.g. Croatia and Tunisia basically prohibiting definite exports and allowing temporary exports only subject to prior state authorization. A second group, including e.g. Denmark, Germany and the Netherlands – the last one not a State Party to the 1970 Convention –, declare both temporary and permanent export

[1029] See Dutch report, p. 32.

[1030] See Swiss report, p. 8, p. 9 et seq. p. 17; however, e.g. in the canton Berne, privately owned movable cultural property can be registered with the consent of the owner (see Articles 20 and 21 Berne Cantonal Act on the Protection of Historical Monuments [*Gesetz über die Denkmalpflege*].

[1031] See Swiss report, p. 19.

[1032] See French report, p. 41.

possible, but again both only with prior state approval. The third group, again with obligatory licenses for temporary exports, combines the other two regimes when it comes to the definite export of movable tangible cultural heritage: countries such as Italy, France, Mexico, Spain or New Zealand distinguish between various levels of protected movables or – in the case of New Zealand – between registered and unregistered movable cultural heritage and prohibit only the definite export of a part of its movable cultural heritage while allowing other movables to be exported also permanently with state approval.

When it comes to the fight against the illicit import of movable tangible cultural objects, a core issue in both the 1970 Convention and the 1995 UNIDROIT Convention, several countries already try to control the import itself. New Zealand, in addition to Canada, might be one of only a few countries which declare the import of unlawfully exported movable cultural heritage to be explicitly illegal, as Section 10A of the POA says that 'a person may not import into New Zealand an unlawfully exported protected foreign object'. Countries such as Croatia or the Czech Republic try to control the import of movable cultural objects by asking the importer to report the import to the responsible national authorities and prove that the exporting state licensed the respective export/import.[1033] Other countries such as Spain, with only optional import declarations, or Mexico rather rely on collaboration between various authorities, in the case of Mexico e.g. of INTERPOL and the National Institute of Anthropology and History (hereafter the 'NIAH').[1034]

Still not unified are the national regimes especially in the field of litigation in relation to bona fide purchase and return claims. With the 1995 UNIDROIT Convention still not being ratified by many major art markets and the 1970 Convention having a vague framework, unification remains a problem, although several countries, including Germany, Canada, Japan or Switzerland, have enacted special regulations of law implementing (at least) the 1970 Convention. Concerns with various issues are raised by

[1033] UNESCO, Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970): Reports by Member States and Other States Parties on the Action They Have Taken to Implement the Convention (UNESCO Doc. 32 C/24 of July 31, 2003) p. 5 et seq. – available online at http://unesdoc.unesco.org/images/0013/001309/130905E.pdf (last visited on December 31, 2008).

[1034] UNESCO, Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970): Reports by Member States and Other States Parties on the Action They Have Taken to Implement the Convention (UNESCO Doc. 32 C/24 of July 31, 2003) p. 11 and p. 15. – available online at http://unesdoc.unesco.org/images/0013/001309/130905E.pdf (last visited on December 31, 2008).

this. These include the question of the general possibility to purchase movable objects bona fide, possible differentiations between normal movable objects and movable cultural objects, the distribution of the burden of proof or time limitations for claims. While some countries, such as Croatia or Tunisia put the burden of proof with regard to the question whether the purchaser was at the time of the acquisition bona fide or not basically on the claimant, others such as Italy choose the opposite way. In New Zealand, for example, the legal situation is not yet clear, as the new POA does not answer the question of distributing the burden of proof sufficiently.[1035] The regulation of time limitations is also diverse and differs with respect to the question of applicability of various international tools, including the 1995 UNIDROIT Convention, or – on a practically limited area – the European Council Directive 93/7/EEC. The possibilities range from claimant-friendly systems with no time limitations, like under the Croatian Ownership Act[1036] to two years under the Taiwanese system, a regulation which – in contrast to many other Taiwanese areas related to cultural heritage protection – was not influenced by the recent development of Japanese law. The Japanese Act on Controls on the Illicit Export and Import and other matters of Cultural Property, which was enacted in 2002 as a national implementation of the 1970 Convention, provides an example of a country which, influenced by international trends, extended its normal time limitation for return rights to ten years, improving the position of a (former) owner of a movable cultural object in comparison to an owner of a normal movable object by eight years.

Inspired and in conformity with Article 5 (d) of the 1970 Convention most countries installed supervising controls over excavations. Trying to prevent illicit excavations, excavations basically may only be carried out with further approval of the responsible authority. Depending on the national distribution of competences this can be a central authority, like the Mexican NIAH,[1037] or regional authorities like Spanish authorities on the level of the autonomous communities.[1038] Not infrequently efforts are made on a

[1035] Davies and Myburgh, loc. cit. n. 956, p. 15 et seq.

[1036] See Croatian report, p. 20 and Articles 118 et seq. COA and *supra* II.2.2.2. for details.

[1037] UNESCO, Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970): Reports by Member States and Other States Parties on the Action They Have Taken to Implement the Convention (UNESCO Doc. 32 C/24 of July 31, 2003) p. 11. – available online at http://unesdoc.unesco.org/images/0013/001309/130905E.pdf (last visited on December 31, 2008).

[1038] UNESCO, Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970): Reports by Member States and Other States Parties on the Action They Have Taken to Implement the Convention (UNESCO Doc. 32

national basis to strengthen the system of excavation permits through the introduction of penal sanctions in cases of unauthorized excavations. The national or regional interest in the protection of still undiscovered movable cultural objects is also expressed by national rules with respect to the law of finds. The majority of countries declare found movable cultural objects automatically state owned or in several cases, such as in the Czech Republic or Switzerland, owned by the province/canton the object was found in. In general, finders are obliged to report finds to the responsible authority and in several countries receive a monetary reward in return. Some national systems introduce state options instead of automatic declaration as state/regional property. According systems can be found e.g. in France or in the Czech Republic, where the state authority can choose between becoming the owner or leaving the object to the finder. There are however also exceptions of the basic principle of (possible) state/regional ownership. Movable cultural objects found on sites not protected by the Dutch Monuments Act fall under the general law of finds regime of the Dutch Civil Code. According to the pertinent rules ownership is divided between the finder and the landowner by even shares, even if the found object itself would qualify as a movable tangible cultural object under the Dutch legislation.[1039] Also New Zealand with its comparatively strong protection of indigenous groups' rights in the field of cultural heritage introduced a different regime as far as Māori artifacts are concerned. As Myburgh explains 'found Māori artefacts are prima facie owned by the Crown until ownership is determined, in which case the artefact passes into the communal ownership'.[1040]

The issue of granting rights to groups and communities or involving them actively in the legislative policy is also an interesting topic in relation to movable tangible cultural heritage, showing similarities to the concept already outlined in the context of immovable cultural heritage.[1041] Among the 16 countries which have contributed to the underlying study, New Zealand and the United States provide for the most extensive national systems respecting the interests of groups and communities. This is reflected by the fact that also in relation to movables Māori groups can be owners and thus can have a right in rem, something which distinguishes the New Zealand system from most other national concepts. Recently, the position of

C/24 of July 31, 2003) p. 14. – available online at http://unesdoc.unesco.org/images/0013/001309/130905E.pdf (last visited on December 31, 2008).

[1039] See Dutch report, p. 37 et seq. for details.

[1040] New Zealand report, p. 14.

[1041] See *supra* II.2.1.2. and II.2.1.3.

Māori has been further improved, not only on paper, but also in practice, as many museums have started to closely work together with indigenous groups in the field of cultural heritage protection and have even returned objects to them.[1042] In the United States the above-mentioned Native American Graves Protection and Repatriation Act (NAGPRA)[1043] provides for a comprehensive involvement of indigenous groups and communities also in the area of movable tangible cultural heritage. The integration of such groups and communities is guaranteed by a framework built on the granting of extensive rights – also including property rights –, repatriation provisions for the return of indigenous tangible cultural objects and a specialized dispute-resolution body inter alia applying a detailed statutory regime of repatriation related questions.[1044] While European countries basically do not grant property rights to indigenous groups due to their lack of legal capacity, Canada is another country with (limited) respect for aboriginal groups' rights. While most Canadian legal statutes in this field deal with immovable cultural heritage, the Indian Act of 1876 protects the interests of aboriginal groups to some extent as its Section 91 prohibits the acquisition of certain defined objects related to aboriginal people.[1045]

SPECIAL NATIONAL REGULATIONS WITH REGARD TO THE PROTECTION AND PRESERVATION OF MOVABLE TANGIBLE CULTURAL HERITAGE IN ARMED CONFLICTS

2.3.1. General Issues

As outlined in Part I of this report, modern concepts of cultural heritage protection and preservation derived from the idea of protecting cultural heritage against its destruction and exploitation during and resulting from armed conflicts.[1046] The 1954 Convention[1047] – which was later supplemented by its Second Protocol in 1999[1048] – and its accompanying First Protocol[1049] were the first comprehensive UNESCO tools dealing solely with issues related to tangible cultural heritage protection on a non-

[1042] See New Zealand report, p. 16 et seq.
[1043] See *supra* II.2.1.2. and II.2.2.2.
[1044] See *supra* II.2.2.2. and United States report, p. 9 et seq. for details.
[1045] For details see Canadian report, p. 6.
[1046] See *supra* I.2.
[1047] For details see *supra* I.2.1.
[1048] For details see *supra* I.2.3.
[1049] For details see *supra* I.2.2.

regional level. With the exclusion of Taiwan which is not a State Party to any convention discussed in Part I, 13 out of the 16 countries which took part in this study are States Parties to the 1954 Convention and its First Protocol, eight countries have joined the Second Protocol. In addition, as of the end of 2008, the United States is completing the process of ratifying the 1954 Convention and its two Protocols[1050].

As the 1954 Convention and its two protocols provide for several special regulations in relation to armed conflicts, we should take a short look at if– and if yes, how –various countries reacted and introduced special measures with regard to tangible cultural heritage on a national level. As we will see in the following, quite surprisingly not all States Parties to the 1954 Convention and its First Protocol have introduced special regulations for the protection of tangible cultural heritage against destruction and exploitation in the course of armed conflicts, as – according to the respective national reporter(s) – only nine out of 13 countries, which are States Parties to those two instruments, provide for a – in some cases quite extensive, in other cases only rudimentary – national legal framework: the Czech Republic[1051], France[1052], Mexico[1053] and Tunisia[1054] refrained from doing so. On the other hand, the United States, New Zealand and Taiwan, all three not States Parties to either the 1954 Convention or one of its two protocols[1055], include some special provisions in their national legislation.

2.3.2. National Protective Regimes For Tangible Cultural Heritage In Relation To Armed Conflicts

Switzerland, a State Party to the 1954 Convention and both protocols, belongs to the group of those countries which implemented the international tools by the enactment of a special national law, the Federal Act on the Protection of Cultural Property in the Event of Armed Conflict[1056] (APCPAC) of 1968. Not only does the APCPAC implement the 1954 Convention extensively, but it also adapts its terminology as can be seen e.g.

[1050] See US report, p.10.
[1051] See Czech report, p. 10.
[1052] See French report, p. 64, where Cornu notes that France 'only implements recommendations regarding the identification of goods provided by the 1954 Convention', but has not enacted any national law.
[1053] See Mexican report, p. 6.
[1054] See Tunisian report. p. 3 and p. 5.
[1055] See *infra* table.
[1056] *Bundesgesetz über den Schutz der Kulturgüter bei bewaffneten Konflikten*

by the definition of the term cultural property. Article 3 of the APCPAC[1057] defines it as 'declared wars, other armed conflicts between two or more states and armed conflicts that [are] not international in nature,' adding that it 'also includes violations of neutrality and resisting these with violence.' The national regulations resemble its model laws, the 1954 Convention and its First Protocol, basing the legal concept on two ideas: safeguarding and respecting cultural property. While the first applies to precautionary measures to be taken in order to avoid damage in the course of armed conflicts, the second one has to be understood in a broad way also comprising the prohibition of illegally removing and taking cultural properties.[1058] Competences and obligations under the APCPAC are divided between the federation, the Swiss cantons and municipalities. Also property owners and the army are involved in the complex system of safeguarding and respecting cultural objects.[1059] Generally speaking, the APCPAC introduces a comprehensive system of tangible cultural heritage protection and regulates various key provisions of the 1954 Convention on a national level, including the concept of the waiver system in cases of military necessity, the establishment of shelters and refuges, the designation with the distinctive emblem of Article 6 of the 1954 Convention, the creation of inventories on federal, cantonal and municipal levels as well as the training of specialized staff. By doing this it can be said that the APCPAC is one of the most detailed national laws having implemented the 1954 Convention.

Canada, a State Party to the 1954 Convention and its two protocols, mainly implemented these international tools by installing new and stricter penal rules with regard to 'the theft and destruction of cultural property'[1060] in various laws: the federal Crimes Against Humanity and War Crimes Act (hereafter the 'AHWCA'), the Cultural Property Export and Import Act and the Criminal Code. As war crimes against or crimes against humanity are further not subject to a time limitation under Canadian law, repatriation claims under the AHWCA and recently also under the Canadian Criminal Code are facilitated.[1061]

Croatia is another example of a country which introduced new penal provisions subsequent to the ratification of the 1954 Convention.[1062] Unlike

[1057] See Articles 18 (1) and 19 (1) 1954 Convention and see also *supra* I.2.1.2.

[1058] For details on safeguarding and respecting measures see Swiss report, p. 7 et seq.

[1059] For details on the involvement of the federation, the cantons and municipalities, as well as owners of cultural property and the army see Swiss report, p. 7 et seq.

[1060] Canadian report, p. 9.

[1061] See Canadian report, p. 9.

[1062] See Article 167 Croatian Penal Code and Croatian report, p. 13.

Canada with its AHWCA, it did not, however, install a separate law dealing with issues in relation to the scope of the 1954 Convention and its two protocols. Pertinent national regulations can be found in the Croatian Cultural Heritage Act (CHA) in the framework of 'protection of … cultural heritage under extraordinary circumstances.'[1063] While not defining the term armed conflict by itself – instead Croatian case law applies common international definitions – the CHA especially stipulates preventive measures to be carried out in peacetime.[1064]

Germany, a State Party to the 1954 Convention and its First Protocol, enacted a set of special regulations of law just recently in 2007, the federal Act Implementing the Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict[1065] (AHC). This act is supported by various older laws[1066] and the further above-mentioned state acts on the preservation of monuments[1067], which all together transform the international framework of the 1954 Convention extensively into national law. The marking of respective objects with the distinctive emblem of Article 6 of the 1954 Convention[1068] is made in many cases which also applies to the installation of refuges[1069]. Germany also installed several authorities responsible for carrying out the tasks related to the 1954 Convention and its national implementation. This applies to both protected immovable and movable tangible cultural heritage.[1070]

Like Germany Japan also enacted a set of special regulations of law dealing with the implementation of the 1954 Convention in 2007 when it became a State Party to the 1954 Convention: the Law for the Protection of Cultural Properties in the Event of Armed Conflict[1071] (hereafter LPCPAC), supplementing the Japanese Law for the Protection of Cultural Properties which does not provide for any special rules. In addition to the introduction of new penal sanctions, the LPCPAC also provides for certain precautionary measures, including proper information for the Japanese Self-Defence Forces.

[1063] Articles 75 et seq. CHA and Croatian report, p. 9.
[1064] See Croatian report, p. 12.
[1065] *Gesetz zur Ausführung der Konvention vom 14. Mai 1954 zum Schutz von Kulturgut bei bewaffneten Konflikten.*
[1066] See German report, p. 12.
[1067] See *supra* II.1.1.2.5. and II.2.1.2.
[1068] See *supra* I.2.1.3.
[1069] See *supra* I.2.1.3.
[1070] For details see German report, p. 12.
[1071] *武力紛争の際の文化財の保護に関する法律.*

The Netherlands, a State Party to the 1954 Convention and its First Protocol since 1958, has only enacted a special national legal statute for implementing the First Protocol, not also in relation to the 1954 Convention itself, as, according to Lubina, it is believed that 'only the First Protocol needed to be concerted into national law as its provisions left a certain margin of appreciation to state authorities and affected the rights and duties of Dutch citizen.'[1072] Nevertheless, certain national regulations directly linked to the 1954 Convention can be found in various national laws.[1073] In addition to legislation aimed at cultural heritage respect and protection awareness training of groups possibly highly affected in armed conflicts, especially of members of the Dutch army, obligations to take precautionary measures can be found in the context of the Act on the Improvement of Disaster Relief. It should also be noted that there are several non-governmental initiatives focusing on the protection of Dutch cultural heritage from the threats of armed conflicts.[1074] In contrast to the parameters of the 1954 Convention, the First Protocol was implemented by a set of special regulations of law, the 2007 Act on the Return of Cultural Objects Removed from Occupied Territories[1075] (hereafter the 'ARCOROT'), ten years after the culmination of an eye-opening restitution case involving the Greek Orthodox Church of Cyprus, which proved the necessity of implementing the pertinent provisions into national law.[1076] In contrast to Denmark, where it is argued that the First Protocol only applies to cases of removal from an occupied country which is a State Party to the First Protocol,[1077] the basic Dutch understanding follows a broader view, which was already outlined in the Part I of this report, namely that not only property situated in territories belonging to States Parties, but also property in other territories falls within the regulatory framework of Section 1 First Protocol.[1078] The ARCOROT led to several practical changes within the Dutch legal framework, as respective recovery claims are not subject to a time limitation and are based on a special regime of litigation involving the Minister of Culture.[1079]

[1072] Dutch report, p. 28.
[1073] See Dutch report, p. 28 et seq. for details.
[1074] See Dutch report, p. 29 et seq.
[1075] *Wet van 8 maart 2007, houdende regels over inbewaringneming en instelling van een vordering tot teruggave van cultuurgoederen afkomstig uit een tijdens een gewapend conflict bezet gebied (Wet tot teruggave cultuurgoederen afkomstig uit bezet gebied).*
[1076] For details on the case see Dutch report, p. 51.
[1077] See Danish report, p. 35.
[1078] See *supra* I.2.2.1. and Dutch report, p. 52.
[1079] For details on the system, including questions about the temporal scope of application, the burden of proof minor role of *bona fide* see Dutch report, p. 51 et seq.

Unlike the above-mentioned countries, Spain just covers the penal aspects in the field of cultural heritage protection in armed conflicts, whereas one will look for the implementation of other regulations of the 1954 Convention and its two protocols in vain. Articles 608 to 614 bis of the Spanish Penal Code also list various crimes committed in the course of armed conflicts in relation to cultural objects and basically take a similar approach as comparable legal statutes in most other countries, raising the possible penalties for the destruction of tangible cultural objects.[1080]

Denmark, which signed the 1954 Convention and its First Protocol in 1954, but did not ratify them until 2003, is another example of a country with no special single law implementing the international parameters. Instead, various relating issues are covered by a patchwork of laws which already existed prior to the ratifications. Although, according to Tamm and Østrup, the Danish Ministry of Culture is of the opinion that the current Danish legal framework is sufficient to deal with the international obligations[1081], it is currently (as of December 31, 2008) in the course of 'preparing the establishment of an advisory committee of representatives from the pertinent authorities and organs, which is to supervise the implementation of and compliance with the 1954 Convention and the First Protocol.'[1082] Like most other countries, Denmark also does not define the term armed conflict, but relies on internationally used definitions such as the definition used by the International Criminal Tribunal for the Former Yugoslavia in its case The Prosecutor v. Dusko Tadic expressing that 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.'[1083]

Regulations concerning the installation of precautionary measures in terms of the 1954 Convention and restitution matters in relation to illegally imported cultural objects in the course of armed conflicts can also be found in Italian national law, mainly copying the respective texts into national legal statutes[1084].

Although New Zealand and Taiwan are not States Parties to the 1954 Convention or either of its Protocols, both countries also introduced some regulations (partly) dealing with issues covered by those instruments.

[1080] See Articles 608 to 614 bis Spanish Penal Code and Spanish report, p. 14.
[1081] See Danish report, p. 34.
[1082] Danish report, p. 35.
[1083] See also *supra* I.2.1.2.
[1084] See Italian report, p. 14 .

While the New Zealand Defence Forces respect cultural heritage 'while overseas through Defence regulations'[1085], Taiwan touches on the issue of cultural heritage protection during armed conflicts with regard to movables as it allows their export 'for avoiding damage'.[1086] The United States take an approach similar to the New Zealand system, as despite being a non-State Party to the 1954 Convention the national system focuses on the awareness raising of military personnel in relation to cultural heritage to be found on foreign territories and the respect for it. [1087] In addition, the United States also follows a strict policy when it comes to questions of 'importation and acquisition of looted material in the circumstances of armed conflict or occupation.'[1088]

CONCLUSION

The 1954 Convention – supplemented by its Second Protocol in 1999 – and the accompanying First Protocol are the oldest major international tools discussed in Part I of this report. Although the international acceptance of these tools is not too low, practical complications can still be found, as major military powers such as the United States or United Kingdom have not ratified those international instruments yet. During the seventh meeting of the High Contracting Parties to the 1954 Convention in December 2007, both countries have however signalized that they might do so in the near future.[1089] In fact, at the Conference in Mexico City in November 2008 James Nafziger, the national reporter of the United States, discussed the progress of its preparation to ratify the 1954 Convention and the two Protocols. One has to wait and see for practical results. On the other hand, some countries which have already ratified the 1954 Convention still do not show any signs of taking steps to implement the tools on a national basis. In the case of Mexico, for example, Sánchez Cordero explains this by saying that the Mexican 'participation has been purely symbolic … [and] the

[1085] New Zealand report, p. 2.
[1086] See Taiwanese report, p. 5.
[1087] See United States report, p. 5 and p. 10 for details.
[1088] United States report, p. 10.
[1089] See UNESCO, *Final Report of the Seventh Meeting of the High Contracting Parties to the 1954 Hague Convention* (Paris, UNESCO 2008) at p. 2.; available online at http://unesdoc.unesco.org/images/0016/001603/160373E.pdf (last visited on December 31, 2008).

ratification of the Hague Convention to date has been merely a good will gesture of compliance.'[1090]

This does not however mean that the other members of the international community are passive as well and take a reluctant approach. Various examples prove the opposite: several countries provide for comprehensive military measures, especially expressed in the education of military staff. Already in 1964 the German Federal Minister of Defence issued military guidelines, the 'International Law of War – Classroom Guidelines (Part 6) – The Protection of Cultural Property in the Event of Armed Conflict'[1091], followed by several supplementary documents. German military district commands also keep cultural property lists, marking those objects on military maps.[1092] The approach of special cultural heritage education for army members is also taken by numerous other countries, including e.g. Italy, Mexico, the Netherlands and Spain. Several national armies also installed special sections covering issues related to the compliance with the rules set forth by the 1954 Convention and the respective national legal framework.[1093] Awareness raising is however not only carried out with respect to armed forces; several countries in accordance with Article 25 of the 1954 Convention (keyword: dissemination)[1094] also try to involve 'concerned civilian parties'[1095] or museums to take necessary precautionary steps.[1096]

As one can also conclude from the previous subchapter and the respective national reports, national legislation in accordance with Article 28 of the 1954 Convention usually complete their implementation frameworks by also installing comparatively severe penal sanctions to be imposed in cases of

[1090] Mexican report, p. 7.

[1091] *Kriegsvölkerrecht – Leitfaden für den Unterricht (Teil 6) – Der Schutz von Kulturgut bei bewaffneten Konflikten (Lehrschrift)* – see UNESCO, *Report on the Implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and Its Two 1954 and 1999 Protocols: Report on the Activities from 1995 to 2004*, (Paris, UNESCO 2005) at p. 10; available online at http://unesdoc.unesco.org/images/0014/001407/140792e.pdf (last visited on December 31, 2008).

[1092] UNESCO report 2005, loc. cit. 1091, at p. 11.

[1093] For details see UNESCO report 2005, loc. cit. 1091, p. 11 et seq.

[1094] Article 25 1954 Convention: 'The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the text of the present Convention and the Regulations for its execution as widely as possible in their respective countries. They undertake, in particular, to include the study thereof in their programmes of military and, if possible, civilian training, so that its principles are made known to the whole population, especially the armed forces and personnel engaged in the protection of cultural property.'

[1095] For details see UNESCO report 2005, loc. cit. 1091, at p. 19.

[1096] For details see or details see UNESCO report 2005, loc. cit. 1091, p. 16 et seq.

breaches against the applicable regime for cultural heritage protection in the context of armed conflicts.

Opinions of States Parties to the 1954 Convention are divided when it comes to the question of marking objects with the distinctive emblem of Article 6 of the 1954 Convention. While e.g. Germany has marked more than ten thousand objects already, other States Parties are more reluctant in doing so or totally refrain from it, basically arguing that 'marking may unnecessarily alarm the civilian population'[1097] or marking 'would be a mistake to make a large number of items of cultural property visible by marking them with the shield.'[1098]

As already explained in Part I of this report[1099], over the years the 1954 Convention has also been subject to criticism. One of the issues refers to the refuges in relation to the special protection under Article 8 of the 1954 Convention.[1100] Respective refuges cannot be found in many countries. Switzerland, which generally plays an active role with regard to its national implementation of the 1954 Convention, expressed its reluctance to install Article 8 refuges by pointing out the main obstacles to a national compliance with Article 8 of the 1954 Convention, including especially the criteria of sufficient space around a designated refuge stipulated by Article 8 (1) (a) of the 1954 Convention.[1101] Time will tell if the Second Protocol with its enhancements also in this area[1102] finds an appropriate national acceptance and can lead to practical improvements on a national basis.

SPECIAL NATIONAL REGULATIONS WITH REGARD TO THE PROTECTION AND PRESERVATION OF UNDERWATER MOVABLE TANGIBLE CULTURAL HERITAGE

2.4.1. General Issues

The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage entered into force in January 2009, as 20 countries have accepted or ratified it[1103] pursuant to Article 27.

[1097] Spanish view – for details see UNESCO report 2005, loc. cit. 1091, at p. 15.
[1098] Swiss view – for details see UNESCO report 2005, loc. cit. 1091, p. 15 et seq.
[1099] See *supra* I.2.1.2., I.2.1.3., I.2.3.1. and I.2.3.2.
[1100] For details see *supra* I.2.3.2.
[1101] See UNESCO report 2005, loc. cit. 1091, at p. 14.
[1102] For details see *supra* I.2.3.
[1103] See http://portal.unesco.org/la/convention.asp?KO=13520&language=E&order=alpha (last visited on December 31, 2008).

With regard to the present study and as of December 31, 2008 only three out of 16 countries have become States Parties to the 2001 Convention: Croatia, Mexico and Spain. Nevertheless, as cultural heritage is not only to be found on land, but can also be located underwater, it is worth taking a look at the question if – and if yes, how –various national legal systems deal with underwater cultural heritage. Are there national concepts of underwater cultural heritage? If yes, what forms do they comprise? Do they differentiate between on land and underwater cultural heritage or do they apply the same legal regime? Is there already any reference made to the 2001 Convention on a national basis? The following subchapter will take a short look at these questions

2.4.2. National Protective Regimes For Underwater Tangible Cultural Heritage

2.4.2.1. Countries With (Certain) Special Regulations

Canada, a coastal state which has not ratified the 2001 Convention yet, provides only for limited provisions related to the protection and preservation of underwater cultural heritage. The only legal statute partly dealing with this issue is the federal 2001 Canada Shipping Act (hereafter the 'SA').[1104] Part 7 of the SA covers the group of wrecks defined by Article 153 of the SA, not distinguishing between wrecks of cultural value and normal wrecks, and especially deals with the law of finds regarding such wrecks if a person 'finds and takes possession of [a] wreck in Canada, or … brings [a] wreck into Canada.'[1105]

Denmark, a coastal state not yet State Party to the 2001 Convention, regulates its maritime zones in various sets of special regulations of law.[1106] Although there is no general definition of the terms submarine and underwater to be found in Danish legislation, it introduces special provisions for the protection and preservation of underwater cultural heritage by the means of two different legislative sets: 'one for the archaeological heritage underwater within Danish jurisdiction and one for the archaeological

[1104] See Canadian report, p. 9.

[1105] Article 155 (1) SA; for the Canadian definition of the various maritime zones see Part I of the federal Oceans Act 1996 which can be found online at http://laws.justice.gc.ca/en/O-2.4/index.html (last visited on December 31, 2008).

[1106] See e.g. http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/DNK.htm (last visited on December 31, 2008).

heritage in the deep seabed area, i.e., outside Danish jurisdiction,'[1107] both regulated by the Danish Museum Act (DaMuA). Archaeological underwater cultural heritage as defined under Articles 28 et seq. of the DaMuA found in maritime zones subject to Danish jurisdiction is declared to be state property, imposing special notification obligations on the finder.[1108] The new Article 28 (a) of the DaMuA, on the other hand, deals with archaeological underwater cultural heritage to be found in maritime areas outside the Danish jurisdiction. Tamm and Østrup explain that this provision was inserted in order to be able to ratify the United Nations Convention on the Law of the Sea of 1982[1109], while the 2001 Convention has not been of any influence yet.[1110] They also note that '[s]uch submarine archaeological heritage belongs to the Danish State unless other states or private individuals may prove their … [property] rights.'[1111]

Despite not being a State Party to the 2001 Convention, the French legislation covers the issue of underwater cultural heritage protection and preservation quite extensively within the framework of the French Cultural Heritage Code (CHC), using a comprehensive definition of the term underwater cultural property in Article L. 532-1 of the CHC. This definition comprises movable and immovable forms such as 'deposits, shipwrecks, remains or more generally any property of prehistoric, archaeological or historical interest, which are located in the maritime public domain or on the seabed in the contiguous zone.'[1112] The French system adopts the concept of in situ protection, obliges a finder to report the discovery to the competent authority and sanctions breaches, such as unauthorized exploration activities, [1113] introducing a couple of special provisions to be applicable in addition to the general regulations of the CHC. Found objects usually fall under state ownership, which is only overturned by private ownership if the respective owner can be determined through a special process of making the discovery public.[1114] Like in most other countries, definitions of maritime zones are not included in the legal framework of underwater cultural heritage protection, but subject to sets of special regulations of law. In the case of

[1107] See Danish report, p. 32 for further references.
[1108] See Danish report, p. 32 et seq. for details.
[1109] For details on pertinent provisions of the United Nations Convention on the Law of the Sea of 1982 see *supra* I.6.1.
[1110] See Danish report, p. 33.
[1111] Danish report, p. 33.
[1112] French report, p. 32.
[1113] See French report, p. 32 et seq.; see also French report, p. 64, saying that basically the same provisions are applicable to immovable and movable underwater cultural heritage.
[1114] See French report, p. 32.

France, there exists a patchwork of legal statutes, most of them comparatively old, with the first one dating back to 1967.[1115]

The national regulation of underwater cultural heritage protection and preservation in Italy, which has not yet ratified the 2001 Convention, might come as a surprise. While there are some similarities to France, such as defining various maritime zones in various sets of special regulations of law[1116] or regulating the issue of underwater cultural heritage in the framework of its core law related to cultural heritage protection, the Code of Cultural Properties and Landscape (CCPL), the way in which underwater cultural heritage protection is addressed differs and can be seen as a unique way for a country which – at the time of writing this report – is not a State Party to the 2001 Convention. Article 94 of the CCPL, the only provision of the CCPL directly linked to underwater cultural heritage[1117], directly refers to the 2001 Convention as it stipulates that 'archaeological and historical objects found in the seabed of the maritime area which extends for 12 miles from the external border of the territorial sea are protected on the basis of the 'Rules concerning activities directed underwater cultural heritage' which are attached to the [2001] UNESCO Convention on the protection of underwater cultural heritage.'[1118] Taking this approach, Italy is even more "progressive" than many countries which are already States Parties to the 2001 Convention, as some of them have not introduced links between the respective national legislation and the 2001 Convention yet.

Tunisia, defining its maritime zones basically by two laws, one enacted in 1973, the other one in 2005,[1119] strictly distinguishes between on land and underwater cultural heritage. With regard to the latter one which is regulated by the Code of Archaeological and Historical Heritage and Traditional Arts (CAHH) and the 1989 Law on Maritime Wrecks (hereafter the 'LMW'), Article 73 of the CAHH introduces a special regulation and declares all discovered archaeological objects 'discovered in internal waters or territorial waters property of the state.'[1120] This, according to Ben Jemia, is the main difference between the two concepts, as on land cultural heritage can also be

[1115] A list of French legal statutes can be found online at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/FRA.htm (last visited on December 31, 2008).

[1116] A list of respective legal statutes can be found online at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/ITA.htm (last visited on December 31, 2008).

[1117] See Italian report, p. 10.

[1118] Italian report, p. 10 with further details.

[1119] Act No. 73-49 delimiting the territorial waters and Act No. 50/2005 concerning the exclusive economic zone off the Tunisian coasts – see http://www.un.org/Depts/los/LEGISLATIONAND TREATIES/STATEFILES/TUN.htm (last visited on December 31, 2008).

[1120] Tunisian report, p. 3.

privately owned.[1121] The regulations in the CAHH are supplemented by the definitions of the term maritime wrecks in Article 1 of the LMW, which defines the culturally significant ones as 'all the objects without owner including the objects of archaeological or historical character which are: run ashore or washed up by the sea on the shores or the riverbanks; drifted from the bottom of the sea into the internal waters, territorial sea or the contiguous zone; found floating in the internal waters or in the territorial sea; found floating in the exclusive economic zone or drifted from this zone but beyond the contiguous zone and drifted back to the territorial sea, to internal waters or to riverbanks.'[1122]

The United States, one of the most powerful coastal states, is not a State Party to the 2001 Convention. However, over the past 20 years it has established a quite comprehensive national legal framework applicable to underwater cultural heritage. What started with the application of general rules of the law of salvage and finds has shifted its focus to special rules in relation to wrecks and underwater cultural artifacts.[1123] In addition to a patchy definition of maritime zones[1124] the United States introduced the Abandoned Shipwreck Act in 1987, transferring the 'authority over coastal wreck from the federal admiralty courts to the President for retransfer to coastal states'[1125] and also transferring 'title to the wrecks to the states in which they are located.'[1126] On an international level the United States is quite active in the conclusion of bilateral treaties and the recognition of other international legal tools, complemented by various pertinent underwater cultural heritage related court cases.[1127] Nafziger notes that the recent trends in this area contain three key features: 'to fashion a constructive in rem basis of adjudicatory jurisdiction; to apply the jus gentium and conventional international law more credibly and responsibly; and to redefine the general maritime law in terms of comparative insights and law-of-the-sea norms.'[1128]

Croatia, a further coastal state, is one of the three countries contributing to the underlying study which has already become a State Party to the 2001

[1121] See Tunisian report, p. 3.
[1122] Tunisian report, p. 7.
[1123] For a historic overview see United States report, p. 5 et seq.
[1124] See the list available online at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/USA.htm (last visited on December 31, 2008)
[1125] United States report, p. 6.
[1126] United States report, p. 10.
[1127] See United States report, p. 6.
[1128] United States report, p. 6.

Convention, ratifying it in 2004. It defines its maritime zones in Part II of its massive Maritime Code 1994, which comprises more than 1000 Articles recently revised in 2004.[1129] With regard to underwater cultural heritage the integrative Croatian Cultural Heritage Act (CHA) puts it under a similar regime as on land cultural heritage, with Article 49 (1) of the CHA stipulating that basically the same rules on archaeological excavations and research apply to underwater cultural heritage. Article 50 of the CHA, however, introduces a special permit procedure of the 'competent port authority'[1130] in relation to the removal of 'submerged objects that are or that are thought to be part of the cultural heritage.'[1131]

2.4.2.2. Countries Without Special Regulations

There are however a couple of countries, coastal states as well as land-locked countries, which do not contain regimes of special regulations of law for the protection and preservation of underwater cultural heritage.

No special provisions on underwater cultural heritage can be for example found in the legal frameworks of the Czech Republic[1132] and Switzerland, both land-locked countries.

Also Japan, though completely surrounded by water, does not distinguish between on land and underwater cultural heritage.[1133] It does however define its maritime zones in two separate legal statutes: the 1977 Law on the Territorial Sea and the Contiguous Zone[1134], amended in 1996, and the 1996 Law on the Exclusive Economic Zone and the Continental Shelf[1135].

The same applies to the Taiwanese legal system of underwater cultural heritage protection. Like its Japanese model law, it does not distinguish

[1129] See e.g. B. Vukas, 'Pomorski Zakonik Republike Hrvatske I Međunardono Pravo Mora' [The Maritime Code of The Republic of Croatia and the Law of the Sea], 58 *Zbornik Pravnog fakulteta u Zagrebu* (2008) p. 181 at p. 181; an English summary is available online at http://hrcak.srce.hr/index.php?show=clanak&id_clanak_jezik=32061 (last visited on December 31, 2008)

[1130] Croatian report, p. 12.

[1131] Croatian report, p. 12.

[1132] See Czech report, p. 8 et seq.

[1133] See Japanese report, p. 6, p. 12 and p. 16.

[1134] *領海及び接続水域に関する法律*; an English translation of this law can be found online at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/JPN_1996_Law.pdf (last visited on December 31, 2008).

[1135] *排他的経済水域及び大陸棚に関する法律*; an English translation of this law can be found online at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/JPN_1996_Law74.pdf (last visited on December 31, 2008).

between protective measures for cultural properties on land and underwater. The same rules are applicable to both forms.[1136]

Germany and the Netherlands are some other examples of countries without special regulations for underwater cultural heritage. Although being coastal states and having defined various maritime zones in tools of special regulations of law[1137], they do not distinguish between cultural heritage being found on land or underwater. Protective regulations conceptualized for the first category applicable to archaeological objects and the regime of treasure trove are also applicable to forms of underwater cultural heritage.[1138]

New Zealand, defining its maritime zones in accordance with the 1982 United Nations Convention on the Law of the Sea[1139], has not introduced a special protective regime for its underwater cultural heritage so far, but includes underwater forms of cultural heritage in the general framework of the Historic Places Act 1993 (HPA) as pursuant to Section 2 (a) (ii) of the HPA the protected group of archaeological sites also includes 'site[s] of the wreck of any vessel where that wreck occurred before 1900,' which as Myburgh notes, 'are found within the territorial limits of New Zealand.'[1140] He further points out that various forms of underwater Māori cultural heritage also fall under the general framework of the HPA, be it within the concept of archaeological sites or historic places.[1141] Aside from the expressive mentioning of this form of underwater cultural heritage no special regulations on its protection and preservation can be found in the HPA, as the HPA 'draws no distinction between land-based and underwater cultural heritage.'[1142]

Not only land-locked countries or coastal states which have not ratified the 2001 Convention, but even not all States Parties to the 2001 Convention have enacted national sets of special regulations of law in the fields of

[1136] See Taiwanese report, p. 5 and p. 8.

[1137] A list of the German legislation can be found online at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/DEU.htm (last visited on December 31, 2008); a list of the Dutch legislation is available online at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/NLD.htm (last visited on December 31, 2008); in addition there is also the Act Establishing a Contiguous Zone for the Kingdom – see Dutch report, p. 30.

[1138] See German report, p. 5, p. 7, p. 11 and p. 13. and Dutch report, p. 30.

[1139] See New Zealand report, p. 3, and Territorial Sea and Exclusive Economic Zone Act 1977, the latter one available online at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NZL_1980_Act.pdf (last visited on December 31, 2008).

[1140] New Zealand report, p. 12.

[1141] See New Zealand report, p. 12.

[1142] New Zealand report, p. 12.

underwater cultural heritage. This is, according to Sánchez Cordero, the case in, for example, Mexico which ratified the 2001 Convention in 2006, but has not introduced any national legislation in this respect.[1143]

Spain, also a State Party to the 2001 Convention, does not deal with underwater cultural heritage as special category in its national legal framework either. Spain, defining maritime zones in various legal tools of which some go back to the 1970s,[1144] has not dealt with the issue of underwater cultural heritage protection on a national level so far, but, according to de Salas, might be on the way, as the legislature discussed the creation of a respective preliminary draft in the first half of 2008.[1145] She also points out that the protection of underwater cultural heritage would be dealt with differently compared to on land cultural heritage, as the first one falls under the exclusive competence of centralized legislation.[1146] The only regulation which is said to be already applicable to underwater cultural heritage can be found in the federal Law on the Historical Heritage of Spain (LHHS), as 'excavation, prospecting and archaeology and discoveries'[1147] of archaeological cultural properties also comprise those to be found underwater.

CONCLUSION

The form of underwater cultural heritage has been neglected for a long time. As shown above, the rudimentary regulations contained in the United Nations Convention on the Law of the Sea of 1982 have been subject to heavy criticism.[1148] Less than ten years ago, the international community could find a compromise and installed the 2001 Convention which can possibly lead to a more effective and comprehensive protective regime for underwater cultural heritage. At the same time it must be noted that progress on a national basis is also being made, albeit slowly. Since the 2001 Convention has just entered into force, one might look for massive changes

[1143] See Mexican report, p. 66; for a list of national laws in relation to Mexican maritime zone see e.g. http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/MEX.htm (last visited on December 31, 2008).

[1144] For a list of the respective Spanish legal mechanisms see e.g. http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/ESP.htm (last visited on December 31, 2008).

[1145] See Spanish report, p. 4.

[1146] See Spanish report, p. 3.

[1147] Spanish report, p. 17.

[1148] See *supra* I.6.1.

of national legislation in vain. Exceptions however prove the rule: while some countries which signed or have ratified the 2001 Convention still lack any national implementation steps, Italy – despite not yet being a State Party to the 2001 Convention – has shown some first signals as its core law, the Code of Cultural Properties and Landscape (CCPL), already expressly refers to that convention asking for taking safeguarding measures up to and including its contiguous zone in accordance with the 2001 Convention.[1149] It will also be interesting to see how Spain will react to the input of the 2001 Convention which it ratified in 2005; interesting also due to the fact that the Spanish competence distribution between national and regional legislation for on land and underwater located cultural heritage differ.[1150]

Although neither being a State Party to the 2001 Convention nor being influenced by that convention, the United States represents also the international trend in the protection of underwater cultural heritage, as over the past 20 years its legislative framework has shifted from keeping silent on underwater forms of cultural heritage to actively addressing related issues on a national level as well as on an international level.[1151]

At present, the majority of countries however do not distinguish between on land and underwater located cultural heritage (to a large extent). Many national legal systems include the latter one in their general concepts or declare general rules applicable also to underwater cultural heritage and by doing this concentrate on mere national aspects. However, one cannot deny that especially underwater cultural heritage – due to its location – also heavily depends on international cooperation and conciliation. What Myburgh expressed in relation to New Zealand, being neither a State Party to the 2001 Convention yet nor having any of its domestic laws influenced by that convention – is also the case with regard to other countries: '[O]ne can only hope'[1152] for further ratifications of the 2001 Convention and influences on national legislation. As the Italian example shows the 2001 Convention at least raised the awareness of the need for a more comprehensive approach to some extent; time will tell if this could lead the way.

[1149] See *supra* II.2.4.2.1.
[1150] See *supra* II.2.4.2.2.
[1151] See *supra* II.2.4.2.1.
[1152] New Zealand report, p. 3

INTAGIBLE CULTURAL HERITAGE

3.1. General Issues

In the last twenty years, international cultural heritage law has shifted its focus from focusing solely on tangible cultural heritage to comprising also intangible cultural heritage. The WHC Operational Guidelines have been amended to include certain aspects of intangible cultural heritage. In 2003, the Convention for the Safeguarding of the Intangible Cultural Heritage was adopted in order to provide a legal framework for safeguarding intangible cultural heritage. Two years later, in 2005, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions was adopted. This rounded off the international framework in the field of intangible cultural heritage protection, which had been initiated by the latest trends within the concept of the 1972 Convention and widened by the 2003 Convention, by focusing on the preservation of cultural diversity as enrichment for mankind.[1153]

In addition, recently, more and more certain traditional cultural products have become commercially valuable and have even led to the creation of new branches of industry. This has created tension between the communities who preserved these traditions for generations and the companies who want to exploit them commercially.

In the following subchapters we will take a short look at how various countries deal with non-materialized forms of intangible cultural heritage. We will touch on several aspects, including the following questions: Do the countries include the regulation of intangible cultural heritage in their legal frameworks? Do they introduce special rules? Are there differences in comparison to tangible forms of cultural heritage? And what can be said about the role of groups and communities – how are they involved in national issues related to intangible cultural heritage?

3.2. National Approaches

One has basically to distinguish between two opposite systems: on the one hand one can find a group of countries which address the issue of intangible cultural heritage protection by special heritage laws, be it in connection with laws also regulating tangible cultural heritage or in separate laws, be it on a

[1153] For details see *supra* I.8.2.

federal or (also) on a regional level. On the other hand there is also a group of countries which (so far) have not installed a special regime, but instead – in the best case – touch on the issue in laws not primarily focusing on cultural heritage and its protection, but mainly in the framework of intellectual property law.

In the following we will outline these two basic concepts showing how different countries deal with the same issue in different ways, some of them rather comprehensively, others only to some extent – if any.

3.2.1. Countries With Special Regulations

When it comes to the protection of intangible cultural heritage, Croatia is among the most progressive countries as it installed a special regime covering this form of cultural heritage in addition to already existing safeguarding measures 'not directly related to the protection of … intangible cultural heritage'.[1154] Intangible cultural heritage protection forms one pillar of the 1999 Croatian Cultural Heritage Act (CHA) and – though not being regulated in as much detail as its tangible counterpart – is subject to the protective regime of the CHA. The CHA defines the term intangible cultural heritage as 'different forms and manifestations of human spiritual creativity in the past'[1155] with 'traditional and cultural expressions … enlisted as particular forms of intangible cultural heritage.'[1156] While the CHA itself does not provide for a set of criteria applicable in the designation process, the Committee for Intangible Cultural Heritage as the main advisory body to the Ministry of Culture uses a detailed internal 'control list'[1157] for its recommendations, also stressing the position of related groups and communities as right holders.[1158] The involvement of groups and communities must however not be understood in a way which grants the respective group or community the right to prohibit the use of its intangible cultural heritage and thus does not give them an absolute position comparable to ownership rights. Instead, if a certain form of intangible cultural heritage is recognized to "belong" to a group or community, it will

[1154] Croatian report, p. 22.

[1155] Article 9 CHA; see also Croatian report, p. 24 et seq.; intangible cultural heritage comprises especially 'language, dialects, speeches, toponyms and oral traditions and expressions; folklore creativity in the field of music, dance, performing arts, rituals, social practices and other traditional national values; traditional skills and craftsmanship' – see Croatian report, note 61 and Article 9 CHA.

[1156] Article 9 CHA, see also Croatian report, p. 18.

[1157] Croatian report, p. 18 et seq.

[1158] For the list and details refer e.g. to Croatian report, p. 19.

lead to financial remuneration for its use, funds form the 'monument annuity' under Articles 112 and 113 of the CHA.[1159] Safeguarding measures in relation to intangible cultural heritage resemble those used also for tangible forms of cultural heritage, including inter alia documentation and listing in the Register of the Cultural Heritage of the Republic of Croatia, research and promotion.[1160] Listing of intangible cultural heritage is important, as only listed forms will be covered by the safeguarding regime of the CHA.[1161] If intangible cultural heritage is not at the same time protected by intellectual property laws – which it can be subject to fulfilling the pertinent intellectual property law requirements – its use is basically not prohibited under the CHA. When it comes to the question of misappropriation one has therefore to distinguish between three possible scenarios: unlisted forms of intangible cultural heritage to which intellectual property laws are not applicable are not protected, neither by the CHA nor by intellectual property laws. Designated and enlisted forms, not at the same time falling under the intellectual property law regime are subject to the remuneration concept of 'monument annuity', but their use is not prohibited. Forms (also) protected by intellectual property law cannot be used freely, as they underlie (also) the control of the intellectual property law regime. Gliha and Josipovic however note that the CHA system does not work properly yet by saying that 'the measures envisaged in the CHA are not yet applied in their full extent. In fact, except for registration of the intangible cultural heritage other measures do not yet function. The system is yet to be established. At this moment, therefore, we cannot speak about particular measures for the protection of the intangible cultural heritage.'[1162]

Like Croatia, but with a longer legal tradition, the Japanese legal framework includes the form of intangible cultural heritage in its main law on cultural heritage protection, the 1950 Japanese Law for the Protection of Cultural Properties (LPCP). Article 2 of the LPCP includes two groups of intangible cultural heritage – intangible cultural heritage in a narrow sense and intangible folk cultural heritage – defining them as: (1) 'Plays, music, artistic techniques and other intangible cultural products which have for Japan high historical or artistic value'[1163] and (2) 'Manners, customs, folk performing arts … related to housing, food and clothing, trades, faith, annual festivals, etc. … which are indispensable for the understanding of the transitions in the

[1159] For details see Croatian report, p. 21 et seq.
[1160] For details see Croatian report, p. 19 et seq.
[1161] See Croatian report, p. 21.
[1162] Croatian report, p. 22.
[1163] Article 2 lit 2 LPCP and Japanese report, p. 4.

lives of the Japanese people.'[1164] Designation, listing and division into two levels are basically similar to the group of tangible cultural heritage.[1165] The sets of criteria elaborated on an administrative level do however differ from their counterparts applicable to tangible cultural heritage and were drafted for exclusive application in relation to the various subgroups of intangible cultural heritage.[1166] In contrast to the group of tangible cultural heritage, groups and communities can be accredited as holders of intangible cultural heritage under the Japanese legal framework. Once designated as intangible cultural heritage, it is to be promoted, protected and passed on to the next generation by the respective holder. As far as the question of misappropriation of intangible cultural heritage is concerned, the Japanese legal system has no particular mechanism to deal with this. Though regulating the groups and designation process of intangible cultural heritage in detail, definitions and special regulation of intangible cultural heritage misappropriation are missing.[1167] One might argue that e.g. Article 76 of the LPCP ('Order or Advice on Custody' of historic sites, places of scenic beauty and/or natural monuments) could therefore somehow be subject to conclusions by analogy, empowering the Commissioner of the Agency for Cultural Affairs to give only the necessary advice and/or recommendations and only 'in cases where those improper uses bring about changes in the content of intangible cultural property and have a grave impact on the cultural property's value.'[1168] Aside from that, general intellectual property law rules come to application if its conditions and requirements are met.[1169]

Taiwan is another country taking an integrative approach by including the protection of intangible cultural heritage in its main law on cultural heritage, the 1982 Cultural Heritage Preservation Act (TCHPA). The Taiwanese approach nevertheless differs from the before-mentioned Croatian and Japanese systems, as the regulation on intangible cultural heritage is also based on a second important law, the new Protection Act for Traditional Intellectual Creation of Indigenous People (PATIC), enacted in 2007. The PATIC is a comparatively progressive law, as it grants extensive rights to groups and communities as holders of intangible cultural heritage. As far as the protection under the TCHPA is concerned one can say that two of seven

[1164] Article 2 lit 3 LPCP and Japanese report, p. 2.
[1165] See Japanese report, p. 16 et seq. and *supra* II.2.1.2. and II.2.2.2.
[1166] For a list of the sets of criteria see also Japanese report, p. 16 et seq.
[1167] See Japanese report, p. 19.
[1168] Japanese report, p. 19.
[1169] See Japanese report, p. 19.

cultural heritage groups[1170] of Article 3 of the TCHPA comprise intangible forms: traditional arts and folklore. Designation and registration of intangible cultural heritage under the TCHPA primarily leads to a governmental 'preservation plan including recording, inventory and teaching'[1171] with preservation and promotion guided by the National Center for Traditional Arts. The PATIC, on the other hand, introduces an innovative concept of respecting and protecting intangible cultural heritage forms related to groups and communities. Under the PATIC 'indigenous people or tribes may apply for the protection of their traditional intellectual creation.'[1172] Once designated and registered by the Council of Indigenous People under the protectorate of the Taiwanese cabinet, the respective group or community is regarded as the exclusive right holder. In the case of commercial exploitation of cultural intangible heritage protected under the PATIC the holding group or community is entitled to claim for damages.[1173]

The classification of the Tunisian system in relation to intangible cultural heritage protection is difficult, as it does not provide for a comprehensive regime comparable to the above-mentioned ones. That leads Ben Jemia to the statement that 'there exists no special text'[1174] for the safeguarding of intangible cultural heritage. It is true that there is no comprehensive law in this field. However, Tunisia – being a State Party to the 2003 Convention – enacted a legal tool aiming at controlling the use of folklore, an important pillar of intangible cultural heritage: the 1994 Law on Literary and Artistic Heritage[1175] (LLAH). The LLAH introduces an authorization system for the extensive use of folklore under the control of the Ministry of Culture and Protection of Heritage. According to Ben Jemia, folklore, defined by Article 7 of the LLAH as 'any artistic heritage inherited from the previous generations and connected to the customs and to the traditions and to any appearance of popular creation, such as popular stories, literature, music and dance,'[1176] finds its protection if being 'qualified as cultural when it has a national value from the historical, aesthetic or artisanal viewpoint.'[1177] The protective system takes also copyright issues into account, protecting folklore against 'any deformation or alteration.'[1178] Promotion of intangible

[1170] For a complete listing see *supra* II.1.1.2.1.
[1171] Taiwanese report, p. 8 et seq.; see also Articles 60 and 61 TCHPA.
[1172] Taiwanese report, p. 2.
[1173] See Taiwanese report, p. 9.
[1174] Tunisian report, p. 5.
[1175] See Tunisian report, p. 6.
[1176] Tunisian report, p. 5.
[1177] Tunisian report, p. 5 et seq.
[1178] Tunisian report, p. 6.

cultural heritage is also of importance in Tunisia which established a system of respective financial state subsidies.[1179]

3.2.2. Countries With Special Regulations (Also) On A Regional Basis

Due to its constitutional distribution of legislative competences in the field of cultural heritage with the main competences given to the cantons Switzerland is a prime example of a country with (also) regional tools of special regulations of law for intangible cultural heritage protection.[1180] In addition, communities and groups play an important role in this context, as they are 'one of the main holders of intangible cultural heritage.'[1181] Private holders of intangible cultural heritage rights, be it an individual, a group or a community, are expressively considered to be the core addressees of protective measures, assisted by various institutional bodies and subsidized with financial aid, either on a federal or on a cantonal level – or even both –, depending on the importance of the respective form of intangible cultural heritage for the canton or the whole federation.[1182] Various (cantonal) intangible cultural heritage forms are summarized and voluntarily enlisted on the Swiss Directory of Intangible Cultural Heritage (hereafter the 'DICH') under the auspices of the Federal Office of Cultural (hereafter the 'FOC'), responsible for cultural heritage issues on a federal basis.[1183] The DICH distinguishes between the nine main groups of music, singing, dance, custom, theater, regional language, handicraft, local cooking and traditional costume listed in the five grids of (1) music, singing, dance; (2) yodel, alphorn, flag thrower, other; (3) costume, customs, ritual, traditional game; (4) theater, tale and legend, regional dialect, patois; and (5) know-how of handicraft, trades and local cooking.[1184] While, as pointed out further below, the cantons are the main holders of legislative competences in the field of

[1179] See Tunisian report, p. 6.

[1180] See Swiss report, p. 21 et seq. for details.

[1181] Swiss report, p. 21.

[1182] See e.g. Swiss report, p. 21, with reference to Article 2 (1) Cantonal Act on Cultural Affairs of the Canton of Fribourg defining 'that cultural activities and the protection of the cultural heritage are mainly in the concern of private persons;' or Swiss report, p. 22 with reference to Article 2 (1) Cantonal Act on the Promotion of Culture of the Canton Grison providing 'for state support for private persons, groups and communities,' and Article 11 of the same cantonal law listing the following criteria for the determination of whether an expression is worth being subsidized: 'the quality of the project, its importance for the Canton of Grisons, the accessibility for different sections of the population and the partial self-financing.'

[1183] The Swiss Directory of Intangible Cultural Heritage and further details is available online under http://www.culturaldiversity.cioff.ch/swissRepertoire/en/Intro.html (last visited on December 31, 2008).

[1184] See http://www.culturaldiversity.cioff.ch/swissRepertoire/en/structure.html for details (last visited on December 31, 2008).

cultural heritage protection, there are also several important regulations on a federal basis, mainly focused on coordinating various tasks related to the 'cultural producing and the cultural diversity'[1185], covering tasks attributable to purely intangible forms and the 'preservation and impartation of culture,'[1186] applicable to mostly tangible, or also materialized intangible cultural heritage forms. In this context it should also be noted that the FOC is not the only Swiss institution with federal tasks with regard to intangible cultural heritage. The independent Pro Helvetia Foundation (hereafter the 'PHF') is another very important institution, mainly involved in cultural sponsoring and practical assistance in culture-related projects.[1187] Federal tasks, which are based on a fragmentized legal framework based on the Swiss Constitution, federal laws and international tools, cover 'activities of national interest [that] exclude in principle activities and efforts of a purely regional or local character,'[1188] with a definition of the term national interest provided by the FOC as: 'an activity is of national interest when it refers to the constitutional safeguard of existing institutions and activities (e.g. the Foundation «Pro Helvetia») or when it refers to the establishment of an appropriate framework for cultural activities.'[1189] As already mentioned and stressed by Belser, Rüegg and Molinari 'the primary competence in cultural matters rests … with the [26] Cantons.'[1190] Sets of criteria for designation of an expression of regional intangible cultural heritage, the extent of specific legal regulations and the means of safeguarding and promotion taken on a regional level differ from canton to canton. Several parameters can be found in the majority of cantonal legislation, including the involvement of groups and communities – also reflected by the information about the holders of the various cantonal forms of intangible cultural heritage registered in the DICH –, regional funding, research and awareness-raising measures as well as the protection of languages.[1191] As far as the national implementation of the 2003 Convention is concerned, Switzerland, which ratified it in July 2008, argues that its active policy has already

[1185] Defined by Belser, Rüegg and Molinari as comprising 'the protection and promotion in the fields of film, visual arts, design, the protection of language minorities and travelling communities as well as cultural education for adults and the sponsorship of Swiss schools abroad' – see Swiss report, p. 23 and p. 23 et seq. for further details.

[1186] Defined by Belser, Rüegg and Molinari as comprising 'the fields of monument protection, the support of archives and the Confederation's collections, the international transfer of cultural heritage and the contact point for stolen art' – see Swiss report, p. 23 and p. 23 et seq. for further details.

[1187] See Swiss report, p. 23 et seq. for details.

[1188] Swiss report, p. 24.

[1189] Swiss report, p. 24.

[1190] Swiss report, p. 30.

[1191] The Swiss report offers a detailed overview of various selected cantonal systems, comprising the cantons of Grisons, Appenzell Ausser Rhoden, Bern, Fribourg and Ticino – see Swiss report, p. 30 et seq.

realized most of the international regulatory framework.[1192] Belser, Rüegg and Molinari however also note that – in relation to the 2003 Convention[1193] – there are still open tasks, including a comprehensive, not only voluntary, inventorying of the Swiss intangible cultural heritage.[1194] As the cantonal competences are relatively strong, the Swiss national regime has also to rely on cooperation with and among the cantons. The national protection of intangible cultural heritage is supplemented by rules applicable in cases of misappropriation, rules which are however not constructed as special rules. Instead, intangible cultural heritage is often protected by the framework of intellectual property law, limited to the extent of its relevance to intellectual property law.[1195]

Spain is another example of a country with detailed regulations on intangible cultural heritage on a regional basis – 'although without many practical results up to now.'[1196] The only, but practically dead, provision related to intangible cultural heritage protection on a centralized basis it to be found in Article 47.3 of the LHHS which reads: 'It is considered that all knowledge and activities stemming from traditional techniques or models used by a specific community have ethnographical value and will enjoy the protection of the administration. When this knowledge or these activities are in danger of disappearing, the competent Administration will adopt the necessary measures for the research and scientific documentation of these assets.'[1197] De Salas explains that there however exists a quite extensive framework covering intangible cultural heritage issues on a decentralized basis. Regional regimes of intangible cultural heritage show big differences, with some regional laws dealing with the issue extensively, others only peripherally. A comprehensive definition of the term intangible cultural heritage can e.g. be found in Article 1.3 of the Law of the Autonomous Community of Valencia on Cultural Heritage which states that '[t]he most

[1192] See Swiss report, p. 41 et seq. for details.

[1193] In contrast to the 2003 Convention which needs some more national implementation, the 2005 Convention is considered as being totally realized, which is reflected by the view that due to the already active national approach 'the [2005] Convention is rather strengthening the legal framework by legitimating the maintenance and development of measures for the protection and promotion of the diversity of cultural expressions' – see Swiss report, p. 44 with reference to Eidgenössisches Departement des Inneren, *Ratifikation der UNESCO-Konvention zum Schutz und zur Förderung der Vielfalt kultureller Ausdrucksformen – Erläuternder Bericht* [Report on the Ratification of the UNESCO Convention on the Protection and Promotion of the Diversity of Culture] (2006; online report, available at http://www.admin.ch/ch/d/gg/pc/documents/1402/Bericht_d.pdf 2000; last visited on December 31, 2008) p. 14.

[1194] See Swiss report, p. 42.

[1195] See Swiss report, p. 44 for details.

[1196] Spanish report, p. 18.

[1197] Spanish report, p. 18.

significant creations, knowledge, techniques, practices and uses, of the Valencian lifestyle and traditional culture, are part of the Valencian cultural heritage. As do intangible assets such as the expressions of the traditions of the Valencian people in their music, art, gastronomy and recreation, and especially those which are transmitted orally and those which support or increase the use of the Valencian language,'[1198] a concept which is further extended to 'relevant manifestations or events in the evolution of technology in the Community of Valencia as well as elements making up the Cultural Heritage of Valencia.'[1199] Other regional concepts are narrower, including especially minority languages.[1200] Depending on the region intangible cultural heritage can be subject to local inventorying[1201] and various protective means, including research, teaching and promotion.[1202] It must however be noted that the regional concepts are of comparatively recent origin, which is the reason why in some cases the practical realization is still pending and the interrelationship between and inclusion of various groups and communities is not yet very clear.[1203]

The Mexican Constitution was subject to two important amendments in 1992 and 2001 recognizing and stressing the importance of 'Mexico's polycultural nature, initially sustained by its Indigenous people.'[1204] The amended Article 2 of the Mexican Constitution now addresses also cultural rights of indigenous people, including inter alia their languages or knowledge.[1205] On a federal basis intangible cultural heritage issues are

[1198] Spanish report, p. 19.

[1199] Article 1.4 Law of the Autonomous Community of Valencia on Cultural Heritage and Spanish report, p. 19 et seq.

[1200] See Spanish report, p. 18 et seq. for details.

[1201] For details on the question of inventorying see Spanish report, p. 21.

[1202] For details see Spanish report, p. 20.

[1203] See Spanish report, p. 20.

[1204] Mexican report, p. 46.

[1205] In the Mexican report, note 11, Sánchez Cordero gives the following translation of the relevant parts of the extensive Article 2 Mexican Constitution: 'The Mexican Nation is one and indivisible. The national State has a multicultural composition, originally sustained on its indigenous peoples, who are those regarded as indigenous on account of their descent from the population that originally inhabited the Country's current territory at the time of colonization, who retain some or all of their own social, economic, cultural and political institutions…This constitution recognizes and protects the right to self-determination of indigenous peoples and communities and, consequently, their right to autonomy, so that they may:…-Decide the ways of their community life as well as their social, economic, political and cultural organization….Preserve and promote their languages, knowledge and all those elements that constitute their culture and identity…To protect this right, in all trials and procedures to which they are party, individually or collectively, the particularities of their customs and culture must be taken into account, respecting the provisions of this Constitution. …. Guarantee and increase educational levels, favoring bilingual and cross-cultural education, literacy, the conclusion of elementary education by students, technical training and medium and higher education….To define and develop educational programs of regional content which recognize the cultural heritage of their peoples in accordance with the laws on the

however not yet protected comprehensively. Although indigenous languages are protected to some extent as they might be used as official court languages, no extensive federal legislation has been enacted so far for the implementation of the 2003 Convention and the 2005 UNESCO Conventions, and the only traces of protective measures can be found on an institutional basis, in the form of e.g. the National Institute's of Anthropology and History[1206] or the National Agency for the Development of Indigenous Populations[1207], covering only certain areas. Under the Mexican system, the protection of intangible cultural heritage, especially in relation to indigenous groups and communities is rather a matter of regional legislation. As Sánchez Cordero explains there are so far (as of December 31, 2008) five Mexican states – the states with the highest percentage of indigenous population – which have enacted regional laws aimed at the protection of intangible cultural heritage, in order to protect the particularities of the indigenous identity and culture.

3.2.3. Countries Without A (Special) Legal Regime Of Intangible Cultural Heritage Protection

France has ratified the 2003 Convention. On a national level however, one will look for a comprehensive implementation of the international tools in vain, as 'French law does not provide any specific dispositions for its preservation.'[1208] The main national legal statute covering cultural heritage protection, the French Cultural Heritage Code, deals exclusively with tangible forms. Two aspects more or less directly related to intangible cultural heritage also of interest in other national frameworks outlined below can be found in legal tools. Firstly, the comparatively old Statute on Registration of 1537[1209] aims at also documenting forms of intangible cultural heritage (but only) if materially expressed in 'any document passed on to the public, whatever its nature [is].'[1210] This task, carried out by various institutions, shall inter alia facilitate the work of researchers in this field. Secondly, the Statute Regarding the Use of the French Language[1211] deals with language issues, however, as Cornu points out, not in full

matter and consulting it with indigenous communities. To promote respect for and knowledge of, the diverse cultures in the Nation'.

[1206] See Mexican report, p. 43.

[1207] See Mexican report, p. 44.

[1208] French report, p. 65.

[1209] *Ordonnance de Montpellier du 28 décembre 1537.*

[1210] French report, p. 65.

[1211] *Loi n° 94-665 du 4 août 1994 relative à l'emploi de la langue française.*

conformity with the European Charter for Regional or Minority Languages.[1212] Misappropriation of traditions is only regulated indirectly and only on the condition that it falls under the regime of intellectual property law. In this context it should be said that the protection under intellectual property law is however 'not very useful'[1213], as not only does it not grant specific rights to groups and communities, but also because of the limited period of time with regard to the legal protection.[1214] On the other hand, the French legal system provides for several promotion tools covering also issues of intangible cultural heritage, e.g. based on financially subsidized 'quotas for film and radio broadcasting'[1215] of French productions.

Italy has also ratified the 2003 Convention and has recently added one provision related to the issue of intangible cultural heritage protection into its Code of Cultural Properties and Landscape (CCPL). Article 7 bis of the CCPL, inserted in 2008, says that 'the expressions of collective cultural identity contemplated by [the 2003 and 2005 UNESCO conventions] are subjected to the provisions of the present code in the event that they are embodied into material manifestations and the premises and conditions for the applicability of Article 10 exist [i.e. that these expressions may be included within the concept of cultural properties].'[1216] At present, there is however no national legislation addressing specifically non-materialized intangible cultural heritage, a fact which leads to two conclusions: on the one hand, as there is no national implementation of the 2003 Convention, the non-self-executing provisions of this convention at present may not be practically implemented. On the other hand, however, intangible cultural heritage plays a role in combination with tangible cultural heritage, as it can be of importance, if 'embodied into material manifestations.'[1217]

Canada is another good example of a country with no special comprehensive legal framework aimed at protecting intangible cultural heritage. The Canadian approach so far is rather conservative and attempts to cover issues related to intangible cultural heritage protection by its intellectual property regime.[1218] Paterson points out that a pillar of the Canadian intellectual property regime is formed by the group of moral rights, having 'been

[1212] See French report, p. 65.
[1213] French report, p. 66.
[1214] See French report, p. 66 for details.
[1215] French report, p. 67.
[1216] Italian report, p. 5.
[1217] Article 7 bis CCPL and Italian report, p. 5.
[1218] See Canadian report, p. 9.

acknowledged in Canada since 1931, in anticipation of Canadian accession to the 1928 revision of the Berne Convention. The Berne Convention established specific protection for attribution … and integrity'[1219], the latter one facilitating the authors chances to 'prevent distortion, mutilation, modification or other treatment of his or her work that is prejudicial to the author's honour or reputation.'[1220] Although the protection of moral rights 'has been seen as sympathetic to the concerns of indigenous peoples,'[1221] it has to be stressed that the individual (author), not a group or community is the addressee of this concept. Thus, moral rights law does not aim at protecting intangible cultural heritage of a group or community itself. Issues related to the protection of intangible cultural heritage might be also found partly covered by various other laws, however, none of them is specially designed to protect intangible cultural heritage comprehensively.[1222] When it comes to the issue of misappropriations of traditions, one must again say that – although it is a hot topic in the scholastic world, heavily supplemented by reports of and discussions between UNESCO and WIPO – legal tools in this area are limited. Potentially leading the way towards a change of mindset is a local agreement also including indigenous intangible cultural heritage issues of aboriginal groups: the agreement between the Nisga'a First Nation of British Columbia and the governments of Canada and British Columbia, which is a first, yet still limited attempt at dealing with this issue in more detail.[1223]

Intellectual property laws are also of importance in the United States, which has not yet ratified the 2003 Convention. On a federal level no set of special regulations of law aimed at the safeguarding of intangible cultural heritage can be found; '[i]nstead, the United States relies on federal copyright and other intellectual property laws.'[1224] This is supplemented by limited federal statutes dealing with rights of indigenous groups: the American Indian Religious Freedom Act (hereafter the 'AIRFA') and the Indian Arts and Crafts Act (hereafter the 'IACA'). While the AIRFA 'seeks indirectly to protect the practice of sacred ceremonies and rites of indigenous people by safeguarding traditional sites'[1225], the IACA rather only indirectly covers issues related to the fight against misappropriation of traditions, as one of its

[1219] Canadian report, p. 9.
[1220] Canadian report, p. 9.
[1221] Canadian report, p. 10.
[1222] See Canadian report, p. 10.
[1223] See Canadian report, p. 11.
[1224] United States report, p. 11.
[1225] United States report, p. 11.

main aims is 'to establish a procedure for certification of authentic work created by an enrolled member of a recognized tribe.'[1226] In addition, and like the case in Canada, some United States state laws and the federal Visual Artists Rights Act of 1999 address also moral rights of artists, the latter one – without the requirement of copyright registration – according to the leading judgment in the court case Carter v. Helmsley-Spear Inc. basically granting three rights: 'the right of attribution, the right of integrity and, in the case of works of visual art of "recognized statute," the right to prevent destruction'.[1227]

The attitude of other countries is even more reserved. According to Šturma, the Czech Republic 'does not know the concept of intangible cultural heritage.'[1228] It covers issues related to the protection of intangible cultural heritage and misappropriation of traditions only – and only as far as it is subsumable – under the regime of its intellectual property law. This may be due to the fact that the protection of cultural heritage in the Czech Republic is based on the only partially amended Law on the State Care of Cultural Heritage which does not include the concept of intangible cultural heritage (yet). However the concept of intangible cultural heritage is lacking only in national legislation. Recently, the Czech Republic has entered into some bilateral international cultural agreements (with e.g. Mexico, Argentina, Peru, Poland, Slovakia and Romania) which also aim at cooperating in issues related to the protection of intangible cultural heritage. The Ministry of Culture has recently started to deal with intangible cultural heritage, and the Government of the Czech Republic adopted its resolution on the Plan for more effective care of traditional popular culture[1229]. The same is the case in Germany, where additionally 'intangible cultural property is protected and safeguarded [only] by the law of intellectual property if it is part of any intellectual property right (e.g. copyright, design) and by general private and criminal law.'[1230]

Denmark is another country which shows no ambitions in ratifying the 2003 Convention. Tamm and Østrup, who note that Denmark gives its preference to institutional promotion, documentation, research and education of and with respect to intangible cultural heritage rather than to its protection by legal regulations, express the Danish view by saying that 'if, however,

[1226] United States report, p. 11 et seq.
[1227] United States report, note 28; see United States report, p. 11 and note 28 for details.
[1228] Czech report, p. 10.
[1229] Czech report, p.10.
[1230] German report, p. 13.

Demark was to ratify the [2003] Convention, it is most likely that this would be only as a token of Danish solidarity with other countries, which have issues as regards the safeguarding of their intangible cultural, and that it would not entail any implementation of new Danish legislation.'[1231] In the context of institutional safeguarding of Danish intangible cultural heritage two core institutions should be mentioned: the Danish Folklore Archives and the Danish Language Council. The first with its long history of more than 100 years of state research is mainly responsible for archiving various forms of intangible cultural heritage and carrying out respective research under the auspices of the Ministry of Culture.[1232] Also under the patronage of the Ministry of Culture, the Danish Language Council on the other hand focuses solely on research related to the Danish language, its development and supervision and reflects the important role of language as central piece of intangible cultural heritage.[1233] As far as the question of misappropriation of traditions is concerned Denmark takes a similar approach as most other countries, as it does not provide for any set of special regulations of law, but instead puts its control under the framework of intellectual property law.[1234] However, even in cases where the pertinent intellectual property law rules find their application, one must bear in mind that groups and communities are not addressed as right holders under that concept due to the fact that they are not considered to be legal entities.

Reluctant to regulate the protection of intangible cultural heritage comprehensively by legal statutes, the Netherlands takes a similar position to Denmark. Lubina reflects the Dutch view with references to the Dutch Ministry of Culture and the Meertens Institute KNWA, an important Dutch research institute in the area of language and culture. With reference to the last one she says that 'there exist academic, ethical, as well as discipline-internal problems with the [2003] Convention.'[1235] The Netherlands emphasizes the evolving character of intangible cultural heritage[1236] arguing

[1231] Danish report, p. 36.
[1232] For details see Danish report, p. 36 et seq.
[1233] For details see Danish report, p. 37.
[1234] See Danish report, p. 37.
[1235] Dutch report, p. 54.
[1236] For a Dutch definition of the term *intangible cultural heritage* Lubina refers to Frijhoff who says that it exists of basically three components: 'firstly, it is something transmittable, ranging from a past performance, via an experience, idea, custom, spatial element, building or artefact, to a set of these. Secondly, one can only speak of (intangible) cultural heritage provided that a human group exists that is able and ready to recognize these objects as a coherent unit, to transmit and to receive them. Thirdly, there must be a set of values linking the object inherited from the past to a future use, in a sense of meaningful continuity or equally meaningful change' – see Dutch report, p. 56 with reference to W. Frijhoff, 'Cultural Heritage in the Making: Europe's Past and its future Identity', in J. van der Vos, ed., *The Humanities in the*

that this form of cultural heritage is 'a living phenomenon with change being inevitable characteristic'[1237] and strictly opposes the idea of containing the status quo of intangible cultural heritage and its inventorying[1238] as 'undesirable'[1239] and 'meaningless'.[1240] With the exception of minority languages, which are actually subject to protection by special regulations of law[1241] and which are the only forms of certain rights given to groups and communities in the field of intangible cultural heritage, safeguarding of intangible cultural heritage is – like e.g. also in Denmark – rather realized on an institutional basis, resting 'upon the shoulders of museums and scientific and policy making institutions.'[1242] Institutes such as the before-mentioned Meertens Institute KNAW or the Dutch Centre for Folk Culture and also Universities and volunteer groups build a network for the research and promotion of intangible cultural heritage in the Netherlands.[1243] When it comes to the question of fighting misappropriations of traditions and other forms of intangible cultural heritage, the Netherlands provides for the same legal framework as most other countries: the major instruments – as far as applicable – are provided by the framework of intellectual property law.[1244]

3.2.4. The New Zealand Model

Although New Zealand legislation does not protect non-materialized forms of cultural heritage as defined under the 2003 Convention and would thus fall under the group of the previous subchapter, the New Zealand model should be dealt with separately due to the important position of Māori also in the field of intangible cultural heritage.

European Research Area – International Conference Amsterdam, The Netherlands 2 September 2004 (Den Haag, Netherlands Organisation for Scientific Research, Humanities 2005).

[1237] Dutch report, p. 55 with reference to G. Muskens, Immaterieel cultureel erfgoed in Nederland: rapportage op basis van interviews met 33 deskundigen, in opdracht van het ministerie van OCW, directie Cultureel Erfgoed, 2005, [*Intangible Cultural Heritage in the Netherlands: Report Based on Interviews with 33 Experts, by Order of the Ministry of Education, Culture and Science*] (Lepelstraat, DOCA Bureaus 2005) at p. 7.

[1238] Although there are no Dutch inventories comparable to the inventories under the 2003 Convention, certain databases and other forms of lists can be found in the Netherlands – see Dutch report p. 57 et seq. for details.

[1239] Dutch report, p. 57.

[1240] Dutch report, p. 57; for details on the Dutch understanding see Dutch report, p. 54 et seq.

[1241] See Dutch report, p. 552 et seq. for details.

[1242] Dutch report, p. 55.

[1243] For details see Dutch report, p. 58 et seq.

[1244] See Dutch report, p. 60 et seq.

As Myburgh points out 'the concept of taonga[1245], recognised under the Treaty of Waitangi, is very broad, encompassing Māori tangible and intangible cultural heritage and traditional knowledge.'[1246] For example, intangible cultural heritage functions as an important factor in the designation of wāhi tapu and wāhi tapu areas as tangible cultural heritage.[1247] In addition based on the Treaty of Waitangi Māori groups have filed various claims resulting in the enactment of legal statutes also dealing with issues related to intangible cultural heritage protection and fruition by Māori, such as sets of special regulations of law protecting and promoting inter alia Māori language or Māori participation in (television) broadcasting.[1248]

The involvement of Māori and their intangible cultural heritage in the national (intangible) cultural heritage protection are still in flux. In this context Myburgh refers to one of the latest claims – at the time of writing this report still pending – in relation to Māori participation in the field of intangible cultural heritage: claim Wai 262 before the Waitangi Tribunal.[1249] One of its subjects covers Mātauranga Māori (traditional Māori knowledge) and the question of its 'retention and protection,'[1250] an area which has not been of interest for legal protection so far. One has to wait for the outcome of this claim and the government's reaction to the tribunal's recommendations.

The question of misappropriation of intangible cultural heritage has quite recently been subject to increased interest, especially when it comes to Māori cultural heritage. The basic legal framework dealing with the issue of intangible cultural heritage and its exploitation, the intellectual property regime, was amended in 2005 to include Māori matters and now especially also comprises regulations on Māori related trade mark registration and the installation of a specialized advisory body in this area.[1251]

[1245] See *supra* II.1.2.2. for a definition.
[1246] New Zealand report, p. 18.
[1247] See *supra* II.1.1.2.2. for a definition of the two terms and details.
[1248] For details see New Zealand report, p. 19 et seq. and p. 22.
[1249] According to the official website of the 1975 established Waitangi Tribunal the tribunal 'is a permanent commission of inquiry charged with making recommendations on claims brought by Māori relating to actions or omissions of the Crown, which breach the promises made in the Treaty of Waitangi' – see http://www.waitangi-tribunal.govt.nz/about/about.asp and http://www.waitangi-tribunal.govt.nz/ for further details (last visited on December 31, 2008).
[1250] See New Zealand report, p. 20 et seq. for details.
[1251] See New Zealand report, p. 21 for details.

CONCLUSION

On April 20, 2006, the 2003 Convention entered into force.[1252] Pursuant to its Article 1 its main objectives are inter alia … 'to safeguard the intangible cultural heritage' … 'to ensure respect for the intangible cultural heritage[1253] of the communities, groups and individuals concerned, [and] …to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof'. Roughly one year later, on March 18, 2007, the 2005 Convention followed.[1254] Its Article 1 expresses that its main objectives are inter alia … 'to protect and promote the diversity of cultural expressions, … to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner, … to promote respect for the diversity of cultural expressions and raise awareness of its value at the local, national and international levels, [and] … to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory.'[1255]

As we could see in the preceding subchapters national concepts in the field of intangible cultural heritage protection differ in their approaches as well as in relation to the extent of legal regulation. Three countries, Croatia, Japan and Taiwan, incorporated the regime of intangible cultural heritage – to be understood in a comparatively comprehensive way – into the respective national cultural core law; all three of them did this already prior to the adoption of the two UNESCO conventions. In addition, all three of them grant specific rights to groups and communities according to Article 1 (b) of the 2003 Convention declaring them as holders of intangible cultural

[1252] See http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html#ENTRY (last visited on December 31, 2008).

[1253] Article 2 (1) 2003 Convention defines the term *intangible cultural heritage* as 'the 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. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.' – see also *supra* I.7.2.

[1254] See http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html#ENTRY (last visited on December 31, 2008).

[1255] See also *supra* note 543.

heritage, though in different ways.[1256] While Taiwan, the only contributing country beside the Netherlands the Czech Republic and the United States which is neither a State Party to the 2003 Convention nor to the 2005 Convention, grants extensive compensation claim rights to the holding group or community through PATIC, one of the two major national laws dealing with intangible cultural heritage in Taiwan, Croatia and Japan which are less restrictive in the use of group or community related intangible cultural heritage. The Japanese law does not stipulate interdiction rights or reward rights in the pertinent cultural heritage laws – making possible breaches only punishable by intellectual property laws as far as they are applicable. Croatia takes a position somewhere in the middle, as it does not provide holding groups and communities with interdiction rights, but at least grants them a right to funded rewards in case their intangible cultural heritage is used. Croatia is also a good example of a country with an inventory of intangible cultural heritage in accordance with Article 12 (1) of the 2003 Convention: designated forms of intangible cultural heritage are enlisted in the Register of the Cultural Heritage of the Republic of Croatia.

Registration of intangible cultural heritage and the protection of the role of groups and communities in relation to intangible cultural heritage can also be found in other countries, which in accordance with Article 1 (h) of the 2005 Convention make to some extent also use of their sovereignty 'to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory', a sovereignty which is, due to the national system of legislative competence distribution, mostly exercised on a local or regional level. Switzerland, Spain and Mexico belong to the group of countries of rich cultural diversity, be it in relation to languages, local customs or traditions. And all three of them put the emphasis on regional legislation. The – in terms of cultural diversity – richest Mexican states set up local legal systems of safeguarding various forms of intangible cultural heritage forms associated with groups and communities. The same is the case in various Spanish autonomous communities with their relatively young intangible cultural heritage legislation. One can see that some of those regional laws reflect the ideas of the UNESCO Convention, as e.g. Article 1.3 of the Law of the Autonomous Community of Valencia on Cultural Heritage refers more or less directly to the definition used in Article 2 (1) of

[1256] For group and community involvement within the framework of the 2003 Convention see e.g. T. Kono, ed., *Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable Development* (Antwerp, Intersentia 2009) pp. 1-415.

the 2003 Convention by stating that '[t]he most significant creations, knowledge, techniques, practices and uses, of the Valencian lifestyle and traditional culture, are part of the Valencian cultural heritage. As do intangible assets such as the expressions of the traditions of the Valencian people in their music, art, gastronomy and recreation, and especially those which are transmitted orally and those which support or increase the use of the Valencian language.'[1257] Switzerland, as illustrated in detail by Belser, Rüegg and Molinari builds its intangible cultural heritage concept on an interrelationship of federal and cantonal legislation, with the main competences again being on a regional level.[1258] The Swiss system characterized by its strong protection of local forms and group and community rights in the field of intangible cultural heritage represents many ideas conceptualized in the 2003 and 2005 Conventions, especially when it comes to safeguarding and promoting local forms of intangible cultural heritage and cultural diversity. However, there are still some national shortcomings in the implementation of the two UNESCO conventions, as the Swiss Directory of Intangible Cultural Heritage does not cover the whole Swiss territory yet and moreover is only subject to voluntary inscriptions.[1259]

Although the approaches taken by those countries show that the issue of intangible cultural heritage protection by legislative means is of growing interest, it cannot be said that this is a universal trend. There is also a big group of countries not providing for special regulations of law in the field of intangible cultural heritage. With the exception of language related issues, countries such as Germany, France, Italy or Canada do not (yet) protect non-materialized intangible heritage by sets of special regulations of law, regulating – at the best – only questions related to misappropriation and only within the framework of intellectual property laws. According to Šturma '[t]he Czech legal order does not [even] know the concept of intangible cultural heritage'[1260], and countries such as Denmark and the Netherlands strongly oppose the idea of regulating intangible cultural heritage by legal statutes. This however does not mean that intangible forms of cultural heritage are not safeguarded in those countries. Understanding safeguarding in a broad way, also including its promotion and natural development, even the Danish and Dutch concepts are not too far away from the national concepts implementing the 2003 Convention by extensive legal frameworks. Promotion and the safeguarding of intangible cultural

[1257] See *supra* II.3.2.2. and Spanish report, p. 19.
[1258] See Swiss report, p. 21 et seq. and *supra* II.3.2.2.
[1259] See Swiss report, p. 42 and *supra* II.3.2.2.
[1260] Czech report, p. 10.

development, not the protection of its status quo, in these two and other just mentioned countries is rather done on an institutional basis, involving research institutes and archives as well as institutions raising the awareness in relation to various forms of intangible cultural heritage. If one understands the main goals of the 2003 Convention as fostering the viability of intangible culture, then one will see that this is accomplished in more countries than only in those with broad legal concepts, however in diverse forms – nearly as diverse as culture can be.

EPILOGUE

We come to the end of the journey through cultural heritage protection and preservation which started with modern international efforts emerging from the need to protect cultural heritage against the threats of destruction in the course of armed conflicts, expanded its point of interest to international awareness raising in relation to various tangible forms of cultural heritage and – for the time being – finds its culmination in the area of intangible cultural heritage. In Part II of this report we took a look at various national concepts of cultural heritage protection and preservation, sometimes with opposing national views, sometimes in accordance with each other and the international frameworks.

Coming back to the initial question also reflected by the title of this report, the impact of uniform laws on the protection of cultural heritage and the preservation of cultural heritage in the 21st century, we should distinguish between two levels, which however show various points of contact: firstly, a legal one and secondly, a cultural one. Both levels can be found on the international as well as on national levels. While the first group comprises legal frameworks laying the foundations for the practical protection and preservation of cultural heritage internationally as well as nationally, the second group rather represents the practical implications of the first group. Taking a look at the impact of uniform laws should be understood in a wide way, also covering the second group and not limiting itself to discussing only the legal parameters.

As this report illustrates, various countries have been influenced by international law on a national legal basis. This is mainly due to the national implementation of the pertinent international tools. Good examples of the national implementation of e.g. the 1970 UNESCO Convention on the

Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 Convention), in some cases prior, in other cases after the respective national ratification, are the Japanese Act on Controls on the Illicit Export and Import and Other Matters of Cultural Property (ACIEI) of 2002[1261], the amendments of the Danish Museum Act (DaMuA) in 2001[1262], the Swiss Act on the International Transfer of Cultural Property (CPTA) enacted in 2005[1263], the German Law on the Return of Cultural Goods (LRCG) enacted just recently in 2007[1264] or the New Zealand Protected Objects Act 1975 (POA) which also implements the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995 UNIDROIT Convention) and which was – despite its title – enacted in 2006[1265]. Some of these national tools of implementation, such as the CPTA or the POA, refer to the 1970 Convention quite directly for example by adopting the same definition of the protected goods, cultural objects. It should be stressed that the 1970 Convention does not and cannot provide for the ultimate solution in the fight against stolen or illegally exported cultural objects. As it is an international legal tool primarily based on public international law[1266] and as its vague language leaves the detailed regulation to its States Parties, various important aspects have to be solved on a national level. For example, core questions related to the burden of proof or time limitations of claims are answered by the national frameworks independently. This leads to differences among national substantive laws which are solved by the tools of conflict of law rules. This exemplifies what was already said in the introduction to this report: classifying international legal tools in the field of cultural heritage protection and preservation as uniform laws must not forget its limitations. For the better understanding of its practical functions it is thus better to refer to this group as representatives of soft uniform laws. It can – as long as it not self-executing – only instruct the respective States Parties to adopt certain measures by implementing its relevant provisions and thus guides them to a goal agreed to internationally. The practical realization of the international provisions has however to be achieved on a national level. In addition, we explained that the international tools of cultural heritage protection and preservation are the results of compromises, often vaguely formulated. In this respect the conventions are also subject to national interpretations as means of practical implementation,

[1261] See *supra* II.2.2.2.
[1262] See *supra* II.2.2.2.
[1263] See *supra* II.2.2.2.
[1264] See *supra* II.2.2.2.
[1265] See *supra* II.2.2.2.
[1266] See *supra* I.5.1.

another reason why in various cases national implementation differs from country to country.

Talking about the fight against illicit trafficking one however has also to include the already mentioned 1995 UNIDROIT Convention. This convention differs from all other international tools outlined in Part I of this report primarily in two regards: first of all it is the only international instrument in the field of private law in the context of cultural heritage protection and preservation to be understood in a comprehensive way. Secondly and in addition, it is widely regarded as being self-applicable, thus potentially showing direct practical impacts. Although this fact is basically a desirable one, unifying the national pillars in the international fight against illicit trafficking, it is also still one of the main obstacles to its large-scale success: in order to work effectively and show far-reaching positive results the 1995 UNIDROIT Convention needs a rate of high acceptance by the World Community. With only 29 States Parties (as of December 31, 2008) and a still hesitant attitude of many major art markets, it is still not as effective as it could – and should – be.

In contrast to the 1995 UNIDROIT Convention, two newer conventions, the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (2003 Convention) already in the triple-digit zone and the 2005 Convention on the Protection and Promotion of the Diversity of Expressions (2005 Convention) rapidly approaching the ratification of its 100th State Party, are more "popular" within the international community. Reasons therefore might be varicolored and include the lack of a comprehensive self-executing character or less interference of the two with private property rights, which are a core, but also a delicate, issue in national legislation.

The issue of intangible cultural heritage protection is also a very interesting one in terms of mutual influences of national and international concepts. As we explained in Part I, international attempts aimed at safeguarding intangible forms of cultural heritage had already been launched a couple of decades before the actual enactment of the 2003 Convention.[1267] After nearly 20 years of stagnancy the first practical results were reflected by the Living Human Treasures Program in 1993 and the Masterpieces of the Oral and Intangible Heritage of Humanity in 1998. Enhancements of the latter one led to the adoption of the 2003 Convention. Influences of and inspirations by the 2003 Convention can be found in several national and regional legislative frameworks, including inter alia newer provincial laws in

[1267] For details see *supra* I.7.1.

Spain, such as the Law on the Cultural Heritage of Navarra of 2005, the Law on the Cultural Heritage of Murcia in 2007[1268], or in Switzerland which despite its longer history of intangible cultural heritage protection and promotion has revised the pertinent national laws such as the General Law on the Promotion of Culture[1269] and the Federal Act Concerning the Pro Helvetia Foundation[1270] due to the implementation of the recently ratified 2003 Convention and the 2005 Convention. There are however several national laws with core regulations of intangible cultural heritage which were already enacted prior to the adoption of the 2003 Convention. The Croatian Cultural Heritage Act introduced the category of intangible cultural heritage comprehensively in 1999; the Japanese Law for the Protection of Cultural Properties included that category as early as 1950, roughly two decades before the issue of intangible cultural heritage was first discussed during the drafting of the 1972 Convention for the Protection of the World Cultural and Natural Heritage (1972 Convention). This interrelationship of national and international legislation exemplifies that certain ideas which are linked to the broad concept of cultural heritage protection and preservation find their origins in national concepts, but are at the same time promoted by the means of major international tools on national levels in other parts of the world.

We touched on the issue of the interaction between intangible cultural heritage and intellectual property law only very briefly, as a detailed analysis would have gone beyond the scope of this report. Nevertheless we saw that this issue is currently a hot topic within the international community[1271]. Some countries refrain from installing special legal frameworks for the protection and preservation of intangible cultural heritage and instead declare intellectual property laws applicable, limited to the extent of the relevance of intangible cultural heritage forms to intellectual property law.

Group and community rights in general are another big issue in the context of cultural heritage protection and preservation. The multifaceted concept of

[1268] See Spanish report, p. 19.

[1269] *Kulturförderungsgesetz*; for details see Swiss report, p. 43 and the explanation of the Swiss Federal Office of Culture (*Bundesamt für Kultur BAK*) available online at http://www.bak.admin.ch/bak/themen/kulturpolitik/00450/index.html?lang=de and http://www.bak.admin.ch/bak/themen/kulturpolitik/00450/01662/index.html?lang=de (last visited on December 31, 2008).

[1270] *Bundesgesetz über die Stiftung Pro Helvetia*; for details see Swiss report, p. 43 and the explanation of the Swiss Federal Office of Culture (*Bundesamt für Kultur BAK*) available online at http://www.bak.admin.ch/bak/themen/kulturpolitik/00450/index.html?lang=de and http://www.bak.admin.ch/bak/themen/kulturpolitik/00450/01662/index.html?lang=de (last visited on December 31, 2008).

[1271] For details about the relationship and some national perspectives see e.g. *supra* I.7.1., I.7.2., II.3.2.3. and the references mentioned there.

group and community rights is interesting primarily because of two reasons: firstly, it reflects regional differences of national approaches and secondly, it also stands for different levels of relevance in relation to the various forms of cultural heritage.

While in many European countries one might look for group or community rights more or less in vain – with the particular exceptions of Croatia with groups and communities as potential holders of intangible cultural heritage rights – indigenous groups and communities often play a more important role in other parts of the world, e.g. in New Zealand, the United States or Canada. The extent to which indigenous groups and communities are involved in the relevant national legislation also differs within the group of the last named countries and sometimes includes major national laws or at least parts of them such as Article II of the New Zealand Treaty of Waitangi aiming at safeguarding 'the unqualified exercise of their chieftainship over their lands, villages and all their treasures'[1272] expressed by the concept of Māori taonga (Māori treasures).[1273] or the United States Native American Graves Protection and Repatriation Act granting 'autonomy to recognized Native American and Native Hawaiian groups in the use and disposition of stipulated cultural material on their lands or otherwise within their authority' [1274] Also in Canada – though on a less extensive level – cultural rights related to indigenous groups and communities can be found, such as in Section 91 of the Indian Act or – on a provincial basis – in the Alberta First Nations Sacred Ceremonial Objects Repatriation Act of 2000, being 'the only one of its kind in Canada and the only Canadian law resembling the [United States] Native American Graves Protection and Repatriation Act.'[1275]

On an international level the participation and involvement of groups and communities is currently of prime interest in the context of intangible cultural heritage protection. The 2003 Convention and the 2005 Convention both reflect the importance that they play in this respect. In many countries which include groups and communities to a certain extent in the regime of cultural heritage protection and preservation the field of intangible cultural heritage is so far also the only national area for group and community involvement. According examples are set by various countries, including inter alia Japan, Taiwan, Switzerland and Croatia. Most of those countries

[1272] New Zealand report, p. 4., see also *supra* II.1.1.1.
[1273] See e.g. *supra* II.1.1.2.
[1274] United States report, p. 4.; see also *supra* II.2.1.2.
[1275] Canadian report, p. 8.; see also *supra* II.1.2.2.

already have a comparatively long tradition of group and community involvement in the field of intangible cultural heritage which dates back to the pre-2003 and/or pre-2005 times. Here again, taking a closer look at the relevant national regulations one will find differences when it comes to the extent of group and community involvement. In this respect Taiwan, neither a State Party to the 2003 Convention nor to the 2005 Convention, chose a quite progressive way by enacting its Protection Act of Traditional Intellectual Creation of Indigenous People which grants extensive rights to groups and communities including the right to claim damages in case of exploitation of intangible cultural creations.

While it is too early to give statements on the impact of the 2001 Convention on the Protection of the Underwater Cultural Heritage (2001 Convention), which has just entered into force,[1276] two other conventions have been widely accepted by the international community: the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflicts (1954 Convention) together with its two protocols (First Protocol and Second Protocol) and the 1972 Convention for the Protection of the World Cultural and Natural Heritage.

The 1954 Convention has to be respected for being UNESCO's first successful attempt of regulating issues related to the protection and preservation of cultural heritage comprehensively on an international level, followed by supportive national implementations. While the modality and extent of national implementation might differ from country to country most States Parties – encouraged by the 1954 Convention – engage in national awareness raising on the possible dangers of destruction and exploitation of cultural heritage caused by and in the course of armed conflicts. In addition to special education of armed forces, several countries have also introduced extensive laws implementing the pertinent provisions of the 1954 Convention, including inter alia Switzerland with its 1968 Federal Act on the Protection of Cultural Property in the Event of Armed Conflict, Germany with its Act Implementing the Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict and Japan with its Law for the Protection of Cultural Properties in the Event of Armed Conflict, the latter two enacted just recently in 2007[1277]. It should however also be noted that not all ideas of the 1954 Convention are widely accepted by its States Parties. The distinctive marking according to Article 6 of the

[1276] But see the interesting Italian insertion of a direct reference to the 2001 Convention into Article 94 CCPL without even being a State Party to the 2001 Convention yet – for details see *supra* II.2.4.2.1.

[1277] For details see *supra* II.2.3.2. and II.2.3.3.

1954 Convention or the regime of special protection stipulated by Chapter II of the 1954 Convention have been subject to international criticism.[1278] The Second Protocol of 1999 tries to resolve certain shortcomings of the 1954 Convention, e.g. by its Chapter III on enhanced protection as an advancement of the rather unpopular special protection regime. One has to wait and see whether this will lead to a wider acceptance by the international community.

The 1972 Convention still is the most popular international tool in the field of cultural heritage protection and preservation with currently 186 States Parties (as of December 31, 2008). It is the prime example of a convention which shows positive effects on an international level supported by national legislation. Most States Parties argue that high international prestige and increased funding were pivotal reasons for ratifying the 1972 Convention.[1279] Due to the increasing number of enlisted objects on the World Heritage List and the high percentage of enlisted objects situated in Western countries the World Heritage Committee has been trying to balance also the geographical inscriptions on the World Heritage List. The category of cultural landscapes was introduced in 1992, representing the 'combined works of nature and man'[1280]. On a national level, States Parties try to fulfill their obligations to protect their national cultural heritage stipulated by Articles 4 and 5 of the 1972 Convention by various means. It has however to be stressed that national concepts of immovable cultural heritage are much broader than the concept of the 1972 Convention based on the outstanding universal value of enlisted objects. While the 1972 Convention tries to comprise only prime objects by the application of a demanding selection process, leading to comparatively low numbers of enlisted national objects, most countries try to protect a larger number of objects on national and regional levels. As far as cultural heritage protection is concerned, most countries mandate the private owners of declared immovable cultural objects to maintain their unchanged status and to care for their good condition under national and/or regional guidance and with the help of public financial support. Obligatory building and modification permits, pre-emption rights and the opportunity to expropriate the property from its private owner in case he does not fulfill his tasks are popular national and/or regional means of safeguarding the national cultural heritage. In various countries cultural objects which are enlisted on the World Heritage List are further subject to

[1278] See *supra* I.2.3.1. and II.2.3.3.

[1279] See the national periodic reports available online at http://whc.unesco.org/en/statesparties/hr/documents/ (last visited on December 31, 2008).

[1280] Paragraph 47 WHC Operational Guidelines and *supra* I.4.2.

privileged protection, as the example of Italy and its Article 2 Law No. 77 of 20 February 2006 show.[1281]

As pointed out in this report, the detailed implementation of the discussed international tools is more or less left to the discretion of the respective States Parties. We also saw that – due to the national perceptions of cultural heritage and diverse legal systems – the national acts of implementation oftentimes differ in terms of comprehensiveness and strictness. In this context, balancing the interests of the state and the private owner also plays an important role. In many cases a similar diversity can also be found on a national level. Several constitutional systems divide the competences in the field of cultural heritage protection, granting certain legislative powers to the centralized government, others to the regional legislator, which in various cases causes practical differences of legal protection also within a single country. For example, the concept of intangible cultural heritage is a common concept in only five Mexican states, while the other 26 Mexican states remain more or less silent on that form of cultural heritage.[1282] Thus, unification of national and regional legislation on cultural heritage protection and preservation is also limited by the national constitutional frameworks.

Nevertheless "uniform" law plays an important role in the field of cultural heritage protection and preservation. In addition to the mutual influences of national and international legal tools and the national implementation, it cannot be denied that international law also has wide influence on the above-mentioned second level of cultural heritage protection and preservation: the cultural level. This refers to the more practical aspects in contrast to the legal level which rather comprises the protective framework and creates an environment in which cultural safeguarding can take place. Parallel to the extension of the international legal framework national and international awareness of the necessity to safeguard cultural heritage for the sake of future generations has been raised over the last decades. This is reflected in the increasing number of independent institutions involved in cultural heritage protection, e.g. by 61 non-governmental bodies in the German state of Schleswig-Holstein[1283] or the very active Swiss Pro Helvetia Foundation[1284].

The recent developments give reason to expect further enhancements of cultural heritage protection both on an international level as well as on a

[1281] See *supra* II.2.1.3.
[1282] See *supra* II.3.2.2.
[1283] See *supra* II.2.1.2.
[1284] See *supra* II.3.2.2.

national one. With two important conventions related to aspects of intangible cultural heritage and cultural diversity having entered into force recently – the 2003 Convention in 2006 and the 2005 Convention in 2007 – and the 2001 Convention covering underwater forms of tangible heritage, the already existing international system is able to conquer a new "market". It however largely depends on the willingness of the international community to implement the concepts outlined on an international level. Over the last couple of years various countries have enacted new or reconditioned laws aimed at better protection and preservation of cultural heritage; some of them even already including the "new" concept of intangible cultural heritage. Other countries, e.g. the Netherlands or Denmark with their framework of research institutes for various forms of intangible heritage have initiated safeguarding campaigns on a more institutional-based level and are reluctant to adopt comprehensive regulations on the protection and preservation of intangible cultural heritage.[1285] Generally speaking one can however detect a global trend towards the creation of more comprehensive concept of cultural heritage protection and preservation. One must hope that those efforts will fructify, so that cultural heritage cannot only be enjoyed at the moment, but also by future generations.

[1285] See *supra* II.3.2.3.