

# Forever Young

Celebrating 50 Years of the World Heritage Convention



edited by

Elisa Baroncini, Bert Demarsin, Ana Gemma López Martín,  
Raquel Regueiro Dubra, Ruxandra-Iulia Stoica

with the collaboration of Manuel Ganarin and Alessandra Quarta

Volume I

6

*Un'anima per il diritto: andare più in alto*

Collana diretta da Geraldina Boni



Mucchi Editore

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L'orizzonte meramente tecnicistico su cui ogni tipo di riflessione sembra oggi rischiare di appiattirsi non solo non cancella quegli interrogativi fondamentali che si confermano ineludibili per ciascuna disciplina in cui si ramifica il pensiero giuridico: ma li rivela, anzi, in tutta la loro impellenza. È dunque a tale necessità che facciamo riferimento nel cogliere e sottolineare il bisogno che si avverte di 'un'anima per il diritto', ispirandoci in modo particolare a quegli ammonimenti che Aleksandr Solženicyyn rivolgeva a studiosi e accademici dell'Università di Harvard nel 1978 e che, a distanza di decenni, mantengono intatta la loro validità. Muovendo dalla domanda «se mi chiedessero: vorrebbe proporre al suo paese, quale modello, l'Occidente così com'è oggi?, dovrei rispondere con franchezza: no, non potrei raccomandare la vostra società come ideale per la trasformazione della nostra. Data la ricchezza di crescita spirituale che in questo secolo il nostro paese ha acquistato nella sofferenza, il sistema occidentale, nel suo attuale stato di esaurimento spirituale, non presenta per noi alcuna attrattiva» – dichiarazione che si riempie di significato alla luce della vicenda personale, tanto dolorosa quanto nota, di colui che l'ha pronunciata –, l'intellettuale russo individuava infatti con profetica lucidità i sintomi e le cause di tale declino. In questo senso, ad interpellarci in modo precipuo in quanto giuristi è soprattutto l'osservazione secondo cui «in conformità ai propri obiettivi la società occidentale ha scelto la forma d'esistenza che le era più comoda e che io definirei giuridica: una 'forma d'esistenza' che tuttavia è stata assunta come fondamento esclusivo e per ciò stesso privata dell'anelito a una dimensione superiore capace di giustificarla. Con l'inevitabile, correlata conseguenza che «l'autolimitazione liberamente accettata è una cosa che non si vede quasi mai: tutti praticano per contro l'autoespansione, condotta fino all'estrema capienza delle leggi, fino a che le cornici giuridiche cominciano a scricchiolare». Sono queste le premesse da cui scaturisce quel complesso di valutazioni che trova la sua sintesi più efficace nella seguente affermazione, dalla quale intendiamo a nostra volta prendere idealmente le mosse: «No, la società non può restare in un abisso senza leggi come da noi, ma è anche derisoria la proposta di collocarsi, come qui da voi, sulla superficie tirata a specchio di un giuridismo senz'anima». Se è tale monito a costituire il principio ispiratore della presente collana di studi, quest'ultima trova nella stessa fonte anche la stella polare da seguire per cercare risposte. Essa, rinvenibile in tutti i passaggi più pregnanti del discorso, si scolpisce icasticamente nell'esortazione – che facciamo nostra – con cui si chiude: «E nessuno, sulla Terra, ha altra via d'uscita che questa: andare più in alto».

\* La traduzione italiana citata è tratta da ALEKSANDR SOLŽENICYN, *Discorso alla Harvard University, Cambridge (MA) 8 giugno 1978*, in Id., *Il respiro della coscienza. Saggi e interventi sulla vera libertà 1967-1974. Con il discorso all'Università di Harvard del 1978*, a cura di SERGIO RAPETTI, Jaca Book, Milano, 2015, pp. 219-236.

# *Un'anima per il diritto: andare più in alto*

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## Section II

# The World Heritage Convention: its Relevance for Strengthening the Values of the International Community

NICCOLÒ LANZONI

THE WORLD HERITAGE CONVENTION,  
CUSTOMARY INTERNATIONAL LAW AND  
THE SCOPE OF PROTECTION OF  
CULTURAL HERITAGE IN PEACETIME\*

**Abstract:** The 1972 World Heritage Convention (WHC) has today 194 States Parties. This almost universal membership seems to express the widespread belief that the management of cultural heritage of Outstanding Universal Value (OUV) should take place under the supervision of the international community. However, while the World Heritage (WH) Committee, which is a treaty-body composed of States Parties' representatives, has advocated strict compliance with the WHC Lists system, States Parties have grown impatient with the WH Committee's recommendations and sometimes tend to underestimate or outright ignore the impact that Economic Over-Development (EOD) might have on their cultural heritage of OUV. Furthermore, outside of this system, also taking into account the controversial scope of Art. 12 WHC, it is not entirely clear whether this collective interest in the international protection of cultural heritage implies the existence of a corresponding customary prohibition for States to intentionally destroy or damage their own cultural heritage, even of potential OUV, in peacetime. In the light of this, the aim of the present contribution is threefold: first, it will expose and rationalise the inconsistency between the WH Committee and the States Parties' attitude towards the protection of their cultural heritage of OUV before EOD instances; second, it will examine international practice outside the WHC to inductively assess whether and to what extent customary international law prohibits States' intentional destruction or damage to their cultural heritage of potential OUV in peacetime; third, it will illustrate the (ambivalent) relationship between the WHC and customary international law in this respect. Finally, it will be argued how, despite the fact that, over the last 50 years, international law on the protection of cultural heritage in peacetime has undoubtedly strengthened, States still appear reluctant to recognise a clear pre-eminence of the collective dimension of cultural heritage protection per se, especially when this conflicts with the pursuit of their economic interests.

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\* Double-blind peer reviewed content.

«Noi vogliamo distruggere i musei,  
le biblioteche, le accademie d'ogni specie»<sup>1</sup>.

## 1. *Introduction*

International law on the protection of cultural heritage<sup>2</sup> originated as part of the *jus in bello*<sup>3</sup>. This is understandable, as cultural heritage normally faces serious risks of destruction or damage in the context of armed conflicts<sup>4</sup>. Consequently, the applicable re-

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<sup>1</sup> F.T. MARINETTI, *Manifesto del futurismo*, in *I Manifesti del futurismo*, edited by F.T. MARINETTI *et al.*, Lacerba, Firenze, 1914, p. 6, para. 10.

<sup>2</sup> For the purposes of this contribution, the expression 'cultural heritage' will be preferred to 'cultural property', since the former is broader in scope, encompassing a «form of inheritance to be kept in safekeeping and handed down to future generations», J. BLAKE, *On Defining the Cultural Heritage*, in *International & Comparative Law Quarterly*, 2000, p. 83. Reference is made here only to immovable, material and 'above-water' cultural heritage, that is to say monuments, groups of buildings and sites. Cultural heritage also includes natural heritage as defined under Art. 2 of the Convention concerning the Protection of the World Cultural Heritage and Natural Heritage (Paris, 16 November 1972) (WHC).

<sup>3</sup> See F. FRANCONI, *Cultural Heritage*, in *Max Plank Encyclopedia of Public International Law*, edited by A. PETERS, OUP, online edn, 2021, para. 1. For an overview of the contribution of international law to the protection of cultural heritage, see F. FRANCONI, *Il contributo del diritto internazionale alla protezione del patrimonio culturale*, in *Alberico Gentili: la salvaguardia dei beni culturali nel diritto internazionale*, edited by CENTRO INTERNAZIONALE STUDI GENTILIANI, Giuffrè, Milano, 2008, p. 317 ss.

<sup>4</sup> International law on the protection of cultural heritage applies in armed conflicts of both international and non-international character, see R. O'KEEFE, *The Protection of Cultural Property in Armed Conflict*, CUP, Cambridge, New York, 2006, p. 326. For a recent analysis on international law on the protection of cultural heritage in the context of an armed conflict, including with respect to illicit trafficking, see R. PAVONI, *International Legal Protection of Cultural Heritage in Armed Conflict: Achievements and Developments*, in *Studi senesi*, 2020, p. 335 ss. See also International Law Commission, *Draft Principles on Protection of the Environment in Relation to Armed Conflicts, with commentaries*, in *Yearbook of the International Law Commission*, 2022, vol. II, Part Two (to be published), Draft Principle 4: «States should designate [...] areas of environmental importance as protected zones in the event of an armed conflict, including where those areas are of cultural importance».

gime has comprehensively developed under international humanitarian law and international criminal law, both at the conventional<sup>5</sup> and customary level<sup>6</sup>.

In contrast, international law on the protection of cultural heritage in peacetime appears more ambiguous and fragmented. UNESCO<sup>7</sup>, the Council of Europe<sup>8</sup> and the Organisation of American States<sup>9</sup> did contribute to the production of conventional and soft-law instruments on this matter. Nevertheless, States have also

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<sup>5</sup> On humanitarian law see Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954), Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954) and Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 26 March 1999); on international criminal law see Charter of the International Military Tribunal (London, 8 August 1945), Art. 6(b) and Rome Statute of the International Criminal Court (Rome, 17 July 2002), Arts. 8(2)(b)(ix) and 8(2)(e)(iv).

<sup>6</sup> On customary humanitarian law on the protection of cultural heritage see R. O'KEEFE, *The Protection*, cit., p. 316 ss.; on customary international criminal law on the protection of cultural heritage see M. FRULLI, *International Criminal Law and the Protection of Cultural Heritage*, in *The Oxford Handbook of International Cultural Heritage Law*, edited by F. FRANCONI, A. F. VRDOLJAK, OUP, Oxford, 2020, p. 100 ss.

<sup>7</sup> Apart from the WHC and the 2003 Declaration (see below, n. 3.3.), see Recommendation on International Principles Applicable to Archaeological Excavation (New Delhi, 5 December 1956), Recommendation concerning the Safeguarding of the Beauty of the Character of Landscapes and Sites (Paris, 11 December 1962), Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works (Paris, 19 November 1968), Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage (Paris, 16 November 1972) and Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas (Nairobi, 26 November 1976). See also Art. 3 of the 1954 Hague Convention.

<sup>8</sup> See European Cultural Convention (Paris, 19 December 1954), Convention for the Protection of the Architectural Heritage of Europe (Granada, 3 October 1985), Convention for the Protection of the Archeological Heritage of Europe (Valletta, 16 January 1992), Framework Convention on the Value of Cultural Heritage for Society (Faro, 27 October 2005) and Convention on Offences relating to Cultural Property (Nicosia, 19 May 2017). See also Namur Declaration (Namur, 24 April 2015).

<sup>9</sup> Convention on the Protection of the Archeological, Historical and Artistic Heritage of the American Nations (Santiago, 16 June 1976).

shown some hesitancy to commit themselves to strict obligations on the management of their cultural heritage in peacetime.

Moreover, States usually react with limited protests, when not outright indifference, to the intentional destruction or damage carried out by other States to their own cultural heritage<sup>10</sup>. Even in the face of the most striking and heinous acts, such as the destruction of the Buddhas of Bamiyan at the hand of the Taliban<sup>11</sup>, it has been questioned whether the international community's condemnation really reflects an *opinio juris* on the existence and/or desirability of a customary regime aimed at protecting cultural heritage *as such* – that is to say, without taking into account the possible overlapping that the protection of cultural heritage may have with other branches of customary international law, such as human rights law, international environmental law and indigenous peoples' rights law – in peacetime<sup>12</sup>.

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<sup>10</sup> 'Intentional destruction or damage' should be intended here as both «an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity» and «in cases of wilful neglect of cultural heritage, including with the intent of letting others destroy the cultural heritage in question», see Human Rights Council, *Report of the Special Rapporteur in the Field of Cultural Rights*, UN Doc. A/71/317, 9 August 2016, para. 32.

<sup>11</sup> See below, n. 3.2.

<sup>12</sup> International case law is also quite scarce on the issue and mainly concerns the participation of the States Parties to the WHC, see *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)*, Judgment, I.C.J. Reports 2013, p. 281, para. 106. See also *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (20 May 1992), para. 78 ss., *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (17 February 2000), paras. 71-72, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007), para. 381 ss., *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009) (*Glamis Gold*), para. 84, and *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No. ARB/16/32, Award (18 February 2020), paras. 226, 238 and 249. The issue has also arisen in the pending *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No. ARB/15/31, in relation to the inscription of the Roşia Montană ancient gold mines in the WHL.

The present contribution aims at adding to and deepening this debate. It will be divided into three parts. The first part examines States Parties' practice within the WHC Lists system. This part will show how, on the one hand, the WH Committee, which is a treaty-body composed of States Parties' «qualified»<sup>13</sup> representatives<sup>14</sup>, has been rather busy in ensuring compliance with the WHC relevant obligations while, on the other, the same States Parties have grown impatient with the WH Committee's recommendations on the impact that Economic Over-Development (EOD) might have on their cultural heritage of Outstanding Universal Value (OUV)<sup>15</sup>. The substantial causes of this discrepancy will also be exposed. This analysis seems particularly instructive as it provides a clear indication of how States will likely act *outside* of the Lists system when faced with the choice of whether to prioritise the preservation of their cultural heritage or the pursuit of their sovereign (mostly economic) interests when the latter is at odds with the former. The second part, after examining the controversial scope of Art. 12 WHC, explores international practice outside the WHC Lists system. It will be argued here that customary international law appears to merely prohibit (extreme) acts of iconoclasm, leaving States free to pursue EOD to the detriment of their cultural heritage, including that of (potential) OUV<sup>16</sup>, at least when this does not result in the violation of other branches of international law, such as human rights law, international environmental law, or indigenous peoples' rights law. Finally, the contribution draws some general remarks on the relationship between the WHC and customary international law and assesses the major inconsistencies that international law on the protection of cultural heritage in peacetime still presents today.

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<sup>13</sup> WHC, Art. 9(3).

<sup>14</sup> WHC, Art. 8(1).

<sup>15</sup> On the definition of EOD and OUV see below, nn. 2.1. and 2.2.

<sup>16</sup> On this definition see below, n. 3.1.

## 2. *The World Heritage Convention and Cultural Heritage of Outstanding Universal Value*

### 2.1. *Preliminary Remarks*

An examination of the WHC goes beyond the scope of the present contribution<sup>17</sup>. However, a few remarks seem necessary for our purposes.

First, the WHC only applies to the cultural heritage of OUV<sup>18</sup>. The WHC does not define the concept of OUV. The Operational Guidelines (OGs)<sup>19</sup> specify that OUV «means 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»<sup>20</sup> and establish a set of criteria for its assessment<sup>21</sup>. But apart from this and other<sup>22</sup> useful indications, the concept of OUV remains inherently «elusive and fluid, changing over time and from differing cultural perspectives»<sup>23</sup>.

In this respect, it is crucial to recall that «it is for each State Party [...] to identify and delineate the different properties situated on its territory»<sup>24</sup>. States have the *exclusive* right to identify the cul-

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<sup>17</sup> See *The 1972 World Heritage Convention: A Commentary*, edited by F. FRANCONI, OUP, Oxford, 2008 and M. GESTRI, *Teoria e prassi di un accordo pionieristico nella gestione dei beni di interesse generale: la Convenzione del 1972 sul patrimonio mondiale*, in *Tutela e valorizzazione del patrimonio culturale: realtà territoriale e contesto giuridico globale*, edited by M. Gestri, M. C. Fregni, M. C. Santini, Giappichelli, Torino, 2021, p. 113 ff.

<sup>18</sup> WHC, Arts. 1, 2 and 3. And see OGs, para. 52.

<sup>19</sup> WHC.21/01 (31 July 2021).

<sup>20</sup> OGs, para. 49.

<sup>21</sup> OGs, para. 77.

<sup>22</sup> See F. FRANCONI, *The Preamble*, in *The 1972 World Heritage Convention*, cit., p. 21 and T. SCOVAZZI, *La notion de patrimoine culturel de l'humanité dans les instruments internationaux*, in *Le patrimoine culturel de l'humanité/ The Cultural Heritage of Mankind*, edited by J.A.R. NAFZIGER, T. SCOVAZZI, Brill-Nijhoff, Leiden/Boston, 2008, pp. 40-49.

<sup>23</sup> C. FORREST, *International Law and the Protection of Cultural Heritage*, Routledge, London, 2010, p. 233.

<sup>24</sup> WHC, Art. 3.



tural heritage they consider to be of OUV<sup>25</sup>. The WH Committee, with the assistance of some advisory entities<sup>26</sup>, will then evaluate whether the property really meets the demanding threshold of OUV and will inscribe it on the World Heritage List (WHL)<sup>27</sup>. The WH Committee may also decide to inscribe a property on the WHL in the In Danger List (IDL)<sup>28</sup>.

Second, it has been argued that the WHC exhibits a low degree of prescriptivity<sup>29</sup>. The operative part of the WHC is indeed limited to the States Parties' due diligence obligations to do «all they can» to ensure the «identification, protection, conservation, presentation and transmission to future generations» of their cultural heritage of OUV<sup>30</sup>, and to «endeavour, in so far as possible, and as appropriate» to take a number of «effective and active measures» to achieve this goal<sup>31</sup>. The WHC also establishes a duty of cooperation in the protection of the world cultural heritage of OUV but, in itself, such a duty is «inherently incapable of producing legal obligations which may be internationally enforceable»<sup>32</sup>. It should be noted, however, that the WH Committee, as will be emphasised below, tends to interpret these obligations rather strictly, at least as far as cultural heritage included in the Lists system is concerned.

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<sup>25</sup> B. BOER, *Art.3: Identification and Delineation of World Heritage Properties*, in *The 1972 World Heritage Convention*, cit., p. 89.

<sup>26</sup> Such as the International Centre for the Study of the Preservation and Restoration of Cultural Property, which is an international organisation, the International Council for Monuments and Sites, which is an NGO, and the Union for Conservation of Nature and Natural Resources, which is a governmental-organised NGO (GONGO), see WHC, Arts. 13(7) and 14(2).

<sup>27</sup> WHC, Arts. 11(2) and 11(3).

<sup>28</sup> WHC, Art. 11(4).

<sup>29</sup> K.D. KORNEGAY, *Destroying the Shrines of Unbelievers: The Challenge of Iconoclasm to the International Framework or the Protection of Cultural Property*, in *Military Law Review*, 2014, p. 170.

<sup>30</sup> WHC, Art. 4.

<sup>31</sup> WHC, Art. 5.

<sup>32</sup> F. LENZERINI, *Art.12: Protection of Properties Not Inscribed on the World Heritage Convention*, in *The 1972 World Heritage Convention*, cit., p. 207.

Third, the WHC seeks to achieve a «realistic reconciliation»<sup>33</sup> between States Parties' cultural sovereignty<sup>34</sup> and the assumption that «parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole»<sup>35</sup>. To overcome this «latent antinomy»<sup>36</sup>, the WHC sets up a comprehensive system of international cooperation, assistance and monitoring and reporting on the protection of States Parties' cultural heritage of OUV<sup>37</sup>, mainly through the establishment of the WH Committee<sup>38</sup>, the WHC Lists system, and the World Heritage Fund (WHF)<sup>39</sup>.

## 2.2. *The In Danger List*

As anticipated, the WH Committee can inscribe a property on the WHL in the IDL. This may happen, *inter alia*, when the property is threatened by «large-scale public or private projects or rapid urban development or tourism [and/or] destruction caused by changes in land use or ownership»<sup>40</sup>. We will refer to this type of threat as EOD.

The WH Committee usually takes the inscription in the IDL into consideration at the request of the State concerned<sup>41</sup>. In case of urgent need, however, it can also make a new entry on its own<sup>42</sup>. Interestingly, there is a clear correlation between the cause of the

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<sup>33</sup> F. FRANCONI, *Thirty Years on: Is the World Heritage Convention Ready for the 21st Century?*, in *Italian Yearbook of International Law*, 2002, p. 19.

<sup>34</sup> WHC, Art. 6(1).

<sup>35</sup> WHC, Preamble. See also M. GESTRI, *op. cit.*, p. 123.

<sup>36</sup> F. FRANCONI, *The Preamble*, *cit.*, p. 6.

<sup>37</sup> WHC, Arts. 7, 21 ss. and 29.

<sup>38</sup> WHC, Art. 8 ss.

<sup>39</sup> WHC, Art. 15 ss.

<sup>40</sup> WHC, Art. 11(4). See also OGs, paras. 178-180.

<sup>41</sup> The inclusion is not automatic, but is subject to the decision of the WH Committee, see OGs, para. 186.

<sup>42</sup> WHC, Art. 11(4). See G.P. BUZZINI, L. CONDORELLI, *Art. 11: List of World Heritage in Danger and Deletion of a Property from the World Heritage List*, in *The*

threat and who takes the initiative. When the threat comes from EOD, it is unlikely that it will be the State concerned<sup>43</sup>. Not only that: States Parties also appear more inclined to protest against the possible or actual listing of their properties in the IDL when threatened by EOD<sup>44</sup>. This is not necessarily because the inclusion would take place without their consent. Indeed, practice shows that States Parties tend not to oppose the inclusion of their properties in the IDL<sup>45</sup>. Rather, these circumstances indicate a different sensitivity when it comes to assessing the existence of threats to cultural heritage of OUV. In essence, States Parties appear to believe that, usually, activities related to EOD do not pose a threat to their properties or, alternatively, that the protection of the latter cannot be to the absolute detriment of the former.

For instance, from 1983 to 1994, Tunisia built three dams around Lake Ichkeul to divert an important fraction of the freshwater supply towards agricultural uses and human consumption. As a result, the salinity of Lake Ichkeul and of the surrounding marshes increased, whereas the number of migrating bird populations dropped<sup>46</sup>. The WH Committee inscribed the Ichkeul National Park in the IDL and requested Tunisian authorities to reverse the degradation of the property<sup>47</sup>. Tunisia stressed that «aucune ac-

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*1972 World Heritage Convention*, cit., p. 181 ss. See also M. GESTRI, *op. cit.* See also M. Gestri, *op. cit.*, pp. 128-131.

<sup>43</sup> A recent study indicates that approximately 40% of the properties included in the IDL between 1990 and 2017 were threatened by EOD, but only 8% of these properties were included at the request of the States concerned. For comparison, over the same period, 54% of the properties threatened by war and/or civil unrest were included in the IDL at the request of the States concerned, see H. HØLLELAND et. al., *Naming, Shaming and Fire Alarms: The Compilation, Development and Use of the List of World Heritage in Danger*, in *Transnational Environmental Law*, 2018, pp. 44, 48-49.

<sup>44</sup> *Ivi*, p. 49.

<sup>45</sup> G.P. BUZZINI, L. CONDORELLI, *Art. 11*, cit., p. 191. After all, this measure entails the allocation of a «specific, significant portion» of the WHF to the financing of possible assistance, see OGS, para. 189.

<sup>46</sup> WHC-96/CONF.201/21 (10 March 1997), para. VII.36.

<sup>47</sup> Decision CONF 201 VIII.A.4 (1994), para. VII.4.

tion de sauvegarde [...] n'est possible si on ne l'intègre pas dans le programme de développement économique et social de la région»<sup>48</sup>, but also outlined an ambitious Management Plan aimed at reconciling its international obligations with EOD. Tunisia's efforts eventually paid off and the WH Committee removed the property from the IDL in 2006<sup>49</sup>.

In 2013, the WH Committee criticised a major real estate project involving the construction of a hotel, an ice rink and a concert hall in the Historic Centre of Vienna<sup>50</sup>. The Austrian authorities dismissed the WH Committee's worries, arguing that Vienna had a «unique opportunity to develop the entire area [...] in a manner that will generate added value»<sup>51</sup>. After repeated warnings, the WH Committee inscribed the property in the IDL<sup>52</sup>. The Austrian Government eventually stepped in and the City of Vienna unenthusiastically committed to «find out whether and which possibilities exist to develop the project in the interest of a better compatibility with the World Heritage»<sup>53</sup>.

Again, in 2014, the Uzbek Government adopted a new 'development programme for tourism' which resulted in irreversible alterations to the Historic Centre of Shakhrisyabz: parts of the medieval quarters, historic urban layers and buildings were demolished and replaced with tourist kiosks and a modern theme park<sup>54</sup>. In 2016, the WH Committee inscribed the property in the IDL and urged Uzbekistan to immediately suspend all EOD projects and provide detailed documentation on the demolition<sup>55</sup>. As to 2023,

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<sup>48</sup> WHC-99/CONF.209/INF.9 (7 October 1999), p. 16.

<sup>49</sup> Decision 30 COM 7A.12 (2006), para. 12.

<sup>50</sup> Decision 37 COM 7B.71 (2013), paras. 4-6.

<sup>51</sup> SOC/DSOC Report 2015, Historic Centre of Vienna (C 1033) (9 January 2019), p. 2.

<sup>52</sup> Decision 41 COM 7B.42 (2017), para. 11.

<sup>53</sup> SOC/DSOC Report 2019, Historic Centre of Vienna (C 1033) (19 April 2019), p. 6 As of 2022, the project has been halted and a new Management Plan enacted, see Decision 44 COM 7A.32 (2021), para. 11.

<sup>54</sup> WHC/16/40.COM/7B.Add (10 June 2016), p. 61.

<sup>55</sup> Decision 40 COM 7B.48 (2016), paras. 6-7.

Uzbek authorities are struggling to draft an Action Plan to implement the WH Committee's recommendations and are exploring the possibility of submitting a proposal of Significant Modifications to the Boundaries (SMB) of the property<sup>56</sup>.

In these and other cases<sup>57</sup>, State Parties' decision to halt, modify or defer EOD projects appears to depend not so much on a genuine concern for their cultural heritage of OUV, as to defend their international reputation and keep the property in the WHL. On the other hand, the name-and-shame logic has not always been so effective.

For instance, in 2004 the WH Committee included the Cologne Cathedral in the IDL<sup>58</sup>. The reason was the granting of a permission for the construction of a complex of skyscrapers on the opposite bank of the Rhine, compromising the visual integrity of the property<sup>59</sup>. The City of Cologne shrugged off the WH Committee's decision and went ahead with the project<sup>60</sup>. The German Government remained inert, save for the Ministry of Foreign Affairs sending a note to the Mayor of Cologne asking to «take all necessary measures» to «avert foreign policy damages»<sup>61</sup>. This inertia is perplexing since, although German Law does not clearly establish

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<sup>56</sup> Decision 44 COM 7A.31 (2021), para. 3.

<sup>57</sup> Other WH sites that made the IDL due to EOD concerns are, for instance, the Lake Baikal, the Aeolian Islands, the Kathmandu Valley, Coro and its Port and the Group of Monuments at Hampi. The difference of sensitivity of States Parties, individually considered and as opposed to that of the WH Committee, is also signaled by the fact that they have sometimes submitted a nomination immediately after or at the same time as approving EOD projects within or nearby the tentative site. It was only when faced with the WH Committee's repeated rejections due to the very impact of these projects that they agreed to halt them – possibly leading to an international dispute when foreign investors were involved in the deal, see, for instance, *Thomas Gosling and others v. Republic of Mauritius* and *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, nt. 12.

<sup>58</sup> Decision 28 COM 15.B70 (2004), para. 8.

<sup>59</sup> See extensively D. ZACHARIAS, *Cologne Cathedral versus Skyscrapers – World Cultural Heritage Protection as Archetype of a Multilevel System*, in *Max Planck Yearbook of the United Nations Law*, 2006, p. 274 ss.

<sup>60</sup> *Ivi*, p. 277.

<sup>61</sup> *Ivi*, p. 279.

the power of the German Government to block such a project, it does authorise it to take action in order to ensure compliance with Germany's international obligations<sup>62</sup>. It was only two years later that, with a low demand in the use of the new units, the City of Cologne backtracked and radically changed the project<sup>63</sup>.

In 2011, the WH Committee strongly criticised the ongoing construction of a 3-km-long coastal beltway encircling the Historic District of Panama and urged Panama to consider alternative solutions<sup>64</sup>. Panama refused, pointing out that «geography is [...] a constraint to the growth of the capital» and that «the new construction to upgrade the Panama Canal [...] needs a more accurate communication system»<sup>65</sup>. The project was completed in 2014<sup>66</sup>.

Recent practice confirms the impression that States Parties tend to underestimate the EOD impact on their cultural heritage of OUV. For instance, in its session of 2021, the WH Committee noted that, contrary to its previous requests, Hungarian authorities have almost completed a number of major new developments within the Historic Centre of Budapest<sup>67</sup>. The WH Committee also warned that the site of Stonehenge would be inscribed in the IDL in case the permission to build a road tunnel nearby were not withdrawn, and criticised the United Kingdom for refusing to consider any alternative to the project on the grounds that «additional benefits of a longer tunnel would not justify the additional costs»<sup>68</sup>.

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<sup>62</sup> *Ivi*, pp. 330-331. See B. BOER, *Art.3*, cit., p. 359 and, *mutatis mutandis*, S. VON SCHORLEMER, *Compliance with the UNESCO World Heritage Convention: Reflections on the Elbe Valley and the Dresden Waldschlösschen Bridge*, in *German Yearbook of International Law*, 2008, pp. 367-371 and 376-379.

<sup>63</sup> D. ZACHARIAS, *Cologne Cathedral*, cit., p. 280. In July 2006, the WH Committee removed the Cologne Cathedral from the IDL, see Decision 30 COM 8C.3 (2006), para. 8.

<sup>64</sup> Decision 35 COM 7B.103 (2011), para. 3 ss.

<sup>65</sup> WHC-12/36.COM/7B.Add (1 June 2012), pp. 206-207.

<sup>66</sup> Despite the WH Committee's warnings the property is still in the WHL and was never included in the IDL.

<sup>67</sup> Decision 44 COM 7B.49 (2021), paras. 9-10.

<sup>68</sup> *Ivi*, para. 8.

In conclusion, and as will be further elaborated below<sup>69</sup>, although the intervention of the WH Committee has usually prevented EOD projects from destroying/damaging the authenticity/integrity of the States Parties' cultural heritage of OUV, over time the latter seem to have grown impatient with such an unconditional protection. This is also confirmed by the fact that, outside the WHC Lists system, and despite Art. 12 WHC, practice shows that they seem to feel free on how to dispose of their cultural heritage, even of (potential) OUV, for economic reasons.

### 2.3. *Delisting*

The intentional destruction of or damage to cultural heritage of OUV have exceptionally resulted in the delisting of the property from the WHL<sup>70</sup>. Perhaps unsurprisingly, all cases of delisting to date are attributable to State Parties' obstinacy to carry on EOD projects to the detriment of their cultural heritage of OUV<sup>71</sup>.

In 2000, Oman enacted a new Management Plan allowing for mining activity, including exploration and production of oil, gas and minerals, to be carried out nearby and within the Arabian Oryx Sanctuary<sup>72</sup>. In 2006, Oman announced that it would reduce the boundaries of the property by 90%, presumably in order to allow hydrocarbon extraction in the areas immediately outside the new

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<sup>69</sup> See n. 2.4.

<sup>70</sup> The WH Committee's authority to delist a property from the WHL is provided for implicitly by the WHC, Art. 11(2), and expressly by the OGs, para. 116. Prior inscription in the IDL is not a condition for delisting the property. See also G.P. BUZZINI, L. CONDORELLI, *Art. 11*, cit., pp. 196-200.

<sup>71</sup> The removal of the Bagrati Cathedral from the WHL does not amount to a delisting but to a SMB of a larger site, now reduced to the Gelati Monastery, see J.A. ESTRELLA FARIA, *La protection des biens culturels d'intérêt religieux en droit international public et en droit international privé*, in *Collected Courses of the Hague Academy of International Law*, Brill, Leiden/Boston, 2021, pp. 131-133.

<sup>72</sup> WHC-07/31.COM/7B (10 May 2007), p. 34.

boundaries<sup>73</sup>. Omani authorities were then informed that such an unilateral and drastic reduction, apart from entailing a blatant breach of the WHC, would irreparably compromise the OUV of the property<sup>74</sup>. Oman replied by formally requesting that the property be removed from the WHL<sup>75</sup>.

In 2006, the WH Committee inscribed the Dresden Elbe Valley in the IDL<sup>76</sup>. The reason was that, following a binding local referendum, the City of Dresden had approved the construction of a four-lane vehicle bridge across the Elbe River, «in the core area of the cultural landscape»<sup>77</sup>. The Mayor of Dresden criticised the WH Committee's decision, but assured that the City would struggle to retain its WH status<sup>78</sup>. The German Government also regretted the decision, but abstained from stepping in<sup>79</sup>. The project was blocked, then unblocked, then appealed, then counter-appealed. Finally, following the involvement of the Länder Judiciary and of the Federal Constitutional Court, the construction of the bridge resumed<sup>80</sup>. The City of Dresden tried to push for a revision of the project, but met with opposition from higher administrative authorities. In the end, the WH Committee delisted the property from the WHL in 2009<sup>81</sup>. The bridge opened in 2013<sup>82</sup>.

Lastly, in 2012 the WH Committee started at the discussion going on at the City of Liverpool, with the support of the British Government, on greenlighting a thirty-year period, 5.5 billion

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<sup>73</sup> *Ivi*, p. 33.

<sup>74</sup> *Ivi*, p. 34.

<sup>75</sup> *Ibidem*.

<sup>76</sup> Decision 30 COM 7B.77 (2006), para. 8.

<sup>77</sup> *Ivi*, para. 3. On the whole case, see D. SCHOCH, *Whose World Heritage? Dresden's Waldschlößchen Bridge and UNESCO's Delisting of the Dresden Valley*, in *International Journal of Cultural Property*, 2014, p. 199 ss.; and S. VON SCHORLEMER, *Compliance*, cit., p. 321 ss.

<sup>78</sup> See D. SCHOCH, *Whose World Heritage?*, cit., pp. 205-206.

<sup>79</sup> *Ivi*, p. 205. See also S. VON SCHORLEMER, *Compliance*, cit., p. 379.

<sup>80</sup> See the intricate legal affair in D. SCHOCH, *Whose World Heritage?*, cit., pp. 205-207.

<sup>81</sup> Decision 33 COM7A.26 (2009), para. 9.

<sup>82</sup> D. SCHOCH, *Whose World Heritage?*, cit., p. 213.



pounds real estate project encroaching the Historic Centre of Liverpool<sup>83</sup>. The WH Committee inscribed the property in the IDL and threatened to delist it from the WHL should the project be approved and implemented<sup>84</sup>. The City of Liverpool reacted bitterly, claiming that the project would be fundamental to regenerate the ‘derelict’ urban fabric, and would help reviving one of the most depressed areas of the Country. The British Government refused to hold a public inquiry and the project went ahead<sup>85</sup>. The WH Committee then requested the United Kingdom to place a two-years moratorium on new development, but the City of Liverpool doubled down, authorising the construction of the new Everton FC stadium within the property<sup>86</sup>. In 2021, with no improvement in sight, the WH Committee delisted the Historic Centre of Liverpool from the WHL<sup>87</sup>.

#### 2.4. Outlook

In the light of the preceding analysis, it is possible to draw a few remarks.

First, as mentioned, the WH Committee’s intervention has usually been decisive in preventing EOD from destroying/damaging

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<sup>83</sup> The project entails the construction of two clusters of ultra-modern buildings, including a fifty-five stories skyscraper, along the docks waterfront and has been described as «the largest scheme being considered anywhere in the world affecting a World Heritage Site», see D. RODWELL, *Liverpool: Heritage and Development – Bridging the Gap?*, in *Industrial Heritage Sites in Transformation: Clash of Discourses*, edited by H. OEVERMANN, H.A. MIEG, Routledge, London, 2015, p. 40 ss.

<sup>84</sup> Decision 36 COM 7B.93 (2012), para. 7.

<sup>85</sup> O. WAINWRIGHT, ‘Final Warning’: Liverpool’s UNESCO Status at Risk over Docks Scheme, in *The Guardian*, 1 July 2017, available at: [www.theguardian.com/uk-news/2017/jul/01/final-warning-liverpools-unesco-status-at-risk-over-docks-scheme#:~:text=%E2%80%9CNot%20one%20person%20who%20comes,iconic%20modern%20buildings%2C%20too.%E2%80%9D](http://www.theguardian.com/uk-news/2017/jul/01/final-warning-liverpools-unesco-status-at-risk-over-docks-scheme#:~:text=%E2%80%9CNot%20one%20person%20who%20comes,iconic%20modern%20buildings%2C%20too.%E2%80%9D).

<sup>86</sup> WHC/21/44.COM/7A.Add (21 June 2021), p. 54.

<sup>87</sup> Decision 44 COM 7A.34 (2021), para. 11.

the authenticity/integrity of the States Parties' cultural heritage inscribed in the Lists system. In particular, the WH Committee has provided a rather strict interpretation of the obligations ensuing from the WHC, assisting, monitoring and exerting political pressure to urge States Parties to review or halt their projects, almost always successfully. Moreover, when faced with the most egregious violations, it did not shy away from putting the property into the IDL against the will of the concerned State Party, or even resorting to the 'nuclear option' of delisting.

It is important to recall that the WH Committee is composed by (twenty-one) States Parties' representatives<sup>88</sup>. Thus, «[t]he individuals who attend the meetings of the WHC do not act in their personal capacity, but as representatives of the states by which they have been appointed», and, more in general, the WH Committee «can be considered as representing the common interest of States Parties»<sup>89</sup>. In this sense, also considering that the WH Committee's decisions are taken by a qualified majority of two-third of its members present and voting<sup>90</sup>, there is certainly some overlapping between the WH Committee's, although 'collectively' expressed, and the States Parties' *opinio* concerning the correct interpretation and application of the WHC<sup>91</sup>.

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<sup>88</sup> WHC, Art. 8(1). The «[e]lection of members of the Committee shall ensure an equitable representation of the different regions and cultures of the world», Art. 8(2). States Parties' representatives are elected every six years by the General Assembly of the States Parties to the WHC, WHC, Art. 9(1). In 2001, the General Assembly invited the States Parties to the WHC to voluntarily reduce their term of office from six to four years, see Resolution 13 GA 9 (31 October 2001), para. 6.

<sup>89</sup> See T. SCOVAZZI, *Art. 8-11: World Heritage Committee and World Heritage List*, in *The 1972 World Heritage Convention*, cit., p. 150. See also M. GESTRI, *op. cit.*, p. 117.

<sup>90</sup> Art. 13(8) WHC.

<sup>91</sup> As noted by Special Rapporteur Georg Nolte, «[t]he output of a treaty body composed of States representatives, and which is not an organ of an international organization, is a form of practice by those States that thereby act collectively within its framework», International Law Commission, *Fourth Report on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties by Georg Nolte, Special Rapporteur*, UN Doc. A/CN.4/694, 7 March 2016, p. 6.

Second, and notwithstanding, over time the same States Parties seem to have grown impatient with the unconditional protection of their cultural heritage of OUV in the face of EOD. In principle, this discrepancy in the interpretation and application of the WHC Lists system – strict when States Parties sit in the WH Committee through their representatives, loose when they act individually at the domestic level – is one of the many manifestations of States' Janus-faced attitude *vis-à-vis* international law. This means that, at times, and also considering that the State's organs involved in the formation/interpretation or, as in this case, supervision/monitoring of compliance with the international rules at the international level are not necessarily the same in charge of their implementation at the domestic level, there may be some inconsistency between what States say or do internationally and what they actually say or do domestically<sup>92</sup>.

From a more substantial point of view, it is only normal that the WH Committee fulfils its supervisory tasks and responsibilities in good faith<sup>93</sup>. As to States Parties, several reasons may explain why, individually, they sometimes tend to risk violating their WHC obligations: the fact that States Parties believe in good faith that the impact of their projects will not destroy or damage the authenticity or integrity of the properties, as it likely was in the Historic Centre of Vienna case; the fact that, regardless, States Parties prefer to accord precedence to EOD to the potential detriment of their properties, as it likely was in the Ichkeul National Park, the Historic Centre of Shakhrisabz, the Historic District of Panama and the Arabian Oryx Sanctuary cases; finally, the fact that there is no clear division of competences at the administrative level and that, therefore, a local choice may end up breaching the State Party's international obligations, as it likely was in the Dresden Elbe Valley case. There can also be more than one reason at a time, as it likely was in the Co-

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<sup>92</sup> On this point see also A. TANZI, *Introduzione al diritto internazionale contemporaneo*, CEDAM, Padova, 2021<sup>6</sup>, p. 569 ss.

<sup>93</sup> See WHC, Arts. Arts. 7, 21 ss. and 29.

logne Cathedral (underestimation of the impact of the project and no clear division of administrative competences) and the Historic Centre of Liverpool (underestimation of the impact of the project and preference accorded to EOD) cases.

Third, States Parties may be tempted to strategically pick which part of their cultural heritage of OUV to place under the supervision and monitoring of the international community<sup>94</sup>. After all, it is no mystery that «there may be a particular motivation behind a State Party's decision to nominate a property, or to withhold the nomination»<sup>95</sup>. The case of the 'Delhi Imperial Capital Cities' nomination is illustrative<sup>96</sup>.

In 2015, India proposed the property – combining the ancient Mughal capital of Shahjahanabad and the British colonial capital of New Delhi – for the WHL<sup>97</sup>. However, just weeks before the WH Committee's session, the Indian Minister for Foreign Affairs withdrawn the nomination<sup>98</sup>. The abrupt decision took observers by surprise. It has been noted that enhancing the cultural legacy of two of the most controversial periods of India's history – the Moghul Empire and British colonial rule – didn't exactly fit well with the Indian Government's nationalist agenda<sup>99</sup>. Although there may be some truth in this, it then turned out that the major reason behind the nomination withdrawal was that the inscription in the WHL would have hampered EOD in Delhi<sup>100</sup>. Thus, it seems plausible that India intentionally refrained from delegating the supervision and monitoring of part of its cultural heritage of OUV at

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<sup>94</sup> See T. SCOVAZZI, *Art.8-11: World Heritage Committee*, cit., p. 171.

<sup>95</sup> B. BOER, *Art.3*, cit., p. 85. In this sense, «the rigid requirement of the territorial State's consent for the inscription of a property on the World Heritage List may be inconsistent with the effective safeguarding of its outstanding universal value», F. FRANCONI, *Thirty Years*, cit., p. 30.

<sup>96</sup> See extensively L. MESKELL, *A Tale of Two Cities: The Fate of Delhi as UNESCO World Heritage*, in *International Journal of Cultural Property*, 2021, p. 27 ss.

<sup>97</sup> *Ivi*, pp. 29-31.

<sup>98</sup> *Ivi*, p. 28.

<sup>99</sup> *Ivi*.

<sup>100</sup> *Ivi*, p. 31.

the international level because it knew that its EOD projects – currently underway<sup>101</sup> – would almost certainly be at variance with the WHC. In the same vein, China has been criticised for never considering nominating the old city of Kashgar for the WHL, despite its obvious OUV. In particular, it has been argued that China's attitude can be explained in the light of its plans to pursue urban development activities in the area. In fact, due to its impact, the carrying out of such activities would likely be incompatible with the obligations ensuing from the WHC.

Fourth, one might wonder what impact (if any) the WHC and its subsequent applicative practice has had on customary law. On the one hand, as the International Law Commission observes, «treaties that have obtained near universal acceptance may be seen as particularly indicative in determining whether particular rules set forth therein reflect customary law»<sup>102</sup>. The fact that almost all States (194) are Parties to the WHC certainly proves that the international community shares a general interest in the protection of cultural heritage of OUV<sup>103</sup>.

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<sup>101</sup> See A. KAPOOR, Modi the Fanatic is Using the Coronavirus Crisis to Destroy India's Heritage, in *The Guardian*, 21 May 2020, available at: [www.theguardian.com/culture/2020/may/21/modi-the-fanatic-is-using-the-coronavirus-crisis-to-destroy-indias-heritage](http://www.theguardian.com/culture/2020/may/21/modi-the-fanatic-is-using-the-coronavirus-crisis-to-destroy-indias-heritage).

<sup>102</sup> *Draft Conclusions on Identification of Customary International Law, with commentaries*, in *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, Conclusion 11, pp. 143-144.

<sup>103</sup> See F. FRANCONI, *Custom and General Principles of International Cultural Heritage Law*, in *The Oxford Handbook*, cit., p. 544. See also F. FRANCONI, *General Principles Applicable to International Cultural Heritage Law*, in *General Principles and the Coherence of International Law*, edited by M. ANDENAS *et al.*, Brill, Leiden/Boston, 2019, p. 399; F. FRANCONI, *The Evolving Framework for the Protection of Cultural Heritage in International Law*, in *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law*, edited by F. LENZERINI, S. BORRELLI, Brill, Leiden/Boston, 2012, p. 19; and F. FRANCONI, *Au-delà des traités: l'émergence d'un nouveau droit coutumier pour la protection du patrimoine culturel*, in *Revue général de droit international public*, 2007, pp. 33-34. As P. M. DUPUY has also noted: «The association of territorial sovereignty with international solidarity in this manner is thus one of UNESCO's major intellectual contributions to a general understanding of the need for rational management of the world's natural and cultural heritage», *The Impact of Legal Instruments Adopted by*

However, «the practice of parties to a treaty (among themselves) is likely to be chiefly motivated by the conventional obligation» and, therefore, «is generally less helpful in ascertaining the existence or development of a rule of customary international law»<sup>104</sup>. This is especially true when it comes to the practice developed in application of a treaty which enjoys almost universal participation, since, according to the 'Baxter paradox', «as the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law dehors the treaty»<sup>105</sup>.

This issue is further complicated here by Art. 12 WHC which specifies that «the fact that a property belonging to the cultural or natural heritage has not been included in either [the WHL or the IDL] shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusion in these lists»<sup>106</sup>. The concrete relevance of this provision is controversial since, as already noted, the operative part of the WHC only imposes a set of duties and due diligence obliga-

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*UNESCO on General International Law*, in *Standard-Setting at UNESCO: Normative Action and Education, Science and Culture*, edited by A.A. YUSUF, vol. I, Brill, Boston/Leiden, 2007, p. 359.

<sup>104</sup> International Law Commission, *Third Report on the Identification of Customary International Law by Sir Michael Wood, Special Rapporteur*, Doc. A/CN.4/682, 17 March 2015, p. 113. See also F. POCAR who, in relation to the Protocol Additional to the Geneva Conventions of 12 August 1949 (160 States Parties) noted that «the treaty itself is an important piece of State practice for the determination of customary law – although [...] the impact that any subsequent practice of the contracting States in the application of the treaty which establishes their agreement or disagreement regarding its interpretation may bear on the development of a customary norm [must be carefully addressed]», *Protocol I Additional to the Geneva Conventions and Customary International Law*, in *The Progression of International Law: Four Decades of the Israel Yearbook on Human Rights – An Anniversary Volume*, edited by Y. DINSTEIN, F. DOMB, Brill, Leiden/Boston, 2011 pp. 202-203.

<sup>105</sup> R.R. BAXTER, *Treaties and Custom*, in *Collected Courses of the Hague Academy of International Law*, Brill, Leiden/Boston, 1976, p. 64. For a thorough analysis of the 'Baxter paradox' see J. CRAWFORD, *Chance, Order, Change: The Course of International Law*, in *Collected Courses of the Hague Academy of International Law*, Brill, Leiden/Boston, 2014, p. 90 ss.

<sup>106</sup> WHC, Art. 12. See also M. GESTRI, *op. cit.*, pp. 136-140.

tions on States Parties<sup>107</sup>. In addition, Art. 12 does not seem to take into account «the objective difficulty of establishing whether a given property that is not inscribed on the lists is really of outstanding universal value»<sup>108</sup>. The fact is that only a property inscribed in the WHL (or in the IDL) *actually* enjoys OUV. Before the inscription, we remain in the realm of possibility<sup>109</sup>, as also recently underscored by the General Assembly of the States Parties to the WHC<sup>110</sup>. From this point of view, Art. 12 appears to mainly recall that «a given property may actually be of outstanding universal value even in the event that it is not considered as having such value by government of the territory in which it is located»<sup>111</sup>. Finally, the (very) poor practice of the WH Committee with respect to the application of Art. 12 may seem to corroborate this assumption<sup>112</sup>. As said, there is

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<sup>107</sup> See above, par. 2.1.

<sup>108</sup> F. LENZERINI, *Art. 12*, cit., p. 207.

<sup>109</sup> F. FRANCONI, *Thirty Years*, cit., pp. 29-30.

<sup>110</sup> «The Committee commits to [r]ecognize Outstanding Universal Value only when deciding to inscribe a property on the World Heritage List [...], noting that a property does not have Outstanding Universal Value if it is not inscribed on the World Heritage List. The Statement of Outstanding Universal Value arises only from inscribing a property on the World Heritage List (*Convention*, Article 12; *Operational Guidelines*, Paragraph 154)», *Declaration of Principles to Promote International Solidarity and Cooperation to Preserve World Heritage*, WHC/21/23. GA/INF.10 (9 November 2021), p. 4, para. 11, emphasis is original in the text.

<sup>111</sup> F. LENZERINI, *Art. 12*, cit., p. 207. See also G.R. BANDEIRA GALINDO, *The UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage*, in *Le patrimoine culturel de l'humanité*, cit., p. 427. In *SPP v Egypt*, the investment tribunal seemed to read the obligations ensuing from the WHC as limited to the properties inscribed in WHL, see R. PAVONI, *Environmental Rights, Sustainable Development, and Investor-State Case Law: A Critical Appraisal*, in *Human Rights in International Investment Law and Arbitration*, edited by P. M. DUPUY, F. FRANCONI, E. PETERSMANN, OUP, Oxford, 2009, p. 535.

<sup>112</sup> On this point see F. LENZERINI, *Art. 12*, cit., pp. 210-214. The concrete reach of Art. 12 should not be entirely underestimated, however. For instance, in *Glamis Gold v United States of America* it did play some role in reinforcing the international investment tribunal's conclusion that a series of administrative measures taken by the State of California, as well as at the federal level, to preserve the sacred lands of the Quechan Indian tribe did not entail a breach of the fair and equitable treatment or result in an indirect expropriation against a Canadian gold-mining company. As it has been pointed out, the fact that the investment

some overlapping between the WH Committee's, although collectively expressed, and the States Parties' *opinio* concerning the correct interpretation and application of the WHC.

To conclude, it seems safe to assume that States' almost universal participation in the WHC, combined with the fact that, at least in theory, Art. 12 extends the general obligations/duties of protection of States Parties' cultural heritage of OUV beyond the WHC Lists system, may suggest but are not, in themselves, two sufficient elements to argue for the existence of a customary rule (or general principle) prohibiting States from intentionally destroying or damaging their cultural heritage of (potential) OUV in peacetime. This matter need now to be addressed based on an analysis of States' broader practice.

### 3. *The Protection of Cultural Heritage outside the World Heritage Convention*

#### 3.1. *Preliminary Remarks*

It remains to be examined what international regime (if any) applies to the cultural heritage of Potential Outstanding Universal Value (POUV), that is that which, despite its obvious cultural/

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tribunal referred to Art. 12 of the WHC is «rather extraordinary, as cultural heritage experts have repeatedly stressed that Article 12 of the WHC is an often-neglected provision», V. VADI, *Culture Clash? World Heritage and Investors' Rights in International Investment Law and Arbitration*, in *ICSID Review*, 2013, p. 135. On this case see also E. BARONCINI, *I siti e la Convenzione UNESCO del 1972 nelle controversie arbitrali internazionali sugli investimenti*, in *Tutela e valorizzazione del patrimonio culturale mondiale nel diritto internazionale*, edited by E. BARONCINI, Bologna University Press, Bologna, 2021, pp. 443-446. More in general, as F. LENZERINI has noted, «the presence of Article 12 in the Convention text is to be considered as essential, because it keeps alive the idea that the regime established by the Convention is not applicable only to inscribed properties and that non-inscribed properties also deserve protection according to the Convention», *Art. 12*, cit., p. 218.



natural value<sup>113</sup>, has not been included in the WHL, either because it has not been nominated by the State (yet) or because the WH Committee has deferred or rejected the nomination<sup>114</sup>, an outcome accounting for almost half of the total nominations<sup>115</sup>. Two schools of thought have emerged in this regard.

According to some authors, including Francioni and Lenzerini, «a general *opinio juris* exists in the international community on the binding character of principles prohibiting deliberate destruction of cultural heritage of significant importance for humanity» and this duty, as in the context of an armed conflict<sup>116</sup>, «is nothing but a manifestation of an *erga omnes* obligation»<sup>117</sup>. There are at least

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<sup>113</sup> There is certainly an inherent subjectivity in any assessments of this kind. However, also in the light of the criteria used to define the concept of OUV, it does not seem impossible to argue that, sometimes, the WH Committee 'certification' is not necessary to recognise that cultural heritage whose importance justifies the fact that international community should have an interest in its protection. See also M. GESTRI, *op. cit.*, pp. 137-138. In this regard, it is perhaps worth recalling that the inscription on the WHL is declaratory in nature, and should not be intended as a constitutive process. This means that the OUV of the cultural heritage inscribed is a precondition, and not the result of the inscription, see F. LENZERINI, *Art. 12*, cit., p. 215.

<sup>114</sup> On the contrary, «the inclusion of a cultural or natural property in the national Tentative List would *ipso facto* produce the effect of putting such property under the attention of the international community, making it the object of protection of the Convention», *ivi*, p. 218.

<sup>115</sup> See the examples in W. FERCHICHI, *La Convention de l'UNESCO concernant la protection du patrimoine mondial culturel et naturel*, in *Le patrimoine culturel de l'humanité*, cit., p. 465.

<sup>116</sup> R. PAVONI, *International Legal Protection*, cit., p. 356.

<sup>117</sup> F. FRANCONI, F. LENZERINI, *The Destruction of the Buddhas of Bamiyan and International Law*, in *European Journal of International Law*, 2003, pp. 635, 638. And see F. FRANCONI, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, in *Michigan Journal of International Law*, 2004, pp. 1213-1214 and F. LENZERINI, *The UNESCO Declaration concerning the International Destruction of Cultural Heritage: One Step Forward and Two Steps Back*, in *Italian Yearbook of International Law*, 2003, pp. 132-134. See also L. LIXINSKI, V.P. TZEVELEKOS, *The World Heritage Convention and the Law of State Responsibility: Promises and Pitfalls*, in *Intersections in International Cultural Heritage Law*, edited by A.-M. CARSTENS, E. VARNER, OUP, Oxford, 2010, p. 253, M. GESTRI, *op. cit.*, p. 139 and P.M. DUPUY, *The Impact of Legal Instruments*, cit., pp. 358-360.

three reasons supporting this solution: first, the widespread conventional and sot-law practice, already recalled above, on the importance of protecting cultural properties; second, «the existence of a customary norm which prohibits the commission of acts of destruction of cultural assets in wartime, [which] reinforces the strength of the corresponding principle applicable in times of peace. In fact, (...) it would be nonsensical to maintain that intentional acts of damage to cultural assets are allowed in times of peace and become prohibited as soon as a war occurs»<sup>118</sup>; third, the circumstance that States' domestic law usually protects the national cultural heritage of POUV, which would point at the existence, if not of a customary rule, at least of a corresponding general principle under Art 38(1)(c) of the ICJ Statute<sup>119</sup>.

On the contrary, according to other authors, including O'Keefe, there is no definitive evidence that «a State is presently under a customary legal obligation, in time of peace, to protect, conserve and transmit to future generations cultural heritage situated on its territory»<sup>120</sup>.

It is difficult to take a stand. Generally, practice shows that the international community will only exceptionally react before such

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<sup>118</sup> F. LENZERINI, *The UNESCO*, cit., p. 139.

<sup>119</sup> See K. WANGKEO, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage during Peacetime*, in *Yale Journal of International Law*, 2003, pp. 196-197.

<sup>120</sup> R. O'KEEFE, *World Cultural Heritage: Obligations to the International Community as a Whole?*, in *International & Comparative Law Quarterly*, 2004, p. 205. See also C. FORREST, *International Law*, cit., pp. 282-283, G.R. BANDEIRA GALINDO, *The UNESCO Declaration*, cit., p. 431, C. BRENNER, *Cultural Property Law: Reflecting on the Bamiyan Buddhas' Destruction*, in *Suffolk Transnational Law Review*, 2006, p. 263, R. GOY, *La destruction intentionnelle du patrimoine culturel en droit international*, in *Revue générale de droit international public*, 2005, p. 279, K. WANGKEO, *Monumental Challenges*, cit., pp. 264-265 and T. GEORGIOPOULOS, *Avez-vous bien dit « crime contre la culture »? La protection international des monuments historiques*, in *Revue hellénique de droit international*, 2001, p. 473: «pourrait-on valablement soutenir que l'État où est situé le monument est lié par une règle coutumière l'obligeant à renoncer à une politique susceptible de dégrader le patrimoine culturel commun ? Rien n'est moins sûr. La pratique en la matière ne fait pas preuve d'une telle avancée du droit coutumier».

instances, also because States do not appear particularly keen on risking jeopardising their international relations over an issue that does not directly affect (or even interest) them<sup>121</sup>.

That said, there have been a few controversial cases that may help to get a better understanding of the state of the art. It seems useful to divide the analysis according to the two reasons behind the intentional destruction of or damage to the cultural heritage of POUV, *i.e.*: iconoclasm and, more frequently, EOD.

### 3.2. *Iconoclasm*

The *Oxford Dictionary of Philosophy* defines iconoclasm as «the odd pair of beliefs shared by enthusiasts [...] that while “false idols” have no supernatural powers they are nevertheless so dangerous that they must be destroyed rather than ignored»<sup>122</sup>. This definition is useful because it entails that, although fanaticism-driven acts of iconoclasm against cultural heritage are usually committed in the context of armed conflicts and framed as violations of human rights law, humanitarian law, international criminal law and/or a threat to international peace and security<sup>123</sup>, the concept has its own autonomy and acts of this kind can also be carried out during peacetime and without a clear discriminatory intent.

History is certainly not short of such examples<sup>124</sup>. Following the Second World War, however, not many cases made the international headlines. In 1968, Brezhnev personally ordered the destruction of the already damaged Konigsberg Castle, an extensive Goth-

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<sup>121</sup> «Most states will often refrain from paying the (political or economic) costs of the invocation of responsibility for something that only indirectly concerns them, in the sense that it is a matter of all states together and of none of them in particular», L. LIXINSKI, V. P. TZEVELEKOS, *The World Heritage Convention*, cit., p. 255.

<sup>122</sup> *Iconoclasm*, in *The Oxford Dictionary of Philosophy*, edited by S. BLACKBURN, OUP, online edn, 2016<sup>3</sup>.

<sup>123</sup> See extensively F. LENZERINI, *Intentional Destruction of Cultural Heritage*, in *The 1972 World Heritage Convention*, cit., p. 81 ss.

<sup>124</sup> See F. FRANCONI, F. LENZERINI, *The Destruction*, cit., pp. 619-620.

ic building dating back to the 13th Century and the former seat of the Teutonic Order, as a manifestation of Prussian militarism<sup>125</sup>. Similarly, from 1966 to 1969, at the peak of the Cultural Revolution, Mao instructed his personal paramilitary units – the Red Guards – to attack Chinese cultural heritage of POUV, such as the White Horse Temple, the oldest Buddhist temple in China, the Famen Temple, the largest pagoda temple in China, and the historical tombs of the Ming Dynasty<sup>126</sup>. In Cambodia, the Khmer Rouge also destroyed a number of ‘impure’ artifacts, monasteries and statues during their horrific rule (1975-1979)<sup>127</sup>. Apparently, in these cases the international community failed to protest<sup>128</sup>.

In the late 1960s, the communist dictator Nicolae Ceausescu launched a policy of land reform, so-called ‘systematisation’, aimed at achieving a more efficient use of urban and rural lands<sup>129</sup>. The project soon took a fanatical turn and resulted in the destruction of and/or irreparable damage to entire cultural districts in Sibiu, Brasov, Pitesti and Bucharest, and the annihilation of *thousands* of traditional villages in the countryside<sup>130</sup>. This time, the inter-

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<sup>125</sup> M.J. ZIELINSKI, *Kant's Future: Debates about the Identity of Kaliningrad Oblast*, in *Slavic Review*, 2018, p. 942.

<sup>126</sup> See J. NOTH, “*Make the Past Serve the Present*”: Reading Cultural Relics Excavated During the Cultural Revolution of 1972, in *Cultural Heritage as Civilizing Mission: From Decay to Recovery*, edited by M. FALSER, Springer International, Heidelberg, 2015, p. 181 ss.

<sup>127</sup> See G.R. BANDEIRA GALINDO, *The UNESCO Declaration*, cit., p. 402. In 1992, the Kar Sevaks, a group of Hindu extremists, stormed and demolished the splendid Babri Masjid, in India. Several States, including Bangladesh, Iran and Pakistan, protested, accusing India of not doing enough to protect Muslim holy places and minorities. However, the Indian authorities formally condemned the incident and prosecuted the authors. Moreover, albeit heatedly debated, the involvement of Indian State officials has never been proved. Therefore, this incident does not seem to represent, at least clearly, a case of *intentional* destruction of cultural heritage and will not be further discussed here. See N. RAO, C. RAMMANOHAR, *Ayodhya, the Print Media and Communalism*, in *Destruction and Conservation of Cultural Property*, edited by R. LAYTON et al., Routledge, London, 2001, p. 139 ss.

<sup>128</sup> This author has found no official manifestation or report in any newspaper or contribution of any reaction by other States against such conduct.

<sup>129</sup> See K. WANGKEO, *Monumental Challenges*, p. 215 ss.

<sup>130</sup> *Ivi*, pp. 217-218.

national community reacted<sup>131</sup>. Criticism came from both Western (Austria, Canada, France, the United Kingdom and West Germany) and Eastern (Hungary) States, international organisations, NGOs and the civil society<sup>132</sup>. Although West Germany and Hungary seemed more interested in the well-being of German and Hungarian minorities living in Transylvania, other States, especially the United Kingdom, genuinely feared for Romania's cultural heritage of POUV<sup>133</sup>. Despite the numerous protests, the project only came to an halt with the fall of Ceausescu in 1989<sup>134</sup>.

Perhaps the most infamous case of modern iconoclasm against cultural heritage in peacetime is the destruction of the Buddhas of Bamiyan at the hand of the Taliban<sup>135</sup>. The facts are well-known<sup>136</sup>. In September 1996, the Taliban seized Kabul and proclaimed the birth of the Islamic Emirate of Afghanistan (IEA). The Taliban ruled with brutality and committed serious human rights violations against the civil population. In February 2001, it ordered the destruction of all statues in Afghanistan<sup>137</sup>. The announcement caused international outcry, especially when it became clear that the main target were the Buddhas of Bamiyan, two imposing statues carved into a rock wall, dating back to the 9th and 11th Century<sup>138</sup>. Between 1 and 6 March 2001, the Taliban blew up the Buddhas, cele-

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<sup>131</sup> *Ivi*, p. 220.

<sup>132</sup> *Ivi*, pp. 218-220.

<sup>133</sup> *Ivi*, pp. 219-220.

<sup>134</sup> *Ivi*, p. 220.

<sup>135</sup> According to some authors, the destruction of the Buddhas of Bamiyan took place in the context of a non-international armed conflict, see F. FRANCONI, F. LENZERINI, *The Destruction*, cit., p. 632 and H. ABTAHI, *From the Destruction of the Twin Buddhas to the Destruction of the Twin Towers: Crimes against Civilization under the ICC Statute*, in *International Criminal Law Review*, 2004, pp. 16-18.

<sup>136</sup> On this case see extensively F. FRANCONI, F. LENZERINI, *The Destruction*, p. 619 ss.

<sup>137</sup> K. WANGKEO, *Monumental Challenges*, cit., p. 245.

<sup>138</sup> The WH Committee had stressed before the «inestimable value» of the Buddhas of Bamiyan, see WHC-97/CONF.208/17 (27 February 1998), para. VII.58. The Cultural Landscape and Archaeological Remains of the Bamiyan Valley have been symbolically included in the WHL after the destruction of the Buddhas, see Decision 27 COM 8C.44 (2003), para. 1.

brating the ‘endeavour’ as a huge success<sup>139</sup>. About a hundred States and several international organisations – including the UN, UNESCO, EU, the Council of Europe and the Organisation of Islamic Cooperation – harshly condemned the incident<sup>140</sup>. Many States emphasised the universal value of the Buddhas of Bamiyan as world cultural heritage, while (only) Ukraine, being Afghanistan a party to the WHC at the time of the events, framed the Taliban’s act as a violation of international law and, *in particular*, of the WHC<sup>141</sup>. Two years later, the UNESCO General Conference also adopted the Declaration Concerning the International Destruction of Cultural Heritage (2003 Declaration) which, among other things, recalls that «when conducting peacetime activities, States should take all appropriate measures to conduct them in such a manner as to protect cultural heritage»<sup>142</sup>.

The extent of the international community’s reaction, culminating in the adoption of the 2003 Declaration, has shaped the debate on customary law and the protection of cultural heritage in peacetime. Thus, Francioni claimed that the 2003 Declaration is «a relevant indicator of the sense of obligation that wilful destruction of cultural heritage, whether in armed conflict or in peacetime, may entail State responsibility»<sup>143</sup>. On a more critical note, Lenzerini pointed out that, due to its hortatory language, the 2003 Declaration «appears to be a rather slight document [delivering] modest

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<sup>139</sup> K. WANGKEO, *Monumental Challenges*, cit., p. 250.

<sup>140</sup> See all the reactions in *ivi*, pp. 246-250 and R. O’KEEFE, *World Cultural*, cit., p. 195 ss.

<sup>141</sup> R. O’KEEFE, *World Cultural*, cit., p. 198.

<sup>142</sup> (Paris, 17 October 2003), Art. IV. On the 2003 Declaration see G.R. BANDEIRA GALINDO, *The UNESCO Declaration*, cit., pp. 411-444, F. LENZERINI, *The UNESCO*, cit., p. 140 ss.; T. SCOVAZZI, *La Dichiarazione sulla distruzione intenzionale del patrimonio culturale*, in *La tutela internazionale*, cit., p. 171 ss.; and J. HLADIK, *The UNESCO Declaration concerning the International Destruction of Cultural Heritage*, in *Art Antiquity and Law*, 2004, p. 215 ss.

<sup>143</sup> F. FRANCONI, *Beyond State*, cit., p. 1219. See also L. LIXINSKI, V.P. TZEVELEKOS, *The World Heritage Convention*, cit., p. 253, P. M. DUPUY, *The Impact of Legal Instrumentas*, cit., p. 361 and J. HLADIK, *The UNESCO Declaration*, cit., pp. 234-236.

progress» and that «UNESCO has lost a precious occasion for using the *momentum* created by the destruction of the Buddhas of Bamiyan in order to bring about a significant improvement in the framework of the international protection of cultural heritage»<sup>144</sup>. On the other side of the fence, O’Keefe noted that «while an impressive array of States jointly and severally condemned the Taliban’s actions, none of them unambiguously characterized it as a violation of a legal obligation, let alone a customary one» and that, in the light of the *travaux préparatoires* of the 2003 Declaration, it is arguable that «the General Conference is not suggesting that States currently owe customary peacetime obligations in respect of cultural heritage situated on their territory»<sup>145</sup>.

### 3.3. *Economic Over-Development*

EOD is arguably the main cause of intentional destruction and damage to the authenticity/integrity of States’ cultural heritage in peacetime. As Francioni has recently noted, «much destruction of cultural heritage of great importance occurs in peacetime and in pursuit of an ill-conceived idea of economic development»<sup>146</sup>. In the same vein, in 2016 the Special Rapporteur in the field of cultural rights Karima Bennouna wished to «underscore the importance of [...] addressing the widespread destruction of cultural heritage engendered by development and modernization»<sup>147</sup> a subject

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<sup>144</sup> F. LENZERINI, *The UNESCO*, cit., pp. 144-145. See also T. SCOVAZZI, *La Dichiarazione*, cit., pp. 173-176.

<sup>145</sup> R. O’KEEFE, *World Cultural*, cit., pp. 204, 209. See also R. GOY, *La destruction*, cit., pp. 278-279 and 288; C. FORREST, *International Law*, pp. 282-284; A.F. VRDOLJAK, *Intentional Destruction of Cultural Heritage and International Law*, in *Multiculturalism and International Law*, vol. XXXV, edited by K. KOUFA, Thessaloniki, 2007, pp. 386-387 and G.R. BANDEIRA GALINDO, *The UNESCO Declaration*, cit., p. 452.

<sup>146</sup> F. FRANCONI, *Customs, General Principles, and the Intentional Destruction of Cultural Property*, in *Cultural Heritage and Mass Atrocities*, edited by J. CUNO, T.G. WEISS, Getty Publications, Los Angeles, 2022, p. 424.

<sup>147</sup> Human Rights Council, *Report of the Special Rapporteur in the Field of Cultural Rights*, UN Doc. A/71/317, 9 August 2016, para. 32.

she said should be explored further in the future<sup>148</sup>.

As seen, practice shows a significant discrepancy between the WH Committee and the States Parties to the WHC when it comes to weighing the actual impact that EOD may have on their cultural heritage of OUV. While the former advocates a strict interpretation and application of the obligation ensuing from the WHC Lists system, the latter tend to underestimate or outright ignore how EOD may affect the authenticity and/or integrity of their cultural heritage of OUV<sup>149</sup>.

This tendency *a fortiori* applies in relation to States' cultural heritage of POUV. Moreover, while the WH Committee's supervision and monitoring of the Lists system effectively exerts a compliance pull on recalcitrant States Parties, «the Convention has had no influence with regard to the very frequent cases of not-blatantly-improper actions performed by government party to the Convention within their own territory (for whatever reason, including public works, urbanistic planning, and promotion of tourism), which threaten or actually prejudice the integrity» of their cultural heritage of POUV<sup>150</sup>. Besides, it is highly unlikely that States will stand up for the protection of other States' cultural heritage of POUV when threatened by EOD. Even in the face of the most extreme acts, States' reaction has been sporadic and played only a marginal, unproductive role<sup>151</sup>.

For instance, in 2002 Saudi authorities announced that they would destroy the Ajyad Fortress, an 18th century Ottoman citadel in Mecca, in order to build a five-star residential complex<sup>152</sup>. Tur-

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<sup>148</sup> See Statement by Ms. Karima Bennouna, Special Rapporteur in the Field of Cultural Rights, at the 71st Session of the General Assembly, 26 October 2016, available at: [www.ohchr.org/en/statements/2016/11/statement-ms-karima-bennouna-special-rapporteur-field-cultural-rights-71st](http://www.ohchr.org/en/statements/2016/11/statement-ms-karima-bennouna-special-rapporteur-field-cultural-rights-71st).

<sup>149</sup> See above, par. 2.

<sup>150</sup> F. LENZERINI, *Art. 12*, cit., p. 209.

<sup>151</sup> For further examples see R. LAYTON, J. THOMAS, *Introduction*, in *Destruction and Conservation of Cultural Property*, cit., p. 1 ss. and other contributions from the same collection.

<sup>152</sup> K. WANGKEO, *Monumental Challenges*, cit., p. 185.



key protested and asked UNESCO to intervene<sup>153</sup>. Saudi Arabia replied that there was an urgent need of new facilities for Muslims going on pilgrimage and that, in any case, that was an internal matter<sup>154</sup>. UNESCO tried to facilitate diplomatic efforts but, eventually, Saudi Arabia razed the property to the ground<sup>155</sup>.

In 2003, Myanmar's military junta authorised the construction of a 60-metre viewing tower in the ancient city of Bagan, one of the most spectacular sites of Buddhist architecture in Asia<sup>156</sup>. Despite UNESCO's scepticism, the tower was opened in 2005, and other tourism facilities have been built within the property since<sup>157</sup>. With the exception of Japan, no other State protested or took an interest in the case<sup>158</sup>.

Another illustrative example concerns the construction of the Ilisu Dam on the River Tigris, in Turkey. This project attracted intense scrutiny because its implementation would result in the flooding of the ancient city of Hasankeyf<sup>159</sup>. This site has been described as an open-air museum, home to Roman, Byzantine, Seljuk and Ottoman remains, such as archeological ruins, a medieval citadel and religious monuments<sup>160</sup>. Despite the obvious gravity of the threat to a cultural heritage of POUV, the international community's response has been almost non-existent. Syria and Iraq – and the Arab League on their behalf – protested against the project, but only because it would dramatically reduce their water supply<sup>161</sup>. UNESCO has not made any statement on the whole matter.

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<sup>153</sup> *Ivi.*

<sup>154</sup> *Ivi.*

<sup>155</sup> *Ivi.*, p. 186.

<sup>156</sup> F. LENZERINI, *Art. 12*, cit., p. 209.

<sup>157</sup> *Ivi.*

<sup>158</sup> In 2019, the WH Committee included Bagan in the WHL subject to Myanmar's commitment to progressively remove the hotels and all «intrusive elements» from the property, see Decision 43 COM 8B.20 (2019), para. 3.

<sup>159</sup> See B. AYKAN, *Saving Hasankeyf: Limits and Possibilities of International Human Rights Law*, in *International Journal of Property Law*, 2018, p. 11 ss.

<sup>160</sup> *Ivi.*, p. 12.

<sup>161</sup> K. WANGKEO, *Monumental Challenges*, cit., p. 233.

For their part, NGOs have tried to frame Hasankeyf's flooding as a violation of human rights and, more specifically, of Arts. 11(1)<sup>162</sup>, 12(1)<sup>163</sup>, and 15(1)(a)<sup>164</sup> of the International Covenant on Economic Social and Cultural Rights<sup>165</sup> and of Art. 8(1)<sup>166</sup> of the European Convention on Human Rights<sup>167</sup>. In 2011, the Committee on Economic Social and Cultural Rights did urge Turkey to stick to a human-rights based approach in its infrastructure development projects<sup>168</sup>. As for the European Court of Human Rights, in 2019 it declared the application inadmissible *ratione materiae*, dismissing the existence of a «universal individual right to the protection of a specific cultural heritage»<sup>169</sup>. The Ilisu Dam has been operational since 2018 and Hasankeyf is now submerged<sup>170</sup>.

### 3.4. Outlook

In the light of the foregoing analysis, one element seems to condition the international community's reaction to States' intentional destruction of or damage to their cultural heritage of POUV in peacetime: the lack of any acceptable or, at least, credible justification.

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<sup>162</sup> «The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions».

<sup>163</sup> «The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health».

<sup>164</sup> «The States Parties to the present Covenant recognize the right of everyone to take part in cultural life».

<sup>165</sup> (New York, 16 December 1966).

<sup>166</sup> «Everyone has the right to respect for his private and family life, his home and his correspondence».

<sup>167</sup> (Rome, 4 November 1950).

<sup>168</sup> Doc. E/C.12/TUR/CO/1 (12 July 2011), para. 26.

<sup>169</sup> *Ahunbay and Others v. Turkey*, Case No. 6080/06, Decision, 29 January 2019, p. 2.

<sup>170</sup> C. GALL, An Ancient Valley Lost to Progress, in New York Times, 5 June 2020, available at: [www.nytimes.com/2020/07/05/world/middleeast/turkey-erdogan-hasankeyf-Ilisu-dam.html](http://www.nytimes.com/2020/07/05/world/middleeast/turkey-erdogan-hasankeyf-Ilisu-dam.html).

The destruction of the Buddhas of Bamiyan provides an obvious example. Taliban's argument that such a criminal act was necessary because Sharia prohibits idol worship was not only intolerable but also, as religious authorities and Islamic States have claimed, absolutely baseless<sup>171</sup>. In fact, it has been observed that the destruction of the Buddhas of Bamiyan was probably intended as some sort of vendetta against the international community for having failed to recognise the Taliban's regime and having imposed crippling sanctions on the IEA<sup>172</sup>. Be that as it may, «the Taliban's claims that it was acting on the basis of its religious beliefs rang hollow with observers» and the destruction of the Buddhas of Bamiyan «appeared extreme and completely unjustified»<sup>173</sup>.

It is important to note that iconoclasm does not seem to embody, in and of itself, an unacceptable reason for the destruction of or damage to cultural heritage of POUV. For instance, after the fall of the Soviet Union, no State or international institution spoke out against the removal or destruction of the many Soviet monuments – mainly statues, buildings and war memorials – in Eastern Europe or the former Soviet Socialist Republics<sup>174</sup>. Similar moves have also been planned recently in Bulgaria, Czech Republic, Poland and Ukraine with only Russia complaining<sup>175</sup>. Sure, one could argue that a giant statue of Lenin or the nth piece of brutalist architecture do not account for cultural heritage of POUV. However, the feeling is that, beyond the actual value of these properties, the international community did not react because it viewed these acts of iconoclasm as understandable – or even welcomed – considering the controversial legacy of the Soviet Union in these States. A feeling that, given the criminal Russian invasion of Ukraine in 2022,

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<sup>171</sup> K. WANGKEO, *Monumental Challenges*, cit., p. 252.

<sup>172</sup> F. FRANCONI, F. LENZERINI, *The Destruction*, cit., pp. 620, 634.

<sup>173</sup> K. WANGKEO, *Monumental Challenges*, cit., p. 263.

<sup>174</sup> *Ivi*, p. 266.

<sup>175</sup> In particular, Ukraine and Poland enacted *ad hoc* legislation banning almost all Soviet monuments across the two Countries, see Law No. 2554 of 9 April 2015 for the former and Law No. 744 of 1 April 2016 for the latter.

will understandably strengthen in the years to come, as the recent demolition of a Soviet-era 80-metre obelisk in Latvia also shows<sup>176</sup>.

Moreover, iconoclasm is less likely to trigger other States' backlash when disguised as EOD. Ceausescu's systematisation plans provide a good example. Here, the international community's reaction was much milder, and only a few States protested because they were genuinely concerned about Romania's cultural heritage. Certainly, this could be due to the fact that the POUV of the Buddhas of Bamiyan was far more recognisable than that of the historic districts of Bucharest or the Romanian villages<sup>177</sup>. But a more convincing explanation is that «Ceausescu's iconoclasm in Romania was different than the Taliban's iconoclasm in Afghanistan because a better case could be made that systematization would achieve economic benefits»<sup>178</sup>.

This brings us to the last hypothesis, namely when the intentional destruction of or damage to the cultural heritage of POUV is dictated solely or primarily by EOD. Practice shows that, in this case, States will tend to ignore other States' violence against the authenticity and/or integrity of their cultural heritage of POUV. Even when they protested, they did so for very specific or unrelated reasons and not because they thought that the other State was violating an *erga omnes* obligation to preserve its cultural heritage of POUV in peacetime<sup>179</sup>. Most importantly, the great majority of the international community acquiesced to these acts<sup>180</sup>.

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<sup>176</sup> ASSOCIATED PRESS, Latvia Topples Soviet-era Obelisk amid Backlash against Russia, in *The Guardian*, 22 August 2022, available at: [www.theguardian.com/world/2022/aug/25/latvia-topples-soviet-era-obelisk-amid-backlash-against-russia](http://www.theguardian.com/world/2022/aug/25/latvia-topples-soviet-era-obelisk-amid-backlash-against-russia).

<sup>177</sup> K. WANGKEO, *Monumental Challenges*, cit., p. 263.

<sup>178</sup> *Ivi*.

<sup>179</sup> Thus, Turkey protested against Saudi Arabia's destruction of the Ajyad Fortress because it interpreted it as an attack to its cultural legacy in the region. Japan protested against Myanmar for the poor management of the ancient city of Bagan because of the importance that Buddhism has in Japanese culture and society. Finally, as said, Syria and Iraq protested against the construction of the Ilisu Dam because the project would dramatically reduce their water supply.

<sup>180</sup> On the importance of the international community's acquiescence in the formation of customary international law see International Law Commission,

The case of the flooding of Hasankeyf is striking. In terms of the gravity of the damage done to the world cultural heritage, it seems no exaggeration to compare it to the destruction of the Buddhas of Bamiyan. In addition, it is questionable whether such a radical choice was really necessary. The Ilisu Dam is expected to have a life span of just 30 to 50 years and is not supposed to meet any vital need, but ‘merely’ to improve the Country’s energy production<sup>181</sup>. In this sense, the flooding of Hasankeyf appears akin to the destruction of the Buddhas of Bamiyan: extreme and unjustified. Nevertheless, the international community’s reaction has been the opposite, that is total silence on the former, unanimous condemnation against the latter. This cannot be explained solely on the basis that Turkey is a regional powerhouse and the IEA was a rogue entity already cut off from international relations. Rather, the crux of the matter seems to be that States share a different *opinio juris* depending on the reason behind the intentional destruction of or damage to cultural heritage of POUV.

#### 4. *Concluding Remarks*

Since the adoption of the WHC, international law on the protection of cultural heritage in peacetime has strengthened. This is mainly due to two factors.

The first one is the increasing awareness of the multifaceted dimension of cultural heritage, which has led to an extension of its protection under different branches of international law, including

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*Third Report on the Identification of Customary International Law by Sir Michael Wood, Special Rapporteur*, Doc. A/CN.4/682, 17 March 2015, p. 9 ss.

<sup>181</sup> B. AYKAN, *Saving Hasankeyf*, cit., p. 14.

human rights law<sup>182</sup>, international environmental law<sup>183</sup>, and indigenous peoples' rights law<sup>184</sup>.

Thus, taking human rights as an example, the recent acts of destruction and damage to the cultural heritage associated with the Rohingya and Uyghur minorities – mainly ancient villages, shrines and mosques –, in Myanmar and China respectively, entail a blatant violation of international law, as they were carried out (outside the context of an armed conflict) by State officials as part of a policy of severe ethnic discrimination and even genocide<sup>185</sup>.

The second factor is the universal participation that the WHC has managed to achieve over the past 50 years, extending now to 194 States Parties. In passing, it is also worth recalling that the WHC has proved a successful model, inspiring the adoption of other legally binding instruments on the protection of other 'categories' of cultural heritage, such as the 2001 Convention on the Protection of the Underwater Cultural Heritage<sup>186</sup> and the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage<sup>187</sup>. Finally, one should not overlook the other regional conventional regimes, especially within the Council of Europe and the Organisation of American States, recalled above.

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<sup>182</sup> See, for instance, F. FRANCONI, *Culture, Human Rights and International Law*, in *Culture and International Economic Law*, edited by V. VADI, B. DE WITTE, Routledge, London, 2015, p. 19 ss., and M.A. RENOLD, A. CHECHI, *International Human Rights Law and Cultural Heritage*, in *Cultural Heritage and Mass Atrocities*, cit., p. 381 ss. See, more in general, the work by the Special Rapporteur(s) in the field of cultural rights, operating under the aegis of the Human Rights Council, available at: <https://www.ohchr.org/en/special-procedures/sr-cultural-rights>.

<sup>183</sup> See, for instance, B. BOER, *The Environment and Cultural Heritage*, in *The Oxford Handbook*, cit., p. 318 ss.

<sup>184</sup> See, for instance, F. LENZERINI, *Investment Projects Affecting Indigenous Heritage*, in *Culture and International*, cit., p. 72 ss.

<sup>185</sup> See R. LEE, J.A. GONZÁLEZ ZARANDONA, *Heritage Destruction in Myanmar's Rakhine State: Legal and Illegal Iconoclasm*, in *International Journal of Heritage Studies*, 2020, p. 519 ss., and R. HARRIS, *Uyghur Heritage under China's "Antireligious Extremism" Campaigns*, in *Cultural Heritage and Mass Atrocities*, cit., p. 133 ss.

<sup>186</sup> Paris, 2 November 2001.

<sup>187</sup> Paris, 17 October 2003.

Nevertheless, customary international law on the protection of cultural heritage in peacetime remains deficient. In particular, advocating that «a [customary norm banning the intentional destruction of cultural heritage] is to be found in the principle according to which cultural heritage constitutes part of the general interest of the international community as a whole»<sup>188</sup> does not seem to reflect international practice. On the contrary, the present analysis supports the idea that «cultural heritage as a common heritage of mankind is not to be equated with the assertion of a customary obligation to preserve this heritage. Such an obligation might be suggested by way of corollary. But a corollary is insufficiently norm-creating in itself to form the basis of a rule of law»<sup>189</sup>.

That said, a distinction can be drawn according to the reason behind the intentional destruction of or damage to the cultural heritage of POUV. Arguably, international practice indicates that the international community will regard the worst acts of iconoclasm a violation of international law, as they cannot be validly defended on the basis of any reasonable justification. In this sense, the clear condemnation issued by hundreds of States and several international organisations against the Taliban's destruction of the Buddhas of Bamiyan, together with the unanimous adoption, two years later, of the 2003 Declaration by the UNESCO General Conference, more

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<sup>188</sup> F. FRANCONI, F. LENZERINI, *Afghan Culture Heritage and International Law: The Case of the Buddhas of Bamiyan*, in *Art and Archeology of Afghanistan: Its Fall and Survival*, edited by J. VAN KRIEKEN-PIETERS, Brill, Leiden/Boston, 2005, p. 281.

<sup>189</sup> R. O'KEEFE, *World Cultural*, cit., p. 205. See also G.R. BANDEIRA GALINDO, *The UNESCO Declaration*, p. 432. Recently, F. FRANCONI has also noted that: «no corresponding customary norms [*i.e.*, no prohibitions] can be found today in relation to the destruction of cultural heritage in peacetime and in isolation from situations of armed conflict or terrorism», *Customs, General Principles*, cit., p. 424. However, the Author also notes that «this gap in the law can be filled by recourse to a wide range of general principles [*i.e.*, the prohibition of the threat or use of force, self-determination, individual criminal responsibility, elementary considerations of humanity and the principle that cultural heritage forms part of the heritage of humanity] that can be applied [...] in the context of both conflict and peacetime», *ivi*.

than mere «dismay and shock»<sup>190</sup>, seems to signal the genuine belief that such an insane conduct is (or should be) prohibited under international law. Two caveats further apply.

First, States' iconoclasm against their cultural heritage of POUV is not unlawful *in itself*. Much will depend on what that cultural heritage symbolises for the State(s) involved and for the international community as a whole: real common heritage of mankind or the controversial vestiges of a fallen regime. Second, States' iconoclasm against their cultural heritage of POUV might be viewed 'less unacceptable' when disguised as or anyway correlated to other reasons, such as EOD. The 'moderate' international reaction against Ceausescu's systematisation plans provides a good example.

This latter consideration ties in with the fact that, generally speaking, States appear to regard the development of EOD projects as compatible with their international obligations on the protection of their cultural heritage.

Within the WHC Lists system, the relevant practice is shaped by the interactions between the WH Committee and States Parties. The WH Committee – which is composed by States Parties' representatives – has managed to ensure that, in the great majority of cases, States Parties' implementation of economic and social projects did not come at the expense of their cultural heritage of OUV. Still, States Parties have sometimes adopted a loose interpretation of their obligations under this system, underestimating and/or ignoring the impact that EOD can have on the authenticity and/or integrity of their cultural heritage of OUV, exceptionally leading the WH Committee to delist the property. The reasons behind this discrepancy have already been singled out and will not be repeated here<sup>191</sup>.

Recalling States Parties' impatient attitude towards an intransigent protection of their cultural heritage of OUV before EOD instances as required by the WH Committee in the context of the

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<sup>190</sup> R. O'KEEFE, *World Cultural*, cit., p. 198.

<sup>191</sup> See above, par. 2.4.



Lists system provides a clear indication of how States will likely act *outside* of such system when faced with the choice of whether to prioritise the preservation of their cultural heritage of POUV or the pursuit of their economic interests when the latter is at odds with the former.

In this regard, it is interesting to note how, over time, an ambivalent relationship seems to have developed between the WHC and customary international law, with specific reference to EOD. Indeed, the establishment of the WHC Lists system risks creating the false impression that only cultural heritage of OUV should be considered 'fully' protected under international law. The argument would go as follows: if a State Party wishes to place the protection of one of its properties under the supervision of the international community, it will submit the corresponding nomination to the WH Committee; but, if it does not (or if the property does not make the WHL), it retains its sovereign freedom on how to dispose of its cultural heritage, even of POUV. In this context, two legal frameworks would allegedly co-exist, and the practice outside the WHC Lists system, as opposed to that implementing it, would be evidence of a customary rule allowing States to intentionally destroy or damage their cultural heritage of POUV for EOD reasons<sup>192</sup>.

This interpretation is obviously at odds with Art. 12 WHC<sup>193</sup>, as well as the gist of the WHC which, in its Preamble, emphasises that «deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world». And yet, this is the (unfortunate) direction which international practice seems to be heading towards,

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<sup>192</sup> See, in general, B.B. JIA, *The Relations between Treaties and Custom*, in *Chinese Journal of International Law*, 2010, p. 83.

<sup>193</sup> As F. LENZERINI puts it, «due to the existence of Article 12, the obligations that arise from the Convention may be invoked when an act at odds with the spirit and the purpose of the Convention itself is perpetrated or yet simply planned to the prejudice of a cultural or natural property of great importance for humanity, even in the event that such property is not inscribed on the World Heritage List or on the List of World Heritage in Danger», *Art. 12*, cit., p. 218.

as the cases of the withdrawn of the ‘Delhi Imperial Capital Cities’ nomination and that of the old city of Kashgar also illustrate<sup>194</sup>.

Even more striking is the gap between the universal treaty regime and customary international law in peacetime. Under the former, the WH Committee deemed Germany’s construction of a bridge across the Dresden Elbe Valley as irreconcilable with its duty of ensuring the protection, conservation and transmission to future generations of its cultural heritage of OUV, delisting the property. Under the latter, Turkey’s flooding of the magnificent site of Hasankeyf for (temporarily) improving its energy production cannot be regarded as unlawful.

This gap, which delineates a *lex specialis* kind of relationship, may perhaps be explained considering that, at the end of the day, the «mantra of territorial sovereignty and domestic jurisdiction»<sup>195</sup> remains strong and still permeates customary international law on the protection of cultural heritage in peacetime, especially when it comes to the sphere of States’ economic interests.

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<sup>194</sup> See above, par. 2.4.

<sup>195</sup> F. FRANCONI, *Thirty Years*, cit., p. 19.

*Un'anima per il diritto: andare più in alto*

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This open access publication gathers young and senior scholars of the Una Europa Universities to celebrate the first fifty years of the UNESCO 1972 World Heritage Convention (WHC). Financed as a Seed Funding Grant of the Una Europa Alliance, the WHC@50 project offers an interdisciplinary analysis of the WHC, the jewel of the UNESCO Conventions. By introducing the (r)evolutionary concept of World Heritage and involving the International Community as a whole in the preservation, valorization and transmission to future generations of cultural and natural sites and landscapes of outstanding universal value, the WHC is indeed one of the major treaty instruments of our age. We therefore hope, through the final results of the WHC@50 research cooperation activity, to contribute to the dissemination of the WHC knowledge, attracting the attention of academics, politicians, experts, officials and civil society, and contributing to the debate for strengthening the 1972 UNESCO Convention, suggesting solutions to overcome the problematic aspects of its implementation and activities.

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