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## Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity

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# BEYOND STATE SOVEREIGNTY: THE PROTECTION OF CULTURAL HERITAGE AS A SHARED INTEREST OF HUMANITY

*Francesco Francioni\**

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## INTRODUCTION

It is a great pleasure for me to take part in this symposium marking the twenty-fifth anniversary of the Michigan Journal of International Law. During these years, the journal has contributed to the development of the science of international law and, with the Michigan Law School, has played a distinct role in promoting trans-Atlantic dialogue between the United State and Europe. Judging from the participants, this symposium is another manifestation of this on-going dialogue.

The general topic on which we are called to make contributions concerns diversity and fragmentation of the international legal order. This is certainly an important and timely theme since international law is becoming ever more complex both at a normative level, with an increasing variety of specialized branches of law, and at the institutional level, with the proliferation of courts and tribunals, agencies and organizations posing the problem of overlapping competences and possible conflicts of jurisdiction. The specific topic I am proposing to address in this presentation concerns culture and the way in which its products and processes—what I call cultural heritage—have stimulated the emergence of new norms and new actors in international law. Culture represents a manifestation of diversity among the States that compose the international community. At the same time culture is also an element of diversity within the State. To the extent that culturally distinct groups exist within a State, the enjoyment of their own culture contributes to the pluralism of national societies and to the articulation of the State in a multiplicity of social actors that often seek international recognition if

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not a true international legal status. Such new actors include ethnically distinct communities, minorities, indigenous peoples, non-governmental organisations (NGOs) and religious groups to mention just a few examples. With the removal or at least the reduction of governmental barriers to the free flow of cultural communication and exchange between different States, the international role of these non-state actors has increased. Hence, the problem arises, as indicated in the title of this symposium, whether the emergence of these different voices onto the international plane is likely to increase diversity or cause cacophony, which is a different word for saying disharmony, discord, or even anarchy. This is a much debated subject today, and legal literature, including some contributions in this symposium, has abundantly covered the implications of the emergence of private actors, such as individuals, NGOs and transnational corporations, as participants in the law making process, tenants of rights and as potential addresses of international obligations. The role of these non-state actors has been analysed both in terms of contributions that they may bring toward a more democratic governance of human society,<sup>1</sup> but also in terms of increased risks that a culturally oriented deconstruction of the general category of citizenship may pose for the unity of the State and the orderly management of international relations.

In this paper I will try to explore the topic from a different perspective: i.e. the emergence of cultural heritage as part of the shared interest of humanity, with the consequent need for international law to safeguard it in its material and living manifestations, including the cultural communities that create, perform and maintain it. Culture in itself is not extraneous to the formation of the modern nation State. Especially in the history of nineteenth century Europe, culture as language, religion, literary and artistic traditions provided the cement and the legitimizing element to support the claim to independent statehood. In the second part of the twentieth century it provided the political foundation for the right of self-determination of peoples striving to form their independent State. This history has also influenced the language of international law where the link between individuals and the State has been identified in terms of nationality rather than citizenship. However, in the contemporary world the case of a State totally coinciding with a culturally homogeneous nation is the exception rather than the rule. Today, within most States there is co-existence of different cultures, traditions, minorities. In some States these cultural differences are filtered and distilled into a higher idea of a common polity, attracting a superior allegiance from the people. In others, diversity is maintained through a constitutional equilibrium of

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1. See Ernst-Ulrich Petersmann, *Theories of Justice, Human Rights and the Constitution of International Markets*, 37 *LOY. L.A. L. REV.* 407 (2003).

power-sharing (as in Switzerland) or through the integration of diversity into a true multicultural society founded on constitutional guarantees of fundamental freedoms and human rights (as in the United States). In other cases, culture can become the source of intolerance, claims for separation, and sometimes for violent oppression and ethnic conflict.

International law has not remained indifferent to this dynamic of culture within the State and between the States. Protection of minorities, as addressed in post World War I peace treaties and *ad hoc* treaties, has helped deconstruct the sovereign State by legitimizing the claim to an international status of culturally distinct groups.<sup>2</sup> Universal human rights law has confirmed this status with Article 27 of the Covenant on Civil and Political Rights,<sup>3</sup> and has provided the foundation for the gradual building up of a movement toward the recognition of a distinct and enhanced status of indigenous peoples.<sup>4</sup> At the same time, international law has played a constructive role in furnishing the intellectual basis to models of supranational integration (as in Europe) which build upon a common core of traditions, democracy, human rights, the rule of law, and economic freedoms. From this common core of cultural values a proto-federal structure transcending the nation State and a new transnational constitution<sup>5</sup> is currently developing.

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2. See, e.g., Treaty between the United States, the British Empire, France, Italy, Japan, and Poland, signed in Versailles, June 28, 1919 (so-called Polish Minorities Treaty), available at <http://www.austlii.edu.au/au/other/dfat/treaties/1920/12.html>, which sets the pattern for all of the other post-World War I treaties on minorities, including e.g.; Paris Treaty between the Principal Allied and Associated Powers and Romania, Dec. 9, 1919 (so-called Romanian Minorities Treaty), available at <http://www.austlii.edu.au/au/other/dfat/treaties/1920/13.html>; Sèvres Treaty between the Principal Allied and Associated Powers, and Greece, concerning Thrace, Aug. 10, 1920, available at <http://www.lib.byu.edu/~rdh/wwi/versa/sevres1.html>. In recent times, the movement for the recognition of the rights of culturally distinct groups has led to the adoption of relevant international legal instruments, both of binding character (see, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, International Labor Organization Convention No. 169, 72 ILO Official Bull. 59 (1989), entered into force Sept. 5, 1991, available at <http://www1.umn.edu/humanrts/instreet/r1c1cip.htm>) and non-binding character (see, e.g., the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, U.N. GAOR, 47th Sess., Agenda Item 97(b), U.N. Doc. A/RES/47/135 (1993)).

3. Article 27 of the International Covenant on Civil and Political Rights states that: "[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 179, 6 I.L.M. 368, 375-76.

4. This movement has especially led to the adoption of the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *supra* note 2.

5. The term "transnational constitution" in relation to the evolving system of community law was used by an eminent member of the Michigan Law School Faculty, Professor Eric Stein, in his seminal article; Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981).

Given this very broad and complex background, an examination of the manifold manifestations in which culture creates an international entitlement for human groups (non-state actors) would occupy much more space and time than what I am allowed. So, I will concentrate my analysis on the more technical aspects of the way in which international law has articulated the relevance of cultural heritage in normative terms. I will identify three separate facets of such articulation: 1) the protection of cultural heritage and cultural groups as part of the protection of human rights; 2) the emergence of the concept of individual criminal responsibility for cultural crimes; 3) the emerging notion of "cultural diversity" as a general interest for whose protection the international community "as a whole" must mobilize.

### I. CULTURAL HERITAGE AND HUMAN RIGHTS

The UN Charter does not contain specific clauses connecting culture to human rights. In 1948 the UN General Assembly rejected the notion of "cultural genocide."<sup>6</sup> Yet, the development of international law since then provides evidence that the protection of human rights, now part of positive international law, extends to culture and cultural heritage of peoples.

First, the concept of human dignity, which informs the human rights provisions of the Charter and of the Universal Declaration ("... recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family ...")<sup>7</sup> includes peoples entitlement to the respect of the cultural heritage that forms an integral part of their identity, history and civilization. Destruction or desecration of symbolic objects and sites that are essential to the enactment of a people's culture (be it a library, a place of worship, a sacred site for indigenous peoples) is a violation of their collective dignity no less than a violation of their personal dignity.

Second, Article 22 of the Universal Declaration states that everyone "... is entitled to realization ... of ... cultural rights indispensable for his dignity."<sup>8</sup> Article 18 guarantees the right to freedom of conscience and religion which is an integral part of one's culture.<sup>9</sup> Article 27 pro-

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6. See U.N. GAOR, 6th Comm., 83d mtg., U.N. Doc. A/C.6/SR.83 (1948). See also *Background Paper Genocide*, ST/DPI/ SER.A/68 (Nov. 1951).

7. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess., Pt. I, Resolutions, at 71, at pmb1., U.N. Doc. A/810 (1948).

8. *Id.* at art. 22.

9. *Id.* at art. 18 (stating that "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom,

claims the "... right freely to participate in the cultural life of the community ..." and "... to enjoy the arts and to share in scientific advancement and its benefits."<sup>10</sup> These rights have been confirmed by Article 15 of the International Covenant on Economic, Social and Cultural Rights.<sup>11</sup> Article 27 of the International Covenant on Civil and Political Rights has been interpreted by the Human Rights Committee in a way to ensure special entitlement to minorities and indigenous peoples to have access to natural resources.<sup>12</sup> It goes without saying that these provisions create not only a negative obligation not to interfere with cultural freedoms, but also a positive obligation to take steps to protect cultural groups and communities in their exercise of such freedoms and, in particular, to protect cultural and religious property which provide the indispensable situs for the practice of such freedoms. Destruction of mosques and libraries in Bosnia, and subsequent destruction of Orthodox churches in Kosovo after NATO "liberation," stand as dramatic evidence of the linkage between human rights and cultural heritage. This linkage was well identified and stressed by the Special Rapporteur of the Commission on Human Rights in his report on the situation of human rights in Yugoslavia.<sup>13</sup>

Third, the exponential growth of international cultural property law in the past fifty years bears witness to the emergence of a new principle according to which parts of cultural heritage of international relevance are to be protected as the common heritage of humanity. This principle is valid both in the event of armed conflict and in peacetime. During armed conflict, the 1954 Hague Convention,<sup>14</sup> now ratified by 109

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either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.")

10. *Id.* at art. 27.

11. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. Article 15(1)(a) states that "[t]he State Parties to the present Covenant recognize the right of everyone: to take part in cultural life. . . ."

12. See *Lubicon Lake Band v. Canada*, Communication No. 167/1984 (Mar. 26 1990), available at <http://www1.umn.edu/humanrts/undocs/session45/167-1984.htm>.

13. See the Report on the situation of human rights in former Yugoslavia prepared by T. Mazowiecki pursuant to Commission resolution 1992/S-1 of Aug. 14, 1992, where he writes:

[a]lthough the conflict in Bosnia and Herzegovina is not regarded as a religious one, it has been characterized by the systematic destruction and profanation of mosques, Catholic churches and other places of worship, as well as other sites of cultural heritage. This has been reported to be the case particularly in areas currently or previously under the control of Serb forces . . . Some Orthodox churches have been destroyed in areas of central Bosnia and Herzegovina which were or are under the control of the Government and/or Croat forces.

U.N. Doc. E/CN.4/1993/50, Feb. 10 1993, para. 106.

14. See Convention on the Protection of Cultural Property in the Event of Armed Conflict, Aug. 7, 1956, 249 U.N.T.S. 240 [hereinafter Hague Convention].

States<sup>15</sup> and *de facto* applied by many non-parties as expression of general principles of international law,<sup>16</sup> recognizes that "... damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world."<sup>17</sup> In peacetime, the 1972 World Heritage Convention, whose parties are now numbering 172, confirms the same principle with respect to cultural and natural heritage as an outstanding universal value and requires that the "State Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate."<sup>18</sup>

Fourth, the relevance of this treaty practice for the present discussion is further proven by the fact that cultural rights of individuals, groups and of humanity as a whole are guaranteed not only in inter-state relations, as in the case of international conflicts, but also in relation to purely domestic situations where the issue of the protection of cultural heritage arises within the territory of the State. The destruction in 2001 of the great Buddhas of Bamiyan, as part of the Taliban's delirium of cultural cleansing, attracted protests and condemnation by States, including Islamic States, the UN, UNESCO, the EU, and other international organizations.<sup>19</sup> The mobilization of shame against such act has led to the adoption by the UNESCO General Conference in October, 2003 of the Declaration on Intentional Destruction of Cultural Heritage, which is intended to prevent the repetition of such acts in the future.<sup>20</sup>

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15. The updated list of State parties is available at <http://erc.unesco.org/cp/convention.asp?KO=13637&language=E>.

16. The United States, whose ratification has been pending in the Senate for the past ten years, has applied the Hague principles in its military manuals. The Operational Law Handbook treats the Hague rules as norms of customary law and the international section of the legal office of the department of defence systematically trains military personnel on the respect for cultural property, on the prohibition of their use for hostile purposes, on the interpretation of military necessity and prior warning in case of unavoidable use of force.

17. Hague Convention, *supra* note 14, at pmbl.

18. Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1975, art. 6, para. 1, 1037 U.N.T.S. 151.

19. See the practice cited in Roger O'Keefe, *World Cultural Heritage: Obligations to the International Community as a Whole?*, 53 INT'L & COMP. L.Q. 189, 195-202 (2004).

20. See UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, UNESCO General Cong., 32d Sess. (adopted by consensus Oct. 17 2003). On the destruction of the Buddhas of Bamiyan, see Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUR. J. INT'L. L. 619 (2003) (this article was part of a larger study commissioned by UNESCO to Professor Francioni with the view of defining the legal framework for the adoption of the above Declaration). For a reductionist and State oriented view of international law on the subject, see O'Keefe, *supra* note 19, who recognizes that wanton destruction of cultural heritage of great importance may not be shielded by domestic jurisdiction but, contradictorily, fails to recognize that such

## II. CULTURE AND INTERNATIONAL RESPONSIBILITY

While it is clear that today the violation of international standards on the protection of cultural heritage of any people may attract State responsibility,<sup>21</sup> it is especially with regard to individual criminal responsibility that one can find the most significant developments in contemporary practice. At the time of this writing, *Prosecutor v. Strugar*<sup>22</sup> is pending before the International Criminal Tribunal for Yugoslavia (ICTY). This legal action is based on an indictment that charged the defendant with violations of the laws and customs of war and in particular with “unjustified devastation, unlawful attacks on civilian objects, destruction or wilful damage to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.”<sup>23</sup> This case is especially interesting because it concerns the bombing of the old city of Dubrovnik, a site inscribed in the UNESCO World Heritage List, which makes it of indisputable universal relevance for humanity as a whole. Strugar, in his capacity as commander of the Yugoslavian army, was responsible for the bombing of the city of Dubrovnik. He was indicted for intentional destruction of cultural property of great interest for humanity as a whole.

In March, 2004, the ICTY enacted its judgment on another case regarding the shelling of the old town of Dubrovnik perpetrated in 1991, holding that “the crime of destruction or wilful damage done to institutions dedicated to religion, charity, education, and the arts and sciences, and to historic monuments and works of art and science . . .

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destruction may constitute an international wrongful act just because of the general interest of the international community in preventing such discriminatory and arbitrary destruction.

21. The principle of State responsibility for intentional destruction of cultural heritage of importance to humanity is included in paragraph VI of the UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, *supra* note 20, which reads: “[a] State that intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish any intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization, bears the responsibility for such destruction, to the extent provided for by international law.” International responsibility for violations of the rules on the protection of cultural heritage has also been spelled out in Article 38 of the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, available at [http://www.unesco.org/culture/laws/hague/html\\_eng/protocol2.shtml](http://www.unesco.org/culture/laws/hague/html_eng/protocol2.shtml) (hereinafter Second Protocol) which includes “the duty to provide reparation.” Article 31 of the Second Protocol provides also that the Parties undertake to act, jointly through the Committee (the treaty body established to oversee the implementation of the Protocol), or individually, in cooperation with UNESCO and the United Nations, and in conformity with the Charter of the United Nations. *See id.* at art. 31. Thus, Article 31 implies the possibility of enforcing State responsibility through sanctions.

22. *Prosecutor v. Strugar*, ICTY Case No. IT-01-42-PT (ICTY Judgment, third amended indictment filed Dec. 10, 2003).

23. *See id.* at Counts 4–6.



represents a violation of values especially protected by the international community.”<sup>24</sup> The ICTY added that such crime, being perpetrated against a site protected by the World Heritage List on behalf of humankind as a whole, “is . . . of even greater seriousness” since it was directed “on an especially protected site . . .”<sup>25</sup>

But what is the legal basis for affirming the responsibility of the individual for cultural crimes? Since 1954 the principle that serious violations of norms relating to the protection of cultural heritage may entail international criminal liability has been recognized in various international instruments. The 1954 Hague Convention recognizes this principle at Article 28.<sup>26</sup> The 1977 Protocol I additional to the Geneva Convention contains a specific provision extending the obligation to suppress grave breaches of the 1949 Geneva Convention to acts of “extensive destruction” of cultural property to which special protection has been accorded within the framework of a competent international organization.<sup>27</sup> The Statute of the International Criminal Tribunal for Yugoslavia has expanded the scope of individual criminal liability for cultural crimes by including such crimes in the category of violations of the laws and customs of war.<sup>28</sup> Similarly, the 1998 Rome Statute of the International Criminal Court includes attacks on cultural heritage in the category of war crimes.<sup>29</sup>

The most advanced and detailed provisions on individual criminal liability for serious violations of international norms on the protection of cultural heritage are to be found in the 1999 Protocol additional to the

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24. Prosecutor v. Jokić, Judgments Int’l Trib. for the Prosecution of Persons Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case No. IT-01-42/1-S, at para. 46 (Mar. 18, 2004).

25. *Id.* at para. 53.

26. See Hague Convention, *supra* note 14, art. 28 (stating that “[t]he High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.”)

27. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 85, para. 4(d), 1125 U.N.T.S. 3 (hereinafter Protocol I). See also, *id.* at art. 53 (prohibiting attacks, military use of, as well as reprisals against, cultural heritage).

28. Statute for the International Criminal Tribunal for the Former Yugoslavia, *as amended* May 19, 2003 by Resolution 1481, available at <http://www.un.org/icty/legal/doc/index.htm> (hereinafter ICTY Statute). Article 3(d) provides that violations of the laws and customs of war shall include “seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.” *Id.* at art. 3(d).

29. The Rome Statute of the International Criminal Court, *circulated as document* July 17, 1998, art. 8(2)(b)(ix)(applicable to international armed conflicts) and art. 8(2)(e)(iv) (applicable to armed conflicts not of an international character), available at [http://www.icc-cpi.int/library/basicdocuments/rome\\_statute\(e\).pdf](http://www.icc-cpi.int/library/basicdocuments/rome_statute(e).pdf).

1954 Hague Convention.<sup>30</sup> This protocol was negotiated and adopted in order to reinforce the rather weak system of the Hague Convention in the face of the devastation brought upon cultural heritage in the conflicts of the 1980s and 1990s, especially the Iraq-Iran war and the Balkan conflict.<sup>31</sup> This protocol applies in its entirety to international and non-international armed conflicts and it is entering into force just at the time of this symposium.<sup>32</sup> Chapter 4 of the Protocol introduces the principle of universal jurisdiction over the most “serious violations” of the norms protecting cultural heritage.<sup>33</sup> Article 17 obliges the party in whose territory the offender is present to prosecute or extradite that person regardless of his or her nationality or of the place where the offence was committed.

The link between the international protection of cultural heritage and individual criminal responsibility has not remained confined to its mere enunciation in conventional and statutory provisions in international instruments. It has been increasingly articulated and fleshed out in the case law of international courts and tribunals, especially of the ICTY. Besides the case of *Prosecutor v. Jokić*,<sup>34</sup> where cultural crimes have been recognized as independent counts of criminal liability under the laws and customs of war, several precedents can be identified which elaborate a typology of connections between cultural heritage and individual criminal responsibility. Thus, the act of destruction of cultural property with discriminatory intent toward a culturally distinct group, besides being capable of autonomously falling under the rubric of war crimes, has been considered to be an element of crimes against humanity, specifically of the crime of persecution within the meaning of Article 5(h) of the ICTY Statute. This principle has been applied in the 2001 decision of *Prosecutor v. Kordić & Cerkez*. Addressing the acts of deliberate destruction of ancient mosques in Bosnia Herzegovina, the ICTY held that:

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30. See Second Protocol, *supra* note 21.

31. See Patrick J. Boylan, Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, <http://unesdoc.unesco.org/images/0010/001001/100159eo.pdf> (1993).

32. Article 43 states that the protocol “shall enter into force three months after twenty instruments of ratification, acceptance, approval or accession have been deposited.” Second Protocol, *supra* note 21, art. 43. The twentieth instrument of ratification or accession was deposited (by Costa Rica) on Dec. 9, 2003, thus the Protocol entered into force on Mar. 9 2004. The States parties are at present 24. See *supra* note 21, <http://erc.unesco.org/cpl/convention.asp?KO=15207&language=E>.

33. Under article 15, these include the attack upon internationally protected cultural property, the use of such property in support of military action, and the extensive destruction or appropriation of cultural property. *Supra* note 21, art. 15.

34. Jokić, *supra* note 24, at para. 53.

... when perpetrated with the requisite discriminatory intent, [the destruction] amounts to an attack on the very religious identity of the people. As such it manifests a nearly pure expression of the notion of 'crimes against humanity' for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects.<sup>35</sup>

This decision is notable also for its recognition that acts of destruction or wilful damage to cultural property dedicated to religion has been "... criminalized under customary international law."<sup>36</sup> In an earlier decision, in the *Blaskic* case,<sup>37</sup> the threshold of persecution set by the Tribunal in relation to acts of wilful destruction of cultural heritage was set quite high: the acts must be re-iterated or systematic and must reveal a pattern of gross violations. Thus not every single act of destruction of cultural heritage, even of wanton destruction, amounts to the crime of persecution.

Another important aspect of the intersection between cultural heritage and individual criminal responsibility is the finding by the Trial Chamber of the ICTY that deliberate destruction of cultural heritage of a given ethnic group may constitute evidence of the element of *mens rea* required for the commission of the crime of genocide.<sup>38</sup> This places new emphasis on the social existence of a group, as opposed to its purely biological existence, with the consequences that the systematic destruction of symbolic places and buildings of their culture and religion may reveal, under appropriate circumstances, the specific intent to destroy in whole or in part such group within the meaning of genocide under the 1948 Convention.<sup>39</sup>

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35. Prosecutor v. Kordic & Cerkez, ICTY Case No. IT-95-14/2-T, (ICTY Judgment, Feb. 26, 2001) at para. 207, available at <http://www.un.org/icty/kordic/trialc/judgement/kortj010226e.pdf>.

36. *Id.* at para. 206.

37. Prosecutor v. Blaskic, ICTY Case No. IT-95-14-T, (ICTY TC Judgment, Mar. 3, 2000), available at <http://www.un.org/icty/blaskic/trialc1/judgements> (concerning *inter alia* acts of destruction of cultural property by Croatian leaders).

38. Prosecutor v. Krstic, ICTY Case No. IT-98-33-T, (ICTY TC Judgment, Aug. 2, 2001), available at <http://www.un.org/icty/krstic/TrialC1/judgement/krs-tj010802e.pdf>. This judgment concerned the massacres committed by military and paramilitary forces of the Serbs of Bosnia in the city of Srebrenica. The appellate chamber has confirmed the unprecedented finding that such massacres amounted to genocide in Prosecutor v. Krstic, ICTY Case No. IT-98-33-4 (ICTY Appeals, Apr. 19 2004), available at <http://www.un.org/icty/krstic/Appeal/judgement/krs-aj040419e.pdf>.

39. See *id.* at para. 579 (citing Dec. 12, 2000 decision of the BundesVerfassungsgericht (the German Federal Constitutional Court) that the definition of the crime of genocide "defends a supra-individual object of legal protection . . . and extends beyond the physical and biological extermination)."

Of course, the limit of this jurisprudence, and of the international norms thereby applied, is that it concerns situations of armed conflict where protection of cultural heritage is somehow becoming part and parcel of humanitarian law and the international protection is a consequence of the fundamental distinction between military and non-military objectives. However, at least with regard to gross violations of the international obligation to respect cultural heritage—such as the intentional destruction of monuments of universal importance—it seems that an *opinio juris* as to their unlawful character also in peace time is emerging. This is witnessed by the world-wide condemnation of the acts of destruction by the Taliban of the great Buddha of Bamyam in 2001.<sup>40</sup> It is confirmed by the resolve manifested within the UN and UNESCO to clarify that international law does not tolerate such acts of barbarity, a resolve that has led to the unanimous adoption in 2003 of the UNESCO Declaration Concerning Intentional Destruction of Cultural Heritage. This declaration is an instrument of soft law.<sup>41</sup> It is not a binding treaty. Yet, the fact that it represents the legal follow-up to a specific act of cultural devastation, together with the nature of the declaration as the product of the will of the international community as a whole—because the whole world is represented in the UNESCO General Conference—<sup>42</sup> makes such instrument a particularly relevant indicator of the sense of obligation that wilful destruction of cultural heritage, whether in armed conflict or in peacetime, may entail State responsibility and individual criminal liability.<sup>43</sup>

In addition to the practice developed in the ICTY and UNESCO, the linkage between protection of cultural heritage and international responsibility for violations of fundamental rights of individuals and groups has influenced the case law of specific human rights courts. In a 1999 decision in the case of *Islamic Community of Bosnia v. Rep. Srpska*, the Human Rights Chamber for Bosnia referred to Article 9 of the European Convention on Human Rights to support its conclusion that freedom of religion in

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40. See *supra* text accompanying note 21.

41. On the relevance of soft law in contemporary international law, see Francesco Francioni, *International 'Soft Law': A Contemporary Assessment*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 167 (Lowe & Fitzmaurice eds., 1996); see also P.M. Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420 (1991).

42. The universal character of the General Conference at the time of the adoption of this Declaration is all the more evident by the re-joining of the United States to the Organization. Today, the only country that appears to be absent from UNESCO is Singapore.

43. See *supra* note 19, at paras. VI, VII.

a given community cannot be achieved unless peaceful enjoyment of the places and buildings dedicated to worship is guaranteed to the people.<sup>44</sup>

### III. INTERNATIONAL LAW AND CULTURAL DIVERSITY

The developments analyzed in the preceding sections show that, under appropriate circumstances, cultural heritage in the territory of any State may be considered an element of the general interest of the international community, and, as such, it must be protected even against the wishes of the territorial State. This new form of protection entails that, today, States are bound to tolerate scrutiny and intervention, especially by competent international organizations, when they wilfully engage in, or intentionally fail to prevent, the destruction of, or serious damage to, cultural heritage of significant value for humanity. While this conclusion leaves open the question of what is the threshold of the “value” of the item of cultural heritage in order for it to reach the level of common concern for humanity, it is clear that the increasing number of lists, registers and inventories established and maintained by competent international organizations, notably UNESCO,<sup>45</sup> are capable of providing objective parameters of evaluation and a *prima facie* certification of the international significance of a given item of cultural heritage. In this sense, culture as the common patrimony of humankind becomes an important tool to counterbalance sovereignty, understood as the complete and undisturbed dominion over a territorial space, and to foreclose the objection of “domestic jurisdiction” so often invoked to preserve the power monopoly of the sovereign State.<sup>46</sup>

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44. See *The Islamic Community in Bosnia and Herzegovina v. The Republika Srpska*, Case No. CH/96/29, Human Rights Chamber for Bosnia and Herzegovina, 38 ILM 534 (1999).

45. There are now at least three different instruments aimed at cataloguing cultural heritage of exceptional importance: the World Heritage List, under the 1972 World Heritage Convention, which now contains 754 cultural items, available at <http://whc.unesco.org/heritage.htm>; the register under the special protection regime of the 1954 Hague Convention, now updated with the new list for “enhanced protection” under the 1999 Protocol to the Convention, Second Protocol, *supra* note 21 art. 11; and, finally, the Representative List of the Intangible Cultural Heritage of Humanity and the List of Intangible Cultural Heritage in Need of Urgent Safeguarding provided for by, respectively, articles 16 and 17 of the Convention for the Safeguarding of Intangible Cultural Heritage, Oct. 17, 2003, art. 16-7, available at <http://www.unesco.org>.

46. U.N. CHARTER art. 2, para. 7 (stating that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”)

But the impact of the international concern with cultural heritage goes beyond the territorial dimension of sovereignty. As we have shown in the preceding sections, cultural heritage is linked to the human element. It represents the symbolic continuity of a society beyond its contingent biological existence. Thus, the obligation to respect cultural heritage is closely linked with the obligation to respect human rights and to sanction its most serious breaches with individual criminal liability under international law.

The recognition of this human dimension of cultural heritage raises the problem whether international law should shift from a protection of cultural heritage as the purely material products of the creativity of a given people or group to the more ambitious goal of safeguarding the very social structures and processes that permit the generation and transmission of such products. This brings us to the subject of cultural diversity as a value to be safeguarded in itself and beyond the value of the single cultural object.

As is known, contemporary international law has already recognized "biological diversity" as the common concern of humankind. The 1992 Convention on Biological Diversity<sup>47</sup> transcends the traditional approach based on conservation of individual species and recognizes the interconnected nature of the different components of the global ecosystem. Hence, the convention recognizes that it is the interest of humanity to preserve biological diversity as a value in itself, beyond the value of the single species to be protected.

Should a similar development take place also with respect to cultural diversity? In addressing this question, certainly one cannot ignore that there is a difference between culture and nature. Biological diversity, which finds expression in the infinite variety of forms of life in the biosphere, is more permanent and resilient; it is subject only to the slow pace of mutation according to the laws of evolution, save for the destructive impact of human activities. Culture, by contrast is more adaptable. It is subject to constant exchange and its evolution may be measured within the span of generations rather than millennia.

While these differences are real, there is no plausible reason for holding that the more dynamic and adaptable character of culture should be an obstacle to the legal recognition of the value of cultural diversity and of the need to safeguard such diversity as a general interest of humanity.

On the contrary, the evolutionary character of culture requires the maintenance of robust cultural traditions whose richness and diversity

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47. See Convention on Biological Diversity, June 5, 1992, available at <http://www.biodiv.org/convention/articles.asp>.

permit fruitful exchange and interaction between different peoples and world views. International law cannot remain indifferent to this task. First, because the present state of economic globalization is generating an increasing concern with the prospect of a uniform commercial monoculture and with the destabilizing effects that this may entail in terms of loss of social cohesion and identity in national societies. Second, because only international law, rather than individual sovereign States, may perform the pedagogical role needed to bridge the gap of diffidence and hostility between different civilizations and world views that globalization has unleashed and that we urgently need to re-compose today in the complex puzzle of shared humanity. How badly we need international law in pursuing this goal is proven, unfortunately, by the current increase in violent conflict and terrorism as a consequence of the attempt to unilaterally transplant, by force, democracy and free market in countries where different social structures and complex cultural traditions prevail.<sup>48</sup>

Thus, if international law has a role to play in the safeguarding of cultural diversity,<sup>49</sup> how has this role been performed and what results have been achieved so far? I shall try to respond to this question by examining two important developments that are currently contributing to the emergence in international law of a common concern for the safeguarding of cultural diversity. I refer to the recent movement toward the adoption of an international regime for the protection of the immaterial elements of living cultures, what we call intangible cultural heritage, and the present effort toward the adoption of a universal treaty on cultural diversity.

### A. *Intangible Cultural Heritage*

The concept of “intangible cultural heritage” covers an infinite variety of manifestations of a living culture as opposed to the material products—movable or immovable—that have been the object of international protection in the past.<sup>50</sup> As possible examples, one may think of

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48. Iraq is only the latest and most tragic example. On the link between unilateral exportation of democracy and the rise of violence and conflict see A. CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* (2002).

49. On this matter, see F. Lenzerini, *Riflessioni sul valore della diversità culturale nel diritto internazionale*, 46 *COMUNITÀ INTERNAZIONALE* 671 (2001).

50. See, e.g., Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, available at [http://www.unesco.org/culture/laws/underwater/html\\_eng/convention.shtml](http://www.unesco.org/culture/laws/underwater/html_eng/convention.shtml); UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, available at <http://www.unidroit.org/english/conventions/c-cult.htm>; Convention for the Protection of the World Cultural and Natural Heritage, *supra* note 18; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural

typical forms of musical expression: literary and oral traditions; poetry, languages, theatre, dance and mime; religious traditions and rituals; crafts and skills; choreography and costumes; agricultural practices; indigenous medicinal practices linked with knowledge of plants; social methods of dispute settlement and other forms of traditional creativity that anthropologists generally catalogue as “folklife.” So many forms of immaterial cultural heritage have one feature in common; all of them provide elements to define the identity of a cultural community with its specific social and intellectual processes and distinct world view. This specificity characterizes the relevant cultural community in relation to the broader framework of the sovereign State; its speciality or uniqueness becomes an appealing symbol of community identity.

An early recognition of the international relevance of these living aspects of culture was the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore.<sup>51</sup> This recommendation was adopted by the General Conference in 1989 after several years of difficult deliberations mainly due to the dilemma whether to protect traditional culture by way of intellectual property rights or through a separate normative instrument. The 1989 Recommendation shunned this dilemma by limiting its role to the enunciation of a set of general principles and guidelines of a non-binding character.<sup>52</sup>

In the period immediately following the adoption of the UNESCO Recommendation little progress was made toward effective protection of intangible cultural heritage. The implementation of the UNESCO Recommendation in domestic law was generally inadequate. Many countries continued to have no laws, administrative measures or customary rules to specially safeguard intangible cultural heritage. Identification and cataloguing of traditional culture remained lacking thus preventing the very visibility of such culture for the purpose of its legal protection. In response to these shortcomings, in the mid 1990’s a new interest and a new approach began to emerge. In 1994, UNESCO adopted the Guidelines on Living Human Treasures,<sup>53</sup> which, following the example set in Asia by countries such as Japan and Korea, aimed at developing incentives and legislation to support the survival of old craft skills which, although not capable of generating sufficient income in a market economy, are

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Property, Nov. 14 1970, *available at* <http://www.unesco.org>; Hague Convention, *supra* note 14.

51. Recommendation on the Safeguarding of Traditional Culture and Folklore, Nov. 15, 1989, *available at* <http://www.unesco.org>.

52. The principles are grouped in six parts: A. Definition of Folklore; B. Identification; C. Conservation; D. Preservation; E. Dissemination; F. Protection; G. International Cooperation. *Id.*

53. Guidelines on Living Human Treasures, *at* [http://www.unesco.org/culture/heritage/intangible/treasures/html\\_eng/method.shtml](http://www.unesco.org/culture/heritage/intangible/treasures/html_eng/method.shtml).



nevertheless an important component of the social fabric and an essential condition for the maintenance and restoration of the material heritage. In 1997, UNESCO launched another initiative relevant to intangible heritage via the program entitled, Proclamation of Masterpieces of Oral and Intangible Heritage. This program was specifically aimed at the recognition and listing of outstanding forms and traditional culture. The first round took place in 2001 and led to the proclamation of some extremely valuable forms of intangible cultural heritage in the different cultural regions of the world,<sup>54</sup> as well as the second proclamation, which took place in 2003.<sup>55</sup>

Building on these two initiatives, as well as on a series of regional seminars, UNESCO and the Smithsonian Institution organized in 1999 in Washington, D.C. a conference entitled "A Global Assessment of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore: Local Empowerment and International Cooperation."<sup>56</sup> The conclusions of the Washington conference contained substantive recommendations and an operational resolution. The recommendations reiterated the necessity of adopting a more inclusive definition of intangible cultural heritage, going beyond the concepts of folklore and of popular culture used in the 1989 UNESCO Recommendation. More important, it highlighted the need to put at the center of the system of protection the peoples, groups and communities that are the creators and bearers of intangible cultural heritage. This represented an important shift as compared to the approach adopted in the past of giving overriding priority to the interest of scientific research thus relegating cultural communities to mere objects of study and investigation. The operational resolution consisted in a request to UNESCO to undertake a feasibility

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54. For example, among the nineteen masterpieces proclaimed in 2001, the following were selected: Kunqu Opera from China; The Cultural Space of the Brotherhood of the Holy Spirit of the Congos of Villa Mella from Dominican Republic; The Oral Heritage and Cultural Manifestations of the Zápara People from Ecuador and Peru; Georgian Polyphonic Singing from Georgia; Kuttiyattam Sanskrit Theatre from India; Opera dei Pupi, Sicilian Puppet Theatre from Italy; Nôgaku Theatre from Japan; Cross Crafting and its Symbolism from Lithuania; The Cultural Space of Djamaa el-Fna Square from Morocco. List of Masterpieces of the Oral and Intangible Heritage of Humanity, at [http://www.portal.unesco.org/culture/en/ev.php-URL\\_ID=21274&URL\\_DO=DO\\_Topic&URL\\_Section=201.html](http://www.portal.unesco.org/culture/en/ev.php-URL_ID=21274&URL_DO=DO_Topic&URL_Section=201.html).

55. Among the twenty-eight masterpieces selected in 2003, one may cite the oral traditions of the Aka Pygmies of Central Africa from Central African Republic, The Baltic Song and Dance Celebrations from Estonia, Latvia and Lithuania, The Andean Cosmovision of the Kallawayá from Bolivia, the Iraqi Maqam, The Royal Ballet of Cambodia and the Vanuatu Sand Drawings. *Id.*

56. A Global Assessment of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore: Local Empowerment and International Cooperation, at <http://www.folklife.si.edu/resources/unesco>.

study in view of the adoption of a new normative instrument on the safeguarding of traditional culture.

It is against this background that between 2001 and 2003, negotiations were undertaken within the framework of UNESCO. In October, 2003, a new Convention on the Safeguarding of Intangible Cultural heritage was adopted unanimously by the General Conference.<sup>57</sup> This convention defines intangible cultural heritage as “the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith—that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.”<sup>58</sup> The rationale of the convention lies in the idea that the protection of intangible cultural heritage has not only the purpose of safeguarding national interests belonging to each sovereign State, but, particularly, the value of such heritage “as a mainspring of cultural diversity,”<sup>59</sup> corresponding to a “common concern” of the international community as a whole.<sup>60</sup> In this sense, the close interrelation between cultural diversity and intangible heritage is stressed by the second part of the definition, according to which “[such] heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.”<sup>61</sup> Consistently, the convention text emphasizes the role “of communities, groups and, where appropriate, individuals that create, maintain and transmit [intangible cultural] heritage,”<sup>62</sup> stressing the necessity that their participation is ensured “[w]ithin the framework of [each State Party] safeguarding activities of [such] heritage”<sup>63</sup> and in the context of the identification and definition of its various elements.<sup>64</sup> It is nevertheless regrettable that representatives of the above communities and groups are not included among the members of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, which is only

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57. Convention on the Safeguarding of Intangible Cultural Heritage, *supra* note 45.

58. *Id.* at art. 2. This definition was elaborated by a group of independent experts, chaired by the present writer, who met in Grinzane Cavour, Turin, Italy, in March, 2001. This meeting, organized by UNESCO, was meant to be, and actually was, the first step of the work which led to the adoption of the Convention by the UNESCO General Conference in October 2003.

59. *Id.* at pmb1.

60. *Id.*

61. *Id.* at art. 2.

62. *Id.* at art. 15.

63. *Id.*

64. *See id.* at art. 11(b).

composed of State representatives.<sup>65</sup> The Committee has the competence, *inter alia*, of selecting the items of intangible heritage to be safeguarded at the international level according to Chapter IV of the convention. This circumstance is capable of weakening the role played by the peoples concerned in the operation of the convention and, *a fortiori*, its proper functioning and effectiveness, since only such peoples own the appropriate knowledge, skills and ability for properly managing and safeguarding the intangible heritage they have created and transmitted from generation to generation.

### B. Diversity of Cultural Contents and Artistic Expressions

While the concept of intangible cultural heritage operates directly within the sphere of national sovereignty in that it entails empowering non-state actors, i.e. peoples and local communities, with a claim to legal protection under international law, the concept of cultural diversity takes this process a step further and introduces the concept of “humanity” as the new “non-state actor” entitled to the safeguarding of cultural diversity as a common patrimony to be preserved in the public interest to be transmitted to future generations. Although no binding treaty has been adopted yet to directly protect and promote cultural diversity, several soft law instruments have already occupied the field and a new convention is now being negotiated within the framework of UNESCO.

The first instrument to be mentioned is the 1966 UNESCO Declaration of the Principles of International Cultural Cooperation,<sup>66</sup> whose Article 1 proclaims that “in their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind.” The 1992 UN General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities<sup>67</sup> reiterated at Articles 1 and 4 that pluralism and cultural diversity form part of the general interest of humanity. Finally, in 2001, the General Conference of UNESCO adopted the Universal Declaration on Cultural Diversity,<sup>68</sup> whose Article 1 expressly states that “as a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature: in this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of the present and future gen-

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65. See *id.* at art. 5.

66. Declaration of the Principles of International Cultural Cooperation, Nov. 4, 1966, UNESCO, art. 1, available at <http://www.unesco.org>.

67. See *supra* note 2.

68. UNESCO Universal Declaration on Cultural Diversity, Oct. 23, 2001, art. 1, available at <http://www.unesco.org>.

erations.” On the basis of this statement, the declaration stresses the inseparability of the defense of cultural diversity from human rights, both in the sense that the former implies a commitment to the fulfilment of human rights and fundamental freedoms, in particular of minorities and indigenous peoples, and in the sense that cultural diversity may not be invoked as an excuse to infringe upon human rights guaranteed by international law.<sup>69</sup> Further, the declaration proclaims cultural heritage as the “wellspring of creativity” because “creation draws on the roots of cultural tradition, but flourishes in contact with other cultures. For this reason, heritage in all its forms must be preserved, enhanced and handed on to future generations as a record of human experience and aspirations, so as to foster creativity in all its diversity.”<sup>70</sup> This entails that cultural products and services should be treated not as mere commodities but as “vectors of identity, values and meaning” and that in the present context of globalization the free flow of ideas and works should be made compatible with “. . . the production and dissemination of diversified cultural goods and services through cultural industries that have the means to assert themselves at the local and global level.”<sup>71</sup>

As often happens in international law, the adoption of a soft law instrument is only the first step toward the establishment of a binding legal regime. This has happened also with the Universal Declaration on Cultural Diversity. In October, 2003, the UNESCO General Conference, on the basis of a comprehensive preliminary study on the technical and legal aspects relating to the desirability of a standard setting-instrument on cultural diversity, approved a resolution deciding that the question of cultural diversity “must be regulated by an international convention.” It was mandating that the UNESCO Director-General submit to the 33rd Session of the General Conference (Fall, 2005) a report on the negotiating progress and a first draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions.<sup>72</sup>

The protection of cultural diversity as the common heritage of humanity is now on the international agenda. The negotiations currently taking place<sup>73</sup> are not likely to produce a quick result. Opposition still

69. See *id.* at art. 4 (stating, *inter alia*, that “[n]o one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.”)

70. See *id.*

71. See *id.* at art. 9.

72. See Desirability of Drawing Up an International Standard-Setting Instrument on Cultural Diversity, July 1, 2003, UNESCO General Conference, Resolution 32C/52, para. 25, available at <http://unesdoc.unesco.org/images/0013/001307/130798e.pdf>.

73. At the time of this writing (April 2004), two rounds of negotiations of governmental experts have taken place and have mostly concentrated on the scope of the future convention. See [http://portal.unesco.org/culture/en/ev.php@URL\\_ID=2450&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php@URL_ID=2450&URL_DO=DO_TOPIC&URL_SECTION=201.html).

remains from certain powerful States based on the fear that the future Convention may allow States to raise barriers to the free circulation of cultural products and services.<sup>74</sup> A difficult challenge lies ahead in terms of tuning the UNESCO work with the existing commitment of its members with the WTO and the TRIPS agreements.<sup>75</sup> But in spite of these uncertainties, for the purpose of our discussion, the work of UNESCO and the international practice developing in connection with it has made abundantly clear that the international community has recognized cultural diversity as the common heritage of humanity. By doing so, it has removed cultural heritage from the exclusive control of national sovereignty; it has empowered the non-state actors represented by the peoples and communities who are the bearers of such heritage to claim international protection, if necessary, even against their national State or against third parties. Ultimately, it has made humanity as such the title holder of the general interest to the protection and transmission of cultural diversity as the common and indivisible patrimony of human civilization.

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74. See The Intervention by the United States Delegation at the UNESCO 32nd General Conference, Meeting of the Committee on Culture, Oct. 13, 2003.

75. One should not forget that all WTO Members are also members of UNESCO (with the only extravagant exception of Singapore). On the interaction between culture and trade, see Bruno De Witte, *Trade in Culture: International Legal Regimes and EU Constitutional Values*, in *THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES* 237 (De Burca & Scott eds., 2001).